

United States Court of Appeals For the First Circuit

No. 25-1486

UNITED STATES OF AMERICA,

Appellee,

v.

JOHNNY BARROS BRANDAO,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel M. Gorton, U.S. District Judge]

Before

Aframe, Lipez, and Howard,
Circuit Judges.

Jillise McDonough, with whom the Law Office of Jillise M. McDonough was on brief, for appellant.

Donald C. Lockhart, Assistant United States Attorney, with whom Leah B. Foley, United States Attorney, was on brief, for appellee.

October 23, 2026

AFRAME, Circuit Judge. Johnny Barros Brandao appeals from his conviction for making false statements on a temporary emergency passport application. Brandao applied for this replacement passport at the U.S. Embassy in Senegal after he fled Cape Verde, where he was facing two homicide charges. On appeal, Brandao argues that the district court should have (1) provided a missing witness instruction based on the absence of a witness from the Cape Verdean government; (2) questioned potential jurors about possible bias stemming from the introduction of evidence about the pending homicide charges; and (3) excluded evidence about, or reference to, the homicide charges as unduly prejudicial. We disagree with Brandao's first argument but agree with the other two. Nevertheless, because of the overwhelming evidence demonstrating Brandao's guilt, we conclude that the identified errors were harmless. Thus, we affirm Brandao's conviction.

I.

Because Brandao has not challenged the sufficiency of the evidence, we recite the facts in a balanced manner with an objective view of the record. See United States v. Rodriguez, 115 F.4th 24, 33 (1st Cir. 2024).

A grand jury indicted Brandao for knowingly and willfully making false statements in a temporary passport application based on his assertions to the effect that he had lost his passport while at dinner in Dakar, Senegal, on December 25,

2022. See 18 U.S.C. § 1542. The government's theory was that Brandao, an American citizen, faced serious charges in Cape Verde, including two homicide charges; the Cape Verdean authorities had confiscated his American and Cape Verdean passports; and he was therefore motivated to avoid justice in Cape Verde by traveling to Dakar and lying on his replacement passport application so that he could return to the United States.

Before trial, Brandao moved to exclude all evidence of the homicide charges against him, arguing that such evidence would be improper propensity evidence under Federal Rule of Evidence 404(b) and would be unduly prejudicial under Rule 403. Brandao instead suggested that the parties only tell the jury that he faced "pending criminal charges" in Cape Verde. These pending charges included "two counts of aggravated homicide, three weapons crimes, one crime of robbery with violence against a person, and crime of attack against the integrity of a cadaver or ashes."

The district court denied Brandao's motion in limine, reasoning that the "gravity" of the homicide charges went to "knowledge and motive," and that excluding evidence of these charges would deny the jury an "explanation as to why Mr. Brandao would bother to falsify an ostensibly immaterial detail in his [passport] application." The court recognized that the charge involving desecration of a corpse "might invite the jury to render a verdict on . . . [an] improper and emotional basis," so,

although it allowed the government to make reference to "serious offenses including homicide," it barred any mention of "any of the charges specifically other than [the] homicide . . . charges." The court also allowed discussion of the maximum penalties that Brandao faced but prohibited the government from discussing the "factual allegations underlying" the homicide charges. In compliance with the district court's ruling, the parties stipulated that Brandao

was charged with serious offenses in Cape Verde, including two separate homicides. The potential penalty for a homicide conviction in Cape Verde is [fifteen] to [thirty] years['] imprisonment. One homicide allegedly occurred on or around March 27, 2014, and the second homicide allegedly occurred on or around July 26, 2021. Mr. Brandao's Cape Verdean trial on the above-referenced [offenses] has not yet occurred and the charges remain pending.

Two weeks before trial, Brandao proposed voir dire questions. As relevant here, he requested the following question: "This case involves testimony about murder charges in a different country. Does the fact that murder charges are involved in the case cause you any concern about your ability to be fair and impartial?" At a subsequent pretrial conference, the district court explained its voir dire process, stating that it was "pretty liberal about the extent of questioning from counsel" and would "give . . . quite a lot of leeway in terms of follow-up questions to the ones that I ask." The court did not, however, inform the

parties at that time about what questions it intended to pose during voir dire and did not share a list of questions with the parties before asking them.

The district court began voir dire by informing the venire that "[g]enerally, the government charges Mr. Brandao with knowingly making . . . false statement[s] on a passport application." The court then asked the venire a series of questions intended to identify possible biases or other impediments to service. Venire members who answered any of the court's questions affirmatively came to the sidebar for further exploration of their answer(s), which included an opportunity for attorney questioning and for-cause challenges. The court did not ask Brandao's requested question about possible bias stemming from the homicide charges as part of the general questions posed to the venire, and Brandao's counsel did not object to the exclusion of the homicide-charge inquiry from the court's list of questions.

While the district court did not ask the venire about the homicide charges, it did ask whether any of the potential jurors or anyone in their families had been investigated for or charged with a crime. A prospective juror indicated that his cousin had murdered someone close to the juror. The court allowed Brandao's attorney to further inquire about possible bias from that circumstance, to which the prospective juror replied that it would be "very hard to not be influenced by emotion" when

discussing murder. As a result, the court excused the potential juror for cause.

The petit jury first heard about the homicide charges against Brandao during the government's opening statement. At the start of his statement, the prosecutor informed the jury that Brandao "was charged with serious offenses in Cape Verde, including two homicides." The prosecutor explained that although the "case [wa]s not about those charges," it was "about what the defendant did to avoid facing" them.

In its case in chief, the government introduced certified public records from Cape Verde documenting that Brandao was arrested in 2021. After being charged, Brandao spent approximately sixteen months in pretrial detention. On December 12, 2022, a Cape Verdean court ordered Brandao released from detention due to a defect in the notice of his public indictment.¹ In doing so, the court stated that "[t]here is clearly a danger of flight" and interdicted Brandao from leaving the country.

Despite the conditions of his release, Brandao arrived at the U.S. Embassy in Dakar, Senegal, approximately two weeks

¹ Specifically, the Cape Verdean court "declare[d] the nullity of the notification of the indictment" as to Brandao alone because the indictment was provided to him in Portuguese, which he claimed he could not read, and he had been provided with neither an interpreter nor a translated indictment.

later.² In an email to the embassy, in his interview with a consular officer, and on his application for a temporary emergency passport, Brandao stated that he had lost his American passport while at dinner in Dakar on December 25, 2022. Brandao affirmed under penalty of perjury that all the statements made in his passport application were true. Thus, on December 28, 2022, the U.S. Embassy in Senegal issued Brandao a temporary passport, which he used to return to the United States a few days later.

Brandao's December 2022 Cape Verdean release order contained the following instruction: "In due course, return the case file to the Public Prosecution Service." Another Cape Verdean record stated that "[i]n compliance with" the order, "the Human Resources, Finance and Assets Department of the Judiciary Police will return" Brandao's Cape Verdean passport, American passport, and Cape Verdean ID. The record noted that the director of that department had "delivered it" on December 12, 2022, and the Clerk of Court had "received it" that same day. Finally, the government introduced a record signed by the Clerk of Court stating that it had "remitted these case files to the Office of Federal Prosecution" on December 12, 2022, and those files included

² Cape Verde is an archipelago off the northwest coast of Africa. Senegal is the closest country on the mainland and is located approximately five hundred to six hundred kilometers east of Cape Verde.

Brandao's American passport, Cape Verdean passport, and Cape Verdean ID.

Diplomatic Security Service Special Agent John Pigman testified that he was stationed in Cape Verde's capital, Praia, from 2021 through 2023. Pigman was aware of local media attention on Brandao's pending case. In May 2023, Pigman visited the Cape Verdean prosecutor's office to view and photograph Brandao's American and Cape Verdean passports and Cape Verdean ID, which were held there at the time.

Approximately a week and a half before trial, Agent Pigman asked a colleague to again visit the prosecutor's office in Cape Verde and view Brandao's travel documents. There were no entry stamps on either passport regarding travel to Senegal on or after December 12, 2022. Pigman testified that he had previously heard that individuals could travel between Cape Verde and Senegal with only an identification card.

At the conclusion of its case, the government moved to preclude the defense from arguing that the prosecution should have called a Cape Verdean official to testify about the chain of custody for Brandao's passport. The government explained that the Cape Verdean authorities had refused to provide such a witness. Brandao opposed the motion and sought a missing witness instruction whereby the jury could infer that testimony from the absent Cape Verdean official would have been unfavorable for the government.

The district court granted the government's motion because Brandao had not shown "that the witness was peculiarly available to the government" and the government had adequately explained the witness's absence.

During closing arguments, the government referenced the homicide and other serious charges that Brandao faced. For example, in rebuttal, one prosecutor argued that Brandao fled Cape Verde because "[h]e wants to avoid justice for two murder charges." The district court issued a limiting instruction at the conclusion of the trial, specifying that the jury was not to consider evidence about the homicide charges for any purpose other than for Brandao's possible motive or intent to commit the charged passport offense.

The jury convicted Brandao, who timely appealed.

II.

A.

We consider first the missing witness instruction claim, which Brandao properly preserved. Accordingly, we review for abuse of discretion the denial of Brandao's request for such an instruction. See United States v. Orlandella, 96 F.4th 71, 98 (1st Cir. 2024).

A missing witness instruction tells the jury that when a party fails "to produce available evidence that would help decide an issue," it may infer "that the evidence would have been unfavorable to the party to whom it is available or whom it would

ordinarily be expected to favor." United States v. Perez, 299 F.3d 1, 3 (1st Cir. 2002) (citation modified). A defendant is entitled to a missing witness instruction if he can demonstrate that the witness was "(1) favorably disposed to testify for the government by virtue of [the witness's] status or relationship with the parties, or (2) peculiarly available to the government, such as being within the government's exclusive control." Orlandella, 96 F.4th at 98 (quoting United States v. DeLuca, 137 F.3d 24, 38 (1st Cir. 1998)). The district court must also consider any explanation for the witness's absence and whether the witness would provide "relevant, non-cumulative testimony." Perez, 299 F.3d at 3.

Here, the government proffered that it had tried to secure, through formal diplomatic channels, a Cape Verdean official to testify but that Cape Verdean authorities rejected the request.³ The district court found that Brandao had not met the standard for a missing witness instruction, even though "the

³ Although Brandao did not challenge the proffer at the time, he now asserts that the government needed to submit evidence of the denial to both the judge and the jury. Brandao waived this objection by failing to raise it before the district court. See Vázquez-Rivera v. Figueroa, 759 F.3d 44, 49 (1st Cir. 2014). In any case, he was unlikely to prevail on this argument because it is within a district court's discretion to accept a party's explanation for a witness's unavailability. See United States v. Aboshady, 951 F.3d 1, 11 (1st Cir. 2020) (suggesting that a court's adoption of the government's explanation for a missing witness was sufficient).

witness previously cooperated with the government" by providing documents. The court further noted that the government provided a reasonable explanation for the Cape Verdean official's absence by identifying the Cape Verdean government's rejection of the witness request.

Foreign witnesses located in foreign countries are beyond the subpoena power of the government and the defendant. See United States v. Aboshady, 951 F.3d 1, 11 (1st Cir. 2020); United States v. Theresius Filippi, 918 F.2d 244, 246 n.2 (1st Cir. 1990). Accordingly, once such a witness rejects the government's request to testify, the government generally has no further recourse. Such a witness is thus not "peculiarly available" to the government. See Aboshady, 951 F.3d at 11; see also United States v. Anderson, 452 F.3d 66, 82 (1st Cir. 2006) (noting that a witness's refusal to comply with a subpoena "demonstrates conclusively that he was not available to the government, much less 'peculiarly available'"); United States v. DeLuca, 137 F.3d 24, 38 (1st Cir. 1998) (affirming the denial of a missing witness instruction where the witness made himself unavailable to both the government and the defense). Given these conditions, Brandao did not demonstrate that the government had the kind of "special access to or leverage over" a Cape Verdean official such that the district court abused its discretion by

declining to give a missing witness instruction. United States v. Pagán-Santini, 451 F.3d 258, 267 (1st Cir. 2006).

Brandao also asserts that he merited a missing witness instruction because a Cape Verdean witness would have been favorably disposed to the government. Yet that prong of the missing witness instruction inquiry applies only to "uncalled, but physically available" witnesses. United States v. Spinosa, 982 F.2d 620, 632 (1st Cir. 1992). And, in any case, Brandao presented "no evidence that [a Cape Verdean witness] would not speak to him or that [the witness] was otherwise uncooperative." Id. at 633 (noting that even paid government informants are not presumed to be so "clearly favorably disposed" to the government such that they become unavailable to defendants).

As a backup contention, Brandao argues that even if he was not entitled to a missing witness instruction, he should have been allowed to argue that the government's failure to call a Cape Verdean official meant there was insufficient evidence to convict. We have noted that it is often permissible for the defendant to identify an absent witness as a basis for arguing "that the government had not presented sufficient evidence to warrant conviction." United States v. Jiménez-Torres, 435 F.3d 3, 12 (1st Cir. 2006). But in those cases, unlike here, both the government and the defendant could have subpoenaed the absent witness and chose not to. See id.; United States v. Diaz-Diaz, 433 F.3d 128,

134-35 (1st Cir. 2005). In contrast, this case involves a witness who is equally unavailable to both parties. When the government attempts in good faith to secure a foreign witness through diplomatic processes but is rejected, it is unfair to penalize the government for that absence.

In similar circumstances, we have approved an instruction telling the jury to draw no inference from the absence of a foreign witness who was beyond the parties' subpoena power after the defendant made an argument like the one that Brandao proposed to make here. See Aboshady, 951 F.3d at 9-10 (finding no error in issuing a curative instruction after a defendant made an argument about a missing foreign witness). To prevent the defendant from making such an argument in the first place merely obviates the need for a court later to give the curative "no inference" instruction that we approved in Aboshady.

Moreover, Brandao was allowed to argue that the government's evidence was insufficient in a different but related way, highlighting to the jury that there were "unanswered questions" about whether his "passport was in the possession of the prosecution the entire time" between December 2022 and May 2023. These points were central to the defendant's argument questioning the passport's "chain of custody." We therefore discern no abuse of discretion in the district court's decisions (1) to decline to give a missing witness instruction and (2) to

prevent Brandao from arguing that the evidence was insufficient because the government failed to call an unavailable Cape Verdean official.

B.

We consider next Brandao's argument that the district court erred by failing to ask the venire his proposed voir dire question about potential bias stemming from knowledge of the homicide charges.

1.

The parties dispute whether Brandao properly preserved this claim given that, during the empanelment process, he did not ask the district court to question the whole venire about bias related to the homicide charges. The government asserts that because Brandao failed to object during empanelment and does not argue that the error was plain on appeal, he has waived his voir dire claim. Brandao replies that submitting proposed voir dire questions, in conjunction with his arguments to exclude evidence of the homicide charges, adequately preserved the argument.

Federal Rule of Criminal Procedure 51(b) provides that

[a] party may preserve a claim of error by informing the court -- when the court ruling or order is made or sought -- of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

Fed. R. Crim. P. 51(b) (emphasis added). A defendant can preserve a claim "by informing the court of the action he wishes the court to take" because that action "brings to the court's attention his objection to a contrary decision." Holguin-Hernandez v. United States, 589 U.S. 169, 173-74 (2020) (citation modified) (regarding preservation of claims about length of sentence). Such an objection, however, must be raised in a "timely manner." Puckett v. United States, 556 U.S. 129, 134 (2009). We have held that a defendant must "object contemporaneously to the district court's [voir dire] procedure." United States v. Casanova, 886 F.3d 55, 60 (1st Cir. 2018); see also United States v. Figueroa-Cartagena, 612 F.3d 69, 86 (1st Cir. 2010). Indeed, where a defendant submits proposed voir dire questions, the district court asks a reframed version of those questions, and counsel acquiesces by failing to object, we generally consider any subsequent claims of error to be unpreserved and thus subject only to plain-error review. United States v. Meader, 118 F.3d 876, 880 (1st Cir. 1997); see also United States v. Urian, 858 F.2d 124, 126 (3d Cir. 1988).

However, these preservation rules are "not absolute." United States v. Teixeira, 62 F.4th 10, 18 (1st Cir. 2023). "If a party did not have a fair opportunity to object to a particular ruling below, a counterpart claim of error is not relegated to plain[-]error review." Id.

Here, the district court did not provide a clear opportunity for Brandao to object. The court never made an explicit ruling on Brandao's pretrial voir dire requests and did not share the list of voir dire questions ahead of asking them. Ideally, before initiating the empanelment process, the court would have provided such a list to the parties.⁴ It is also true, however, that nothing in this record shows that Brandao was barred from raising an objection to the exclusion of his requested question about the homicide charges after the court read the voir dire questions to the venire. Thus, the preservation question is close. We need not resolve it, however, because we conclude that the voir dire error was harmless. We therefore give Brandao the benefit of the doubt and proceed to review the court's voir dire questioning for abuse of discretion. See United States v. Delgado-Marrero, 744 F.3d 167, 201 (1st Cir. 2014).

2.

The district court's broad discretion in conducting voir dire is bounded by the "essential demands of fairness." Id. (quoting United States v. Misla-Aldarondo, 478 F.3d 52, 60 (1st Cir. 2007)). Accordingly, while the court need not "pose every voir dire question requested by a litigant" and may "frame[] its

⁴ A district court might also ask the parties if they wish the court to consider asking any further questions after it concludes questioning. See United States v. Ortiz-Colón, 178 F.4th 1, 13-14 (1st Cir. 2026).

own questions in its own words," id. (quoting Real v. Hogan, 828 F.2d 58, 62 (1st Cir. 1987)), there are "certain, few, fundamental[] [questions] that a party is entitled to have asked." United States v. Anagnos, 853 F.2d 1, 5 (1st Cir. 1988). Among those questions are ones that touch on material matters and that would uncover the kind of prejudice that impedes an impartial verdict. See Aldridge v. United States, 283 U.S. 308, 311 (1931). Fairness requires, then, that a defendant be allowed to ask questions during empanelment that would allow him to "intelligently exercise both for-cause and peremptory challenges." United States v. Nieves, 58 F.4th 623, 633 (2d Cir. 2023) (citation modified).

Brandao was deprived of that opportunity here. The facts of this case resemble those in Nieves, 58 F.4th 623. There, the defendant faced charges related to his conduct as a gang member. Id. at 627. Both parties "proposed gang-related voir dire questions," id. at 628, but the court declined to ask them, id. at 629. Although one prospective juror raised gang-related concerns at sidebar, the trial judge did not raise the topic to the broader venire. Id. at 630. The Second Circuit concluded that the omission was error, holding that prejudice against gang members constituted "a pervasive bias relevant to a key dynamic likely to arise at trial" that the district court should have inquired about. Id. at 633.

Here, it was apparent that Brandao's homicide charges would be central at the trial given the dueling motions in limine about that evidence. The pending charges were "likely -- indeed, certain -- to arise at trial as the cornerstone of the government's theory of motive, and . . . there was a significant risk that potential 'strong feelings' concerning [those charges] would 'skew deliberations in fact.'" Nieves, 58 F.4th at 637 (quoting United States v. Barnes, 604 F.2d 121, 137-39 (2d Cir. 1979)); cf. Delgado-Marrero, 744 F.3d at 202 (finding no abuse of discretion where district court "failed to ask prospective jurors about specific facts unknown to the court, unraised by the parties, and not yet at issue"). Along these lines, and as described above, one prospective juror noted that it would be "very hard to not be influenced by emotion" given the homicide charges, which would have provided another cue that other jurors might have strong reactions to learning that Brandao faced multiple murder charges. See Nieves, 58 F.4th at 640, 642.

Given that the homicide charges would be a material issue at trial, the district court could have inquired about potential bias by asking jurors a question like the one that Brandao proposed.⁵ Alternatively, the court could have provided

⁵ Obviously, the failure to conduct voir dire about the homicide charges is error only because the district court decided to admit the evidence of those charges. See infra.

"sufficient context about the case" such that a potential juror could "self-identify the relevant biases" and then ask a more generalized question or provide a general warning. Nieves, 58 F.4th at 639; see also Ristaino v. Ross, 424 U.S. 589, 595 (1976) ("[T]he . . . obligation . . . to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant." (footnote omitted)).

Yet here, the government's opening statement was the first time that the jurors learned about the homicide charges against Brandao. By that point, the jury was already empaneled and thus it was too late to probe for any potential bias along those lines. Although the district court asked a question about whether any of the prospective jurors or their family members had been investigated for or charged with a criminal offense, that question would not trigger a potential juror to disclose a general bias against persons accused of homicide. Thus, the voir dire questions did not sufficiently "guard against[] the specific bias . . . potentially at play in this case." Nieves, 58 F.4th at 640; see also United States v. Bates, 590 F. App'x 882, 889 (11th Cir. 2014) ("Because the jurors had no reason to know that [particular] issues . . . would be a part of the evidence at trial, they had no reason to offer up prejudices they might harbor on that basis when the District Court posed its general questions.").

Like Nieves, this is an "extreme case," and we caution that our ruling here should be understood narrowly. United States v. Mensah, 110 F.4th 510, 528 (2d Cir. 2024). This was a case where the court ruled pretrial that it would admit evidence with a potentially unfair prejudicial effect and did not take any precaution to condition the potential jurors to this evidence or to inquire about its effect on them.

C.

We turn now to Brandao's argument against the admission of evidence concerning the Cape Verdean homicide charges on the ground that the probative value of such evidence was "substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. We review this properly preserved challenge for abuse of discretion. See United States v. Cadden, 965 F.3d 1, 18 (1st Cir. 2020).

On appeal, Brandao does not challenge the district court's Rule 404(b) determination that evidence of the homicide charges against him went to "knowledge, willfulness, and motive."⁶

⁶ Federal Rule of Evidence 404(b) prohibits evidence of a defendant's prior bad acts to prove that he has a propensity to commit other crimes. United States v. Varoudakis, 233 F.3d 113, 118 (1st Cir. 2000). Such evidence may, however, be admitted for purposes "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident," Fed. R. Evid. 404(b)(2), so long as the evidence also clears Rule 403's bar against being excessively prejudicial. See Varoudakis, 233 F.3d at 118.

Rather, he contests the district court's Rule 403 finding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

The government sought to introduce evidence of the homicide charges so that the jury would not "conclude that the offenses were minor" and thus "not a reason to flee Cape Verde and make . . . false statement[s] on a U.S. passport application." Accordingly, part of our analysis concerns the "government's need for the evidence." United States v. Varoudakis, 233 F.3d 113, 122 (1st Cir. 2000). The probative value of the homicide evidence for Rule 403 purposes "may be calculated by comparing evidentiary alternatives." Old Chief v. United States, 519 U.S. 172, 184 (1997).

One available alternative was for the district court to admit evidence of the mandatory minimum and maximum penalties that Brandao faced without specifying that the charges were for murder.⁷ That is because evidence of the "length of the penalty itself" is "highly probative as to [a defendant's] motive to flee." United States v. Earls, 704 F.3d 466, 471 (7th Cir. 2012) (affirming admission of evidence of a potential sentence "ranging from probation to sixty years" where no reference was made to the

⁷ Brandao initially requested "an exclusion of any evidence relating to the criminal cases in their entirety." On appeal, he concedes that "the length of the potential sentences may have been relevant" to his knowledge and motive.

underlying child sexual assault charges). The probative value of penalty evidence to show motive to flee increases where the maximum penalties are significant or where there is a mandatory minimum sentence.⁸ Brandao was facing penalties of fifteen to thirty years' imprisonment, which sufficiently conveys the gravity of the crimes he was charged with. Brandao's motive to avoid a long sentence had nothing to do with the nature of the underlying crime. And if there is any reason why a sentence for homicide in Cape Verde would be a more daunting prospect than an equivalent-length sentence for a non-homicide crime, the government has not offered one. Anything else that the government sought to glean from invoking the homicide charges apart from the serious penalties attached to them is therefore "of marginal probative value." United States v. Gilbert, 229 F.3d 15, 25 (1st Cir. 2000).

That brings us to unfair prejudice, which "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief, 519 U.S. at 180. In

⁸ We note that there may be other kinds of cases with different facts where the nature of the prior bad act will be significantly probative, regardless of the act's penalties. See United States v. Johnson, 996 F.2d 306 (5th Cir. 1993) (per curiam) (finding deserter status relevant to motive to acquire false passport); United States v. Zamora-Sanchez, 959 F.2d 243, 1992 WL 69324, at *5 (9th Cir. 1992) (unpublished) (holding prior illegal entry furnished motive to make false statement to procure a passport).

particular, unfair prejudice may exist where the evidence "invites the jury to render a verdict on an improper emotional basis" or "is so shocking or heinous that it is likely to inflame the jury." United States v. Perez-Cubertier, 958 F.3d 81, 89-90 (1st Cir. 2020) (citation modified). Unlike many cases involving prior-bad-acts evidence, the issue here is not that the jury would unfairly convict due to typical propensity reasoning (i.e., because a defendant committed a prior bad act, he was more likely to have committed the pending crime). Rather, the evidence that Brandao had been charged with two homicides was unfairly prejudicial because it could lead the jury to convict him on the basis that it (1) believed him to be a bad person generally, or (2) wished to punish him for the crimes he allegedly committed. See Old Chief, 519 U.S. at 181 (recognizing the concern about "preventive conviction even if [the defendant] should happen to be innocent momentarily").

We note that, aside from references to the dates of the two homicides -- which occurred approximately seven years apart -- the district court excluded underlying details of Brandao's pending charges. The lack of such detail can blunt the prejudicial effect of homicide-related evidence. See Perez-Cubertier, 958 F.3d at 90. Nevertheless, there is no doubt that, because they are emotionally charged, certain kinds of prior bad acts are more likely to be prejudicial. See United States v.

Sabeau, 885 F.3d 27, 38 (1st Cir. 2018) (incestuous sexual abuse of young child); United States v. Mehanna, 735 F.3d 32, 64 (1st Cir. 2013) (terrorism); United States v. Hands, 184 F.3d 1322, 1328 (11th Cir. 1999) (domestic violence). Murder -- a particularly emotionally charged and serious crime -- is among the offenses that can create "a meaningful danger of unfair prejudice" because of its potentially inflammatory impact on the jury. Sabeau, 885 F.3d at 38. And the risk of unfair prejudice was made more acute here because Brandao's alleged involvement in violent crimes was introduced in a prosecution that otherwise related to false statements on a government form -- a crime far less likely to trigger an emotional response from the jury. See id. (noting specter of unfair prejudice "lurked" when evidence of child sexual abuse was introduced in tax evasion, drug distribution, and healthcare fraud case).

Moreover, the possibility of unfair prejudice was compounded by the failure to ask questions about homicide during voir dire, as discussed supra at Part II.B.2. Evidence that the defendant was charged with two homicide offenses could have an outsized impact on jurors who themselves harbor insuppressible bias related to that type of crime. And in this case, the district court did not ask a general question that would have elicited individual disclosures of such bias -- an omission that, as we have discussed already, was error. Additionally, the government's

closing arguments arguably introduced another layer of unfair prejudice. Specifically, in its rebuttal, the government claimed that Brandao "want[ed] to avoid justice for two murder charges." The government's reference to "justice" may well have been intended to convey only Brandao's efforts to avoid trial. Yet such phrasing could have been understood to suggest that Brandao would have been convicted had he remained in Cape Verde.

Although a limiting instruction can sometimes "cure" prejudice stemming from prior-bad-acts evidence, any instruction must be carefully constructed. United States v. García-Sierra, 994 F.3d 17, 34 (1st Cir. 2021). The court must specifically tailor it to the potential unfair prejudice caused by the evidence and provide "case-specific guidance." Id.

Here, the district court instructed the jury that it could not consider evidence of the Cape Verdean offenses "to infer that, because of his character, the defendant carried out the acts charged in this case," and that the evidence could only be used for the limited purpose of determining motive and intent. That is a standard propensity instruction that does not address the actual risk posed by the evidence: that the jury would convict Brandao of making false statements on a passport application because he was charged with two homicides. Cf. United States v. Trenkler, 61 F.3d 45, 56 (1st Cir. 1995) (discussing instruction to jury that it could not use prior-bad-acts evidence either to infer

defendant's guilt "simply because he was a bad person" or for propensity reasoning). Because the instruction was not "suitably prophylactic, [it] did not effectively mitigate the prejudice posed by the prior-bad-acts evidence admitted in this case." García-Sierra, 994 F.3d at 35 (citation modified).

In sum, given the availability of other evidence to show Brandao's motive to flee, the homicide evidence was unduly prejudicial within the circumstances of this case.⁹ See Mehanna, 753 F.3d at 61 (recognizing the case-specific nature of the Rule 403 inquiry). Although a district court's Rule 403 decision is entitled to "great deference on appeal," we think this is a case that would require intervention if not for the harmless error doctrine. Varoudakis, 233 F.3d at 122, 124. On the record before us, Brandao's pending homicide charges in Cape Verde should have been excluded.

D.

While we have determined that the district court committed multiple errors related to the proposed homicide evidence, we must consider whether these were nevertheless

⁹ While the evidentiary error was significant, its impact should not be overstated. It was appropriate in this case to admit motive evidence that Brandao faced charges for serious crimes with hefty penalties. Thus, the unfair prejudice here was incremental because the jury would have had some understanding of Brandao's pending charges.

harmless errors. We conclude that they were because the evidence against Brandao was overwhelming.

1.

We first determine the appropriate standard to apply in assessing harmlessness, which turns here on whether the asserted error is constitutional. The parties agree that the Rule 403 error is non-constitutional, so we must consider whether it was "highly probable that the error did not contribute to the verdict." United States v. Kilmartin, 944 F.3d 315, 338 (1st Cir. 2019) (citation modified).

Whether the failure to ask the venire about the homicide charges was an error of constitutional magnitude warranting a showing that it was "harmless beyond a reasonable doubt," Chapman v. California, 386 U.S. 18, 24 (1967), is a more "difficult question."¹⁰ Jacobs v. Redman, 616 F.2d 1251, 1256 (3d Cir. 1980). Brandao asserts that a faulty voir dire process implicates both the Sixth and Fourteenth Amendments. Generally, a voir dire question that "might be helpful in assessing whether a juror is impartial" is "constitutionally compelled" only if "the trial court's failure to ask [it] render[s] the defendant's trial fundamentally unfair." Mu'Min v. Virginia, 500 U.S. 415, 425-26

¹⁰ The government argued that the voir dire claim was unpreserved and therefore subject to plain error review. In his briefing, Brandao did not discuss harmless error at all, let alone what standard should apply.

(1991); see also Ristaino, 424 U.S. at 594 ("The Constitution does not always entitle a defendant to have questions posed during [v]oir dire specifically directed to matters that conceivably might prejudice veniremen against him.").

The Supreme Court has held that in certain case-specific circumstances, the failure to conduct voir dire regarding racial bias may rise to the level of constitutional error. Ham v. South Carolina, 409 U.S. 524, 526-27 (1973) (involving prosecution of a Black civil rights activist, who argued he had been framed because of his civil rights activities). In that same case, however, the Court also held that declining to ask a question about prejudice against people with beards was not a constitutional violation. Id. at 528. Many other circuits have concluded that an erroneous failure to ask case-specific voir dire questions does not constitute constitutional error. See, e.g., Beuke v. Houk, 537 F.3d 618, 637 (6th Cir. 2008) (involving question to prospective jurors about why they wanted to serve); Campos v. Peters, 37 F.3d 1501 (7th Cir. 1994) (unpublished) (concerning pregnancy in case involving murder of pregnant woman); United States v. Greer, 968 F.2d 433, 437 (5th Cir. 1992) (regarding jurors' religion in skinhead prosecution); Jacobs v. Redman, 616 F.2d 1251, 1256-57 (3d Cir. 1980) (respecting whether jurors had been victims of a crime). But see Bates, 590 F. App'x at 888 (applying

constitutional harmless-error standard to failure to voir dire regarding prejudice about sexual orientation).

We may bypass this question because, even if we apply the Chapman standard, the error was still harmless. See United States v. Pridgen, 518 F.3d 87, 91 (1st Cir. 2008); United States v. Jadowe, 628 F.3d 1, 21 (1st Cir. 2010).

2.

Under the harmless-error standard for constitutional errors, "we are required to affirm the conviction if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." United States v. Pullman, 139 F.4th 35, 47 (1st Cir. 2025) (citation modified). The standard is satisfied where the government's evidence of guilt is overwhelming. Id.

We think that the government has met that standard here. The government presented documents and testimony demonstrating that Brandao lied about losing his U.S. passport in Dakar because, at that time, the passport was in the custody of the Cape Verde prosecutor's office in Praia. The records showed that, when Brandao was released from pretrial custody, he was forbidden from leaving Cape Verde. They also illustrated that his Cape Verdean passport, American passport, and Cape Verdean ID were transmitted from the judiciary police to the clerk of court, who then provided the documents to the prosecutor's office, where they remained until

Agent Pigman photographed them in May 2023. Also, Brandao's travel papers lacked any stamp denoting entry to Senegal after his release from custody.

The defense's central argument was that the government could not establish that Brandao had lied on his passport application because they could not prove where his passport was on December 28, 2022. To cast doubt on the government's evidence, Brandao contended that his passports were returned to him when he was released from pretrial custody and not transferred to the prosecutor's office. Brandao suggested that he lost his passport -- as he claimed on his temporary passport application -- and "someone could have found these important documents and provided them to the closest embassy." Alternatively, he proposed that, given the high profile of the case, anyone who discovered his passports and identification card "would have known where to return them" (i.e., to the prosecutor's office in Cape Verde).¹¹

Given the record in this case, this line of argumentation was fanciful. Believing Brandao's argument about a good Samaritan returning his travel documents requires crediting a string of

¹¹ On appeal, Brandao clarifies that his theory was that, after losing his passport in Dakar, "it [wa]s not out of the realm of possibility that someone would return it to the" U.S. embassy in Senegal and the officials from that office would send it to the Cape Verde prosecutor.

conjectures. The "chain of custody" documents detail the path of Brandao's U.S. passport and other identifications from the judiciary police to the Cape Verde prosecutor's office. Brandao's release paperwork corroborates that path. Moreover, when American officials went to locate Brandao's identification documents, they found his Cape Verdean passport, American passport, and Cape Verdean ID precisely where the Cape Verdean paperwork indicated that they would be found. This was not a complex case, and the government's evidence was strong. "If the jury credited" the government's view of the Cape Verdean documents (and there was almost nothing done to discredit that view), any evidence about the pending homicide charges "was comparatively irrelevant." United States v. Carpenter, 403 F.3d 9, 13 (1st Cir. 2005).

In short, while the errors identified in this case could have affected many prosecutions, the government's evidence here was so strong that the errors identified above were harmless beyond a reasonable doubt.¹²

¹² Evidence of guilt that satisfies the Chapman beyond-a-reasonable-doubt standard necessarily also satisfies the highly-probable standard for non-constitutional errors. See United States v. Green, 698 F.3d 48, 53 (1st Cir. 2012) (describing the latter as "a more lenient standard"); Pridgen, 518 F.3d at 91-93 (declining to decide which harmless error test applies when evidence of guilt is "strong" and "compelling").

III.

For the reasons stated, we affirm Brandao's conviction.

So ordered.

- Concurring Opinion Follows -

LIPEZ, Circuit Judge, concurring. I join the thoughtful majority opinion in all but one respect. To the extent my colleagues consider the district court's failure to perform a voir dire previewing the evidence about murder charges as a factor in assessing the prejudice from that evidence, I disagree.¹³ In my view, even if the district court had done a proper voir dire, that inquiry would not have offset the unfair prejudice from admitting murder evidence that was plainly unnecessary to advance the government's theory of Brandao's motive to lie on his passport application.

The Supreme Court has noted "the special role played by the American prosecutor in the search for truth in criminal trials." Strickler v. Greene, 527 U.S. 263, 281 (1999). In recognition of that unique advocacy role, we have emphasized the importance of restraint when the government assesses whether to introduce evidence that is probative but highly prejudicial:

Just because evidence may have a smidgen of probative value, that bare fact does not give the government free rein to capitalize upon its emotionally laden content, particularly where, as here, the government can easily prove its case without fanning the flames of unfair prejudice.

¹³ As the majority opinion recounts, Brandao proposed the following voir dire question after the district court ruled that the government could introduce the murder evidence: "This case involves the testimony about murder charges in a different country. Does the fact that murder charges are involved in the case cause you any concern about your ability to be fair and impartial?"

The prosecution -- which has available to it the immense resources of the federal government -- possesses a significant advantage in criminal cases, and there seldom is a good reason for a prosecutor to push the envelope of that advantage. Mindful of this imbalance, we consistently have "warn[ed] the government" about "the folly of . . . overkill."

United States v. Kilmartin, 944 F.3d 315, 337 (1st Cir. 2019) (quoting United States v. Frankhauser, 80 F.3d 641, 650 (1st Cir. 1996)) (alteration and omission in original).

This case exemplifies such "overkill." Although I focus primarily on the murder charges, I note that the government sought to admit evidence of Brandao's other pending criminal charges as well. Its motion in limine asked the court "to admit evidence of the criminal charges asserted against the [d]efendant in Cape Verde, including multiple homicides," albeit "not the underlying allegations supporting the charges." The motion reported that Brandao "was charged in Cape Verde with two counts of aggravated homicide, three weapons crimes, one crime of robbery with violence against a person, and [a] crime of attack against the integrity of a cadaver or ashes." Brandao, meanwhile, moved for "exclusion of any evidence relating to the criminal cases in their entirety," and further asked, if the court rejected that request, that the evidence "be limited to the language 'criminal charges,' and not 'murder' or 'homicides.'"

As the majority opinion describes, the district court granted the government's motion, with limitations. The court allowed the government to "proffer that Mr. Brandao has been charged with[] 'serious offenses including homicide[]' [b]ut may not refer to any of the [other] charges specifically." The court also ruled that the government could "report the maximum penalties that Mr. Brandao faces for the charged offenses, but may not refer to any of the factual allegations underlying those charges."

Despite allowing the government to reference the murder charges, the district court recognized that the government had crossed a line with its motion. The court noted that, "[c]ertainly, a charge as gruesome as the attack upon the integrity of the cadaver or ashes is a shocking and heinous crime that might invite the jury to render a verdict on . . . [a]n improper and emotional basis." My colleagues and I have concluded that the evidence of the murder charges also crossed the line in the circumstances of this case. The highly inflammatory evidence that Brandao may have taken a life could have affected the jury's deliberations in two impermissible ways. First, the emotional impact of that information may have moved the jurors to punish Brandao without focusing on the specific evidence in this case. See Old Chief v. United States, 519 U.S. 172, 180 (1997) (quoting Committee Notes to Rule 403 explaining that "unfair prejudice within its context means an undue tendency to suggest decision on

an improper basis, commonly, though not necessarily, an emotional one" (citation modified)).

Second, the jurors may have drawn a type of propensity inference -- i.e., that Brandao's past bad conduct shows that he is the sort of unsavory character who would be likely to falsify a passport application. See id. ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."); United States v. Nieves, 58 F.4th 623, 637 (2d Cir. 2023) (noting the "significant risk that potential strong feelings concerning" the evidence that was "the cornerstone of the government's theory of motive" "would skew [the jury's] deliberations" (citation modified)).

To be sure, the government properly sought to prove Brandao's motive to lie on his passport application through evidence that he was facing serious criminal charges in Cape Verde. Although such evidence would be prejudicial to Brandao even without the specific reference to murder, it is only unfair prejudice that requires exclusion of evidence. See, e.g., United States v. Ross, 171 F.4th 522, 530 (1st Cir. 2026) ("[O]nly unfair prejudice is to be avoided, as, by design, all evidence is meant to be prejudicial." (quoting United States v. Morales-Aldahondo, 524 F.3d 115, 119 (1st Cir. 2008))). Here, the unfairness is apparent

because the government did not need to introduce the pending murder charges. It could simply have introduced the less inflammatory -- but equally probative -- evidence that Brandao was at risk of a lengthy term of imprisonment for unspecified crimes. Cf. United States v. Varoudakis, 233 F.3d 113, 122 (1st Cir. 2000) ("The prejudice to an opponent can be said to be unfair when the proponent of the evidence could prove the fact by other, non-prejudicial evidence." (citation modified) (quoting 22 Wright & Miller's Federal Practice and Procedure § 5214 (1978))).

Although the trial judge is the ultimate gatekeeper in regulating the balance between probative value and unfair prejudice, prosecutors should not push the limits of admissibility on the assumption that, if they go too far, the judge will draw the correct line. As I read Supreme Court precedent, prosecutors have an independent obligation to make reasoned judgments about the balance between probative value and prejudice. See, e.g., Strickler, 527 U.S. at 281 (observing that the government's "interest . . . in a criminal prosecution is not [to] win a case, but that justice shall be done" (quoting Berger v. United States, 295 U.S. 78, 88 (1935))). Here, as I pointed out above, the government had an obvious alternative to evidence of the murder charges. Indeed, the parties stipulated to that alternative -- namely, that Brandao's crimes exposed him to fifteen to thirty years' imprisonment. The fact that Brandao faced the

prospect of up to thirty years in prison starkly shows why he might have sought to evade prosecution by falsely claiming he had lost his passport. The fact that the criminal charges included homicide was an unnecessary addition to demonstrate that motive.¹⁴ See Old Chief, 519 U.S. at 184 ("[W]hat counts as the Rule 403 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives."); Varoudakis, 233 F.3d at 122 ("The probative value of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point." (quoting Wright & Miller, *supra*, § 5250)).

In Old Chief, Justice Souter elaborated as follows on the competing considerations at play when the government has available highly prejudicial -- but relevant -- evidence:

The Notes to Rule 403 . . . stat[e] that[,]
when a court considers "whether to exclude
[evidence] on grounds of unfair prejudice,"
the "availability of other means of proof may
. . . be an appropriate factor." The point
gets a reprise in the Notes to Rule 404(b),
dealing with admissibility when a given
evidentiary item has the dual nature of
legitimate evidence of an element and
illegitimate evidence of character: "No
mechanical solution is offered. The
determination must be made whether the danger
of undue prejudice outweighs the probative

¹⁴ To be clear, I am not suggesting a categorical rule that evidence of a murder charge could never be introduced to establish motive. But the decision to seek introduction of such evidence should only emerge after a careful analysis of the need for it. Here, there was clearly no need for it.

value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under [Rule] 403." Thus the notes leave no question that when Rule 403 confers discretion by providing that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.

519 U.S. at 184-85 (omission in original) (citations omitted). Although framed in this passage as guidance for district courts, Justice Souter's observations about the importance of assessing the need for prejudicial evidence necessarily apply in the first instance to the judgment of the prosecution -- with its "special role . . . in criminal trials" -- concerning the evidence it seeks to admit. Strickler, 527 U.S. at 281. That examination of need apparently did not occur here.

Importantly, I cannot agree that the prejudicial impact of the evidence that was improperly admitted -- and that is so inflammatory that it could not be offset by the familiar curative instruction directing jurors to reject any propensity inference¹⁵ -- might have been sanitized if the jurors had been

¹⁵ The court gave the following curative instruction:

You have heard evidence that the defendant was facing, and still is facing, charges of serious crimes, including homicide in Cape Verde. You may not consider that evidence to infer that, because of his character, the defendant carried out the acts

asked pretrial about their anticipated reaction to it. As stated in the majority opinion, the "standard propensity instruction" given here fell short of curing the prejudice from the "particularly emotionally charged" evidence that Brandao may have committed multiple murders -- evidence whose inflammatory impact not only risked a conviction based on Brandao's bad character but also could have influenced the jury to punish him for such horrendous behavior. Similarly, a general inquiry during voir dire advising the jurors that the case involved murder charges -- as proposed by Brandao -- would have been unlikely to diminish the jurors' reaction to the specific evidence that Brandao was charged with two homicides.

Indeed, as we previously have noted, a juror "who harbors a bias may not appreciate it" during voir dire or "may be reluctant to admit [a] lack of objectivity." Sampson v. United States, 724 F.3d 150, 164 (1st Cir. 2013). The limitations of juror inquiry are widely recognized. See, e.g., Nancy S. Marder, "Juror Bias, Voir Dire, and the Judge-Jury Relationship," 90 Chi.-Kent L. Rev. 927, 933 (2015) (noting that it is difficult for jurors "to decide

charged in this case. You may consider such evidence only for the limited purpose of deciding: First, whether defendant had a motive or the opportunity to commit the acts charged in the [i]ndictment; and second, whether defendant had the state of mind or intent necessary to commit the crime charged in the [i]ndictment.

whether they have any biases that will affect their judgment in a particular case" when they are "questioned in public and a response is called for on the spot and without time for reflection"); see also id. at 934 ("[I]ndividuals -- judges and jurors alike -- are not always aware of their own biases."); see also, e.g., Smith v. Phillips, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."); Crawford v. United States, 212 U.S. 183, 196 (1909) ("Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence").

Moreover, the possibility that voir dire questioning could justify admission of evidence that would otherwise be inadmissible would perversely incentivize the government to propose admission of unfairly prejudicial evidence with an offer to soften its impact through voir dire -- "open[ing] the door to lawyers, particularly prosecutors," to circumvent the protections of the Rule 403 balance between prejudice and probative value. United States v. Hoffman, 806 F.2d 703, 718 (7th Cir. 1986) (Will,

J., dissenting).¹⁶ In effect, accepting voir dire as a type of pretrial curative measure would undermine our warning against "push[ing] the limits of admissibility of [prejudicial] evidence." Varoudakis, 233 F.3d at 125. The government might be encouraged to use the voir dire process to gain admission of evidence that, based solely on its nature and the government's need for it, would be unfairly prejudicial. We should not distort the delicate balance between prejudice and probative value with reliance on a voir dire process known to be unreliable in ferreting out juror prejudice.

This is an unusual case because the overwhelming evidence of Brandao's guilt overrides the harm from admission of the murder evidence. However, that fortuitous harmless error conclusion does not alter the fact that here the inescapably provocative murder evidence was unnecessary and, accordingly,

¹⁶ In Hoffman, the panel majority concluded that "any possible prejudice that might have resulted" from evidence of the defendant's controversial religious affiliation "was effectively eliminated by the district court's thorough and exhaustive voir dire and the court's excusing of two jurors who might have been prejudiced against the defendant because of his religious affiliation." 806 F.3d at 708. In dissent, Judge Will, a district court judge sitting by designation with the Seventh Circuit, characterized the majority's holding as "unprecedented" and "a drastic change in the rules of evidence." Id. at 717-18; see also id. at 718 ("The fact that the jurors have denied that they would be prejudiced by particular evidence has never before, to my knowledge, entered into the balance."). Judge Will expressed concern that "advocates may now use voir dire to neutralize any objections their opponents may raise at trial based on Rule 403." Id. at 717.

unfairly prejudicial. Moreover, the prejudice would have been no less substantial if the evidence had been generally previewed to the jurors through voir dire. The government's "overkill" in using the unnecessary murder charges stands on its own in establishing unfair prejudice.