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THE HONORABLE SHARON GLEASON

8 UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ALASKA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 vs.

13 JOHN PEARL SMITH, II,

14 Defendant.

No. 3:16-cr-0086-SLG-DMS

DEFENDANT'S MOTION TO COMPEL
FEDERAL BUREAU OF PRISONS
STATISTICAL INFORMATION

15 **I. MOTION**

16 Comes now, John Pearl Smith, II, by and through counsel, and hereby asks this
17 Court to order the Government to disclose produce the statistical information listed in
18 Exhibit 1. This motion is based upon the Rule 16, the Fifth, Sixth, Eighth and Fourteenth
19 Amendments and the cases cited and discussed below.

20 **II. FACTS**

21 In this capital prosecution, the Government alleges that John Pearl Smith, II
22 presents a future danger. Dkt. 168. As this is a capital case, assuming Mr. Smith is
23 convicted, he is facing life without parole or being sent to death row. The Government's
24 allegation of future dangerousness is therefore specific to the possibility that Mr. Smith
25

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1 would be dangerous while in the custody of the Bureau of Prisons. The statistical
2 information sought by this discovery demand is specific to the question of whether Mr.
3 Smith does indeed pose a risk of future dangerousness once sentenced to spend the
4 remainder of his life in BOP custody. The Government alleged that he does in its
5 indictment and the Defense seeks data which is directly relevant to rebutting that
6 allegation.

7 In *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983), the Supreme Court recognized
8 that while inherently unreliable, prediction of future danger was not unconstitutionally
9 unreliable. The Court held that whether addressed or not, it was a question that may weigh
10 on the minds of capital jurors. Further, they said that the evidence was not unconstitutional
11 because capital juries will also have benefit of “contrary evidence by the opposing party.”
12 This right of rebuttal is also specifically laid out in the FDPA, which requires that the
13 defendant must be “permitted to rebut any information” presented by the government. 18
14 U.S.C § 3593(c). Here, the Government is in possession of the data which will rebut its
15 allegation and the Defense seeks access to that data in order that we may present the
16 contrary evidence to the jury.

17 The data sought here is commonly obtained through discovery in capital
18 prosecutions. It forms the basis of expert opinion as to the rates of violence in BOP, the
19 factors which are associated with violence in BOP, and how that data applies to Mr. Smith.
20 We expect that our experts will present evidence that the United States Bureau of Prison
21 (BOP) can take steps to ensure that even the most violent offenders are not dangerous in
22 prison. Broadly, based on the requested statistical data, we expect that our experts will
23 broadly testify to the following:

24 a. The data indicate that the Bureau of Prisons base rates of violent behavior in federal
25 prisons are extremely low, meaning that there are few violent incidences overall. We

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1 expect the data to show this because previous research and testimony in prior cases have
2 consistently shown this to be true. The data sought will permit the experts to update these
3 studies and present current, scientifically reliable and accurate information to the jury.

4 b. The data are likely to support the rebuttal evidence that capital defendants, like Mr.
5 Smith, when sentenced to life without parole or release (LWOR), do not commit more or
6 more severe violent assaults than other prisoners in United States penitentiaries.

7 c. The data will support the presentation of testimony that nature and extent of the
8 underlying offenses that led to the capital charges are unrelated to the likelihood of being a
9 danger in custody.

10 d. There are established risk factors which the DOJ relies upon to assess custodial
11 level for sentenced inmates and those risk factors such as age and education can be
12 effectively put to use in determining housing conditions for life sentenced inmates and
13 thereby significantly reducing the risk of future violence. Moreover, personality
14 characteristics are not predictive of future violent behavior.

15 e. There is a correlation between gang affiliation (which Smith does not have) and the
16 likelihood of engaging in violence in prison.

17 f. The data will provide the experts updated data from which they can testify as to
18 how inaccurate the government has been in asserting that capitally prosecuted inmates pose
19 a future danger, offering the jury a basis for understanding that the Government makes this
20 allegation in many cases and is wrong in nearly every one of them.

21 The experts asked us to obtain the statistical information contained in Exhibit 1.
22 The Government has refused to do so. See Exhibits 2, 3, and 4.

23 **III. ARGUMENT**

24 The Government's refusal to provide the information violates Smith's rights under
25 the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as the Federal Death Penalty

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1 Act (FDPA). Mr. Smith is entitled to a full and fair opportunity to rebut the future danger
2 aggravating factor, which the Government has elected to put into issue. The Due Process
3 Clause requires that "criminal defendants be afforded a meaningful opportunity to present
4 a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Gardner v.*
5 *Florida*, 430 U.S. 349, 358, 362 (1977) (denial of due process "when the death sentence
6 was imposed, at least in part, on the basis of information which he had no opportunity to
7 deny or explain.").

8 A. SMITH IS ENTITLED TO THE INFORMATION BECAUSE IT IS ESSENTIAL TO
9 REBUTTING THE GOVERNMENT'S CLAIM THAT HE WILL POSE A
10 FUTURE DANGER.

11 Mr. Smith must be given a full opportunity to present evidence to rebut any
12 inference by the Government that his incarceration for life will present a danger in prison.
13 It is immaterial whether the Government puts the inference in play by directly alleging, as
14 here, an aggravating factor, or indirectly by introducing extensive evidence suggesting
15 future danger. *Kelly v. South Carolina*, 534 U.S. 246 (2002)(defendant entitled to rebut
16 future danger inference even if implied and not explicitly argued).

17 The Supreme Court has made clear that a court may not constitutionally prohibit a
18 capital defendant from presenting evidence that he will pose a low risk of future violence
19 in prison. Under the Eighth Amendment, "evidence that the defendant would not pose a
20 danger if pared (but incarcerated) must be considered potentially mitigating. Under
21 *Eddings v. Oklahoma*, 455 U.S. 104 (1982), such evidence may not be excluded from the
22 sentencer's consideration." *Skipper v. South Carolina*, 476 U.S.1, 5 fn 1 (1986)("[w]here
23 the prosecution specifically relies on a prediction of future dangerousness in asking for the
24 death penalty," the "elemental due process requirement that a defendant not be sentenced
25 to death 'on the basis of information which he had no opportunity to deny or explain'"
requires that a capital defendant be permitted to present evidence that he would not pose a

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1 danger in prison); see also *Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994) ("The
2 trial court's refusal to apprise the jury of information so crucial to its sentencing
3 determination, particularly when the prosecution alluded to the defendant's future
4 dangerousness in its argument to the jury, cannot be reconciled with our well-established
5 precedents interpreting the Due Process Clause.")

6 The importance of Mr. Smith's opportunity to fully rebut the future dangerousness
7 aggravating factor cannot be overemphasized. Studies of the decision-making process by
8 capital jurors demonstrate that the allegation of future dangerousness is the most
9 compelling aggravating factor in the eyes of jurors. See, e.g. Blume, Garvey & Johnson,
10 *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 398
11 (2001); Constanzo & Constanzo, *Jury Decision Making in the Capital Penalty Phase*, 16
12 Law & Hum. Behav. 185, 188-89 (19992). As an aggravating factor, the FDPA requires
13 that the aggravating factor be proven beyond a reasonable doubt. 18 U.S.C § 3593 (d). This
14 Court will instruct the jury that if the jury does not *unanimously* find that he future danger
15 aggravating factor has been proven *beyond a reasonable doubt*, no juror can consider the
16 aggravating factor in the weighing process *even if* that individual juror does believe that
17 future danger has been proven. The failure to permit a meaningful opportunity to rebut an
18 aggravating factor thus infects the entire process in the most fundamental way.

19 In its letter, Ex. 2, the Government's position appears to be that it does not have to
20 provide such information because the expert testimony relies, in part, on studies that are
21 more statistical in nature rather than personal to Mr. Smith. First, the Government's
22 representation of the evidence is incorrect. Much of the testimony will be based on factors
23 specific to Smith, (such as his age, education, good adjustment during prior incarcerations
24 and his lack of prior violent history while previously incarcerated). The statistical
25 information will provide critical information about the place that Mr. Smith will be

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1 designated to spend the rest of his life - in BOP custody. That is the context in which the
2 jury must make its determination as to whether he poses a risk for future danger.

3 Individualized prediction is always difficult, and this data will assist the jury in making a
4 determination specific to Smith because they will hear evidence that addresses how
5 similarly situated people have behaved. The requested data will demonstrate that Smith is
6 less likely than other people to pose a future danger.

7 The defense experts in this case will use the statistics sought here to apply actuarial
8 models that are the basis for predicting future behavior. Alexander Scherr, *Daubert &*
9 *Danger: The "Fit" of Expert Predictions in Civil Commitments*, 55 Hastings L.J. 1, 15
10 (2003). They will compare Smith to the other federal inmates of similar age, education,
11 criminal history and other personal characteristics to extrapolate Smith's personal potential
12 for violent misconduct in the BOP. These types of opinions rest on the statistical
13 prevalence of a particular behavior over a set period of time under the same set of
14 circumstances. The requested information is a fundamental group statistic in risk
15 assessment and is considered to be the single most important piece of data necessary in
16 making an accurate risk estimate. Without this data as an anchor of a comparative
17 reference point, individual risk estimates at capital sentencing may be little more than
18 speculation.¹

19 And, the Government's letter also fails to point out that, while prosecutor's have
20 been making the argument that this type of evidence is not "individualized" in many
21 districts, the argument was soundly rejected last year when the Fourth Circuit reversed a
22

23
24 ¹ The other method of predicting future dangerousness is the clinical assessment. "[T]he clinical method
25 relies on human judgment that is based on informal contemplation and, sometimes, discussion with others
(e.g. case conferences)...Clinical opinions have never received high marks for reliability." Scherr at 16-17
(2003).

