No. 06-672

In the Supreme Court of the United States

KENNETH P. WILK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Death Penalty Act of 1994 requires the government to file its notice of intent to seek the death penalty "a reasonable time before the trial." 18 U.S.C. 3593(a). The questions presented are:

1. Whether the denial of a defendant's motion to strike the government's notice of the death penalty as untimely is immediately appealable as a collateral order.

2. Whether the reasonableness of the notice must be assessed by reference to any scheduled trial date at the moment the notice is filed, rather than the date to which the trial date is continued.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 452 F.3d 1208. The order of the district court (Pet. App. 32a-51a) is reported at 366 F. Supp. 2d 1178.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2006. A petition for rehearing was denied on August 15, 2006 (Pet. App. 52a-53a). The petition for a writ of certiorari was filed on November 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the Southern District of Florida charged petitioner with, *inter alia*, three capital

offenses stemming from the killing of a local law enforcement officer who had been assisting in a federal investigation. Pet. App. 5a, 12a. The government filed a notice of intent to seek the death penalty. *Id.* at 11a, 14a. Before trial, petitioner moved to strike the notice as untimely. *Id.* at 12a, 14a. The district court denied the motion, and petitioner took an interlocutory appeal. *Id.* at 32a-51a. The court of appeals affirmed. *Id.* at 1a-31a.

1. In any case in which the government decides to seek the death penalty for a capital-eligible offense, the Federal Death Penalty Act of 1994 (FDPA) requires the government to file with the court a notice stating its intention to "seek the sentence of death" and "setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death." 18 U.S.C. 3593(a)(1) and (2). The notice must be filed "a reasonable time before the trial or before acceptance by the court of a plea of guilty." 18 U.S.C. 3593(a). "The court may permit the attorney for the government to amend the notice upon a showing of good cause." *Ibid.*

2. In 2001, petitioner threatened law enforcement personnel during the prosecution of his domestic partner, Kelly Ray Jones, on federal child pornography charges. Some of the threats were made over the Internet, and petitioner's online profile listed such hobbies as "cop bashing" and "hunting cops." Pet. App. 2a. In July 2004, Jones, who was precluded from using the Internet as a condition of his supervised release, transmitted child pornography to an undercover law enforcement officer using petitioner's Internet account and a computer located at a residence the two shared. *Ibid.* Following Jones's arrest, petitioner attempted to intimi-

date and discredit a witness and deleted e-mails relevant to Jones's prosecution. *Id.* at 2a-3a. Thereafter, investigators obtained warrants to arrest petitioner and search his residence for evidence of child pornography and witness tampering. *Id.* at 3a.

On August 19, 2004, Deputy Sheriff Todd M. Fatta and Sergeant Angelo Cedeno, both of the Broward County Sheriff's Office, assisted federal agents in executing the warrants. Pet. App. 3a. Shots were fired as the officers entered the residence, and both Cedeno and Fatta were wounded. *Ibid.* Fatta died from his injuries. *Ibid.* Petitioner was the only person found at the residence, *ibid.*, and later told police that he accidentally shot Fatta. Pet. 3.

3. On August 26, 2004, a grand jury charged petitioner with child pornography offenses and witness and evidence tampering. Pet. App. 3a. Although capital charges were added later, the court and the parties treated petitioner's case as a potential death penalty prosecution from the beginning. *Id.* at 3a-4a. The district court appointed an experienced capital defense attorney for petitioner. *Id.* at 3a. In September 2004, petitioner made a presentation to the United States Attorney's Office about the propriety of capital punishment in connection with Fatta's murder, and a similar meeting was scheduled with Department of Justice (DOJ) officials in Washington. *Id.* at 4a.