1 death sentence in *Lawlor v. Zook*, 909 F.3d 614 (4th Cir. 2018).² Citing to *Eddings v.*
2 *Oklahoma*, 455 U.S. 104 (1982), *Skipper v. South Carolina*, *supra*, *Boyde v. California*,
3 494 U.S. 370 (1990), *Simmons v. v. South Carolina*, 512 U.S. 370 (1990); *Lockett v. Ohio*,
4 438 U.S. 586 (1978), and *Jurek*, *supra*, the Circuit Court held that where the only issue at
5 sentencing was life without the possibility of parole or death, the Virginia courts
6 contravened clearly established Supreme Court precedent when it held that evidence
7 limited to Lawlor's probability of committing acts of future violence in prison was "not
8 relevant."³ Further, the Circuit said that that expert testimony of the sort proposed here –
9 a statistical model that compiles and extracts a set of objective attributes that predicts the
10 probably of future behavior by individuals and then applies them to a specific defendant
11 (in this case Mr. Smith) – is admissible. The Fourth Circuit concluded by holding that the
12 Virginia courts recognized the controlling United States Supreme Court precedent but
13 "attempted to circumvent by relying on baseless interpretation of state law that themselves
14 contravened longstanding Supreme Court law." *Id.* at 633.⁴

17 ² See also *Boyd v. French*, 147 F.3d 319, 326-27 (4th Cir. 1998) (finding constitutional error in exclusion of
18 expert testimony that the "circumstances under which [defendant] might be dangerous would be unlikely to
19 reoccur in prison") (citing *Skipper*, 476 U.S. at 5), *People v. Lucero*, 750 P.2d 1342, 1353-55 (Cal. 1998)
20 (holding the trial court violated the Eighth Amendment by excluding expert evidence of defendant's future
21 behavior in prison); *Valle v. State*, 502 So. 2d 1225, 1226 (Fla. 1987) (ruling that *Skipper* required admission
22 of "expert testimony [that] was proffered in proof of the probability that [defendant] would be a model
23 prisoner in the future"); *State v. Patterson*, 351 S.E.2d 853, 857-58 (S.C. 1986) ("We interpret *Skipper* to
24 require that opinion testimony of psychiatrists and psychologists bearing on a capital defendant's future
25 adaptability to prison life be admitted as 'relevant mitigating evidence' of a defendant's character.").

21 ³ Both of the orders cited to in the Government's letter were entered before the decision in *Lawlor* was
22 published on November 27, 2018. And the Government's citation to Dkt. 504 in *United States v. Coonce* is
23 less than compelling since it is simply a docket entry stating the defendant's motion was denied but contains
24 no reasoning.

24 ⁴ And, it should be noted that *Lawlor* was a habeas case with exceedingly stringent standards of review. The
25 petitioner was required to not just demonstrate error but error that was occasioned by the state court's failure
to apply "clearly established Supreme Court precedent" and that the error had a substantial and injurious
effect on the jury's verdict.

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1 This Court should adopt the more recent, compelling and correct analysis in
2 *Lawlor*.

3 B. SMITH IS ENTITLED TO THE INFORMATION BECAUSE IT IS
4 ESSENTIAL TO HIS MITIGATION CASE.

5 In addition to rebutting the Government's allegation of future dangerousness as an
6 aggravating factor, the expert testimony is independently relevant to mitigation. In *Skipper*
7 *v. South Carolina, supra*, the Court held that a defendant must be permitted to introduce
8 evidence that he will not pose a risk. Citing the all-encompassing mitigation principle
9 announced in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Skipper* held that "such evidence
10 may not be excluded from the sentencer's consideration." 476 U.S. at 5. See also *United*
11 *States v. Troya*, 733 F.3d 1125, 1137 (11th Cir. 2013) (exclusion of expert testimony that
12 defendant "was likely to make a positive adjustment to prison" was abuse of discretion
13 under *Skipper*).

14 The Supreme Court has repeatedly held that "a capital defendant is entitled to
15 introduce any relevant mitigating evidence that he proffers in support of a sentence less
16 than death." *Dawson v. Delaware*, 503 U.S. 159, 167 (1992) (citing *Eddings*, 455 U.S. at
17 114; and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)). The Court has taken a
18 broad view of what constitutes "relevant" mitigating evidence: any evidence that "tends
19 logically to prove or disprove some fact or circumstance which a fact-finder could
20 reasonably deem to have mitigating value". *McKoy v. North Carolina*, 494 U.S. 433, 440
21 (1990); see also *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) ("When we addressed
22 directly the relevance standard applicable to mitigating evidence in capital cases in
23 *McKoy*..., we spoke in the most expansive terms.").

24 *Skipper* makes clear that, where "the jury could have drawn favorable inferences
25 from . . . testimony regarding petitioner's character and his probable future conduct if

1 sentenced to life in prison," then "there is no question but that such inferences would be
2 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death'"
3 under the Eighth Amendment. 476 U.S. at 4-5 (quoting *Lockett*, supra). Such probable
4 "future conduct" evidence is subject to the "well-established" constitutional rule that "the
5 sentencer may not ... be precluded from considering 'any relevant mitigating evidence.'" *Id.*
6 at 4 (quoting *Eddings*, supra). "[E]vidence that the defendant would not pose a danger if
7 spared (but incarcerated) must be considered potentially mitigating." *Id.* at 5 (emphasis
8 added). As the Court explained, "precluding the defendant from introducing otherwise
9 admissible evidence for the explicit purpose of convincing the jury that he should be
10 spared the death penalty because he would pose no undue danger to his jailers or fellow
11 prisoners and could lead a useful life behind bars if sentenced to life imprisonment" is
12 unconstitutional. *Id.* at 7 (emphasis added).

13 C. THE INFORMATION REQUESTED IS MATERIAL AND EXCULPATORY.

14 The Government must disclose all items in its possession that are material to
15 preparing a defense. Fed. R. Crim. Proc. 16(a)(1)(E). Material information is defined
16 more broadly under Rule 16 than under *Brady v. Maryland*, 373 U.S. 667 (1963). But even
17 under *Brady*, the Government is required to disclose evidence that would mitigate against
18 the death penalty. *Brady* at 88-89. And the Government is required to disclose items that
19 would tend to impeach the Government's case. *Giglio v. United States*, 405 U.S. 150
20 (1972).

21 The Government does not argue that the evidence would impeach its claim that
22 Smith would pose a future danger in prison. Nor can it credibly do so. On information and
23 belief based upon experience, discussion with experts and the review of other cases, the
24 historical evidence is quite favorable to capital defendants. The BOP's policies,
25 procedures and rules in its secure facilities make the rates of violence by lifers in prison

1 very low. And, it appears escapes from high security BOP facilities are virtually non-
2 existent.⁵

3 Rather the Government's letter asserts that the information sought is not *Brady*
4 material by relying on an order from *United States v. Cramer et.al.* # 16-CR-26 (ED Texas
5 Feb. 20, 2018). It is true that district judge in that case rejected the defendants' argument
6 that the requested BOP information was material to the defense. But that judge based her
7 denial on the conclusion that such information was not an "individualized" determination
8 of the defendant's character or the circumstances of the crime. As discussed above, this
9 reasoning has been soundly rejected by the Fourth Circuit in *Lawlor*. The district judge in
10 *Cramer* simply got it wrong.⁶

11 Finally, the Government appears to be asserting that all of the information
12 requested is available on publicly accessible BOP websites. Counsel has reviewed that
13 website, and, in her view, the website does not contain the breadth of information Smith is
14 seeking. Moreover, it is not in the (useable) format the experts have asked for.

15 IV. CONCLUSION

16 This Court should order the Government to provide the requested information.

17 Signed this 15th day of May 2019.

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23 ⁵Since opening in 1994, no prisoner has escaped from the Administrative Maximum Facility — known as
24 "the ADX." https://www.washingtonpost.com/nation/2019/02/14/el-chapo-escaped-two-prisons-mexico-no-ones-ever-busted-out-adx/?utm_term=.f531a6bbb1ef

25 ⁶ Moreover, Rule 16 requires much broader disclosures than *Brady*. *United States v. Condor*, 423 F.2nd 904, 911 (7th Cir. 2006).

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CERTIFICATE OF SERVICE

I, SUZANNE LEE ELLIOTT, hereby certify that on May 15, 2019, I filed foregoing document with the United States District Court's Electronic Case Filing (CM/ECF) system, which will serve one copy by email on Assistant United States Attorneys FRANK V. RUSSO, WILLIAM A. TAYLOR, JAMES B. NELSON and KAREN VANDERGAW.

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