After the government confirmed in October 2004 that it was considering seeking the death penalty in connection with a forthcoming superseding indictment, the district court granted petitioner's request for the appointment of a second capital defense lawyer and approved the hiring of an investigative firm and mitigation specialist. Pet. App. 4a-5a; see 18 U.S.C. 3005. The court

also granted petitioner's motion for continuance of the trial date, in which petitioner had relied upon the possibility of capital charges as a reason why more time was needed. The court rescheduled the trial for December 13, 2004. Pet. App. 4a-5a. In the months that followed, the district court conducted *ex parte* proceedings in which it approved petitioner's retention of more than ten experts and authorized numerous expenditures for his experts, investigators, and mitigation specialist. See *id.* at 5a-13a.

On October 21, 2004, the government filed a superseding indictment that added four new counts against petitioner, two of which carried a possible death sentence in connection with Fatta's murder: (1) murdering Fatta with malice aforethought, in violation of 18 U.S.C. 1111(a) and 1114; and (2) using and carrying a firearm during and in relation to Fatta's murder, resulting in death, in violation of 18 U.S.C. 924(j)(1). Pet. App. 5a; 10/21/04 Indictment 8-10. The superseding indictment cited the FDPA and alleged statutory aggravators and culpability factors that, if proved, would render petitioner eligible for the imposition of a death sentence. Pet. App. 5a-6a; see 18 U.S.C. 3591(a)(2), 3592(c).[1]

On October 28, 2004, petitioner requested a continuance of the December 13, 2004, trial date, asserting that more time was needed to resolve outstanding discovery

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[1] The superseding indictment alleged, *inter alia*, that petitioner: intentionally killed Fatta, see 18 U.S.C. 3591(a)(2)(A); knowingly created a grave risk of death to one or more persons in addition to Fatta, see 18 U.S.C. 3592(c)(5); committed the murder after substantial planning and premeditation, see 18 U.S.C. 3592(c)(9); and intentionally killed or attempted to kill more than one person in a single criminal episode, see 18 U.S.C. 3592(c)(16). Pet. App. 5a-6a; 10/21/04 Indictment 16-18.

issues and to accommodate the defense's meeting with DOJ officials about whether the government would seek the death penalty, which had been postponed at petitioner's request. Pet. App. 6a, 44a. The government suggested a May 2005 trial date based on its belief that, by that time, discovery would be complete and a decision would be made on whether to seek the death penalty. *Id.* at 6a. Petitioner asserted that the defense could not be ready for trial by May, particularly if the government were to seek a capital sentence. *Id.* at 6a-7a. Over petitioner's objection, the district court reset the trial for April 18, 2005. *Id.* at 7a.

On January 28, 2005, the government stated that it did not expect a final decision on whether capital punishment would be sought until February 25 because the new Attorney General had not yet taken office. Pet. App. 8a. The government asserted that February 25 would be a "reasonable time" before the scheduled April 18, 2005, trial date because (1) petitioner had been represented by two defense attorneys since October 2004 in anticipation of a capital prosecution; and (2) the court had already approved petitioner's retention of experts, investigators, and a mitigation specialist. *Id.* at 8a-9a. When petitioner asserted that February 25 would not be reasonable and that he could not be ready for a capital trial by April 18, the district court stated that "it would probably behoove [petitioner] to assume that the government will be seeking the death penalty." *Id.* at 9a. The court confirmed that the trial was set for April 18 and directed the government to file its notice of intent to seek the death penalty no later than February 18. *Ibid.* To assist petitioner in his preparation for a likely capital trial, the government agreed to provide him with a list of the non-statutory aggravating factors on which it in-

tended to rely; petitioner received the list on February 4, 2005. *Id.* at 9a & n.7. The parties also began preparing the juror questionnaire, which included inquiries about capital punishment. *Id.* at 9a-10a.

On February 18, 2005, the government filed its notice of intent to seek the death penalty, which listed the same statutory aggravating factors that were alleged in the superseding indictment and four non-statutory aggravators. Pet. App. 11a.[2] On March 8, 2005, petitioner filed a motion to strike the death penalty notice as untimely under Section 3593(a). *Id.* at 12a.

On March 10, 2005, the government filed a second superseding indictment that added a third capital count charging petitioner with intentionally killing Deputy Sheriff Fatta while Fatta was assisting in a federal investigation, in violation of 18 U.S.C. 1111 and 1121(a)(1)(A) . Pet. App. 12a. The statutory aggravators and culpability factors alleged in the second superseding indictment were identical to those set forth in the October 2004 indictment and the February 18 death penalty notice. *Id.* at 12a-13a. On March 29, 2005, the district court granted the government's motion for leave to file an amended death penalty notice, noting that the amended notice was identical to the February 18 notice except for language describing the new count. *Id.* at 14a, 36a; see 18 U.S.C. 3593(a). On March 31, 2005, peti-

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[2] The alleged non-statutory aggravators were that petitioner: (1) killed Fatta in an attempt to obstruct justice; (2) may be convicted contemporaneously of offenses in addition to the murder; (3) was a danger to others; and (4) caused injury and harm to Fatta's family. Pet. App. 12a. Although the record does not conclusively establish that the alleged non-statutory aggravators were the same factors included in the government's February 4 list (*id.* at 12a n.9), petitioner does not contend that new or different factors were included in the notice (Pet. 5-6).

tioner moved to strike the amended death penalty notice as untimely. Pet. App. 14a.

The district court held conferences in late March and early April 2005 to discuss the numerous pending motions[3] and other issues. Pet. App. 14a, 16a. The government stated that it could be ready for trial on April 18 but suggested postponing the trial until late summer or early fall, citing petitioner's failure to have disclosed his expert witnesses and potential mental health defense. *Id.* at 15a. Petitioner urged the court instead to strike the death penalty notice and bring the matter to trial on April 18 as a non-capital case. *Id.* at 16a. The court found that "the interest of justice served by a continuance far outweighs any interest of the public and [petitioner] in a speedy trial" and postponed the trial until August 29, 2005. *Id.* at 17a.

4. On April 27, 2005, the district court denied petitioner's motion to strike the death penalty notice. Pet. App. 32a-51a. In assessing whether the time between the notice and the trial was "objectively reasonable," the court was guided by the non-exhaustive list of factors articulated in *United States* v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003): "(1) the nature of the charges presented in the indictment; (2) the nature of the aggravating factors provided in the Death Notice; (3) the period of time re-

[3] On February 16, petitioner filed 39 motions, including, *inter alia*, a motion to strike the statutory aggravating factors alleged in the superseding indictment. Pet. App. 10a-11a. On March 25, 2005, petitioner filed a host of additional motions, including, *inter alia*, a motion to dismiss the second superseding indictment on speedy trial grounds, seven motions to dismiss portions of the second superseding indictment for other reasons, and a motion to exclude all nine of the government's expert witnesses under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). Pet. App. 14a; *id.* at 39a & n.1.

maining before trial, measured at the instant the Death Notice was filed and irrespective of the filing's effects; and, in addition, (4) the status of discovery in the proceedings." Pet. App. 38a (footnote omitted) (quoting 332 F.3d at 737).

The court then turned to the question of "which trial date to use when measuring the reasonableness of the timing of the notice," April 18, the scheduled trial date when the government filed its notice on February 18, or August 29, the scheduled trial date when the court ruled on the defendant's motion to strike the notice of intent to seek the death penalty. The court explained that it would be appropriate to use the August 29 trial date in calculating the amount of time between the death penalty notice and the trial because the April 18 date had been continued for reasons unrelated to the filing of the notice, such as the numerous unresolved motions and petitioner's failure to have disclosed his expert witnesses. Pet. App. 39a-41a. But regardless of which of the two dates was used, the court concluded that the notice was filed "a reasonable time before the trial." *Id.* at 42a-43a.

The court found that "two months, let alone six months, would be sufficient time to prepare a defense" because the "homicide charges are rather basic," and because "the aggravating factors merely track the statute's language and are reflective of the same facts that are in the homicide charges themselves." Pet. App. 44a-45a. Regarding discovery, the court observed that the disclosures were "mostly complete from the government's side" but that petitioner "had yet to disclose any defense experts or produce any mental health evidence even though [he] had consulted at least a dozen experts." *Id.* at 46a (footnote omitted). Lastly, the court

stressed that the October 2004 superseding indictment "listed the statutory aggravating factors that were later relied upon in the Death Notice" and thus "put [petitioner] on notice of the statutory aggravating factors justifying a death sentence" long before trial. *Id.* at 46a-47a.[4]

5. The court of appeals affirmed. Pet. App. 1a-31a. The court rejected the government's argument that the district court's interlocutory order was not immediately appealable. Instead, it joined the Fourth Circuit in holding that a "district court's order denying a motion to strike the government's death notice [is] reviewable as a collateral order" under 28 U.S.C. 1291 "because such orders 'are conclusive, collateral to the merits, and if wrongly decided will irreparably deprive capital defendants of an important right.'" Pet. App. 21a (quoting *Ferebe*, 332 F.3d at 730) (brackets in original).

Turning to the merits, the court of appeals concluded, based on the "totality of the circumstances," that the government filed its death penalty notice an "objectively reasonable" time before trial. Pet. App. 23a; see *id.* at 30a.[5] The court rejected petitioner's argument

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[4] The court concluded that the filing of the amended death penalty notice 20 days before the April 18 trial date "d[id] not affect the reasonableness analysis under *Ferebe*" because it merely added a description of a new charge that was "based on the same facts as the two former capital counts and required little or no additional preparation." Pet. App. 47a-48a. Petitioner himself treats (Pet. 23) the February 18 date as the appropriate starting point in calculating the time remaining before the trial.

[5] The court stated that it would be appropriate to consider factors including, but not limited to, the following: "(1) what transpired in the case before the formal Death Notice was filed; (2) the period of time remaining for trial after the Death Notice was filed; (3) the status of discovery and motions in the proceedings; (4) the nature of the charges

that the scheduled April 18 trial date should be used in the analysis, noting that the trial was continued to August 29 for reasons unrelated to the death penalty notice, and that Section 3593(a) does not in any event preclude a continuance in the trial date "to assure that defendants have adequate time to prepare a defense to the death penalty." *Id.* at 29a. Employing the August 29 date, the court concluded that the six-month period between notice and the trial was "clearly adequate to prepare a death defense in this case." *Id.* at 25a; *id.* at 30a. "[F]rom the start," the court explained, "all parties knew this was a likely death penalty case." *Id.* at 24a. The court observed that petitioner's counsel, "who had extensive capital crimes experience, began to prepare a death defense months before the Death Notice was filed," securing the appointment of co-counsel, hiring experts, and obtaining funds for investigators and a mitigation specialist. *Ibid.* The court further noted that the October 2004 superseding indictment gave petitioner notice of the statutory aggravating circumstances months before the death penalty notice was filed, and that the non-statutory aggravating circumstances set forth in the notice were "straightforward." *Id.* at 30a. Finally, because petitioner's numerous motions for funding and experts were submitted *ex parte*, the court was unable to "describe the nature of the potential defenses revealed therein"; nevertheless, the court concluded that "six months is clearly more than sufficient time no matter what approach the defense decides to take." *Ibid.*

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in the indictment; (5) the nature of the aggravating factors claimed to support the death penalty; and (6) the anticipated nature of the defense, if known." Pet. App. 23a.

ARGUMENT

Petitioner contends (Pet. 11) that this Court's review is warranted to resolve a conflict among the circuits on how to determine whether a death penalty notice was filed a "reasonable time" before trial. He also notes (Pet. 25-30) that, if the Court granted certiorari, it could resolve the circuit conflict on whether review under the collateral order doctrine is available from the denial of a motion to strike a death penalty notice as untimely. Both of those questions implicate disagreements in the circuits, but the issues are narrow ones that have received consideration in only a handful of courts. As to jurisdiction, only three courts of appeals have considered the issue, and, although two of them (including the court below) have resolved it erroneously, those holdings appear unlikely to prove problematic as a practical matter. And, as to the merits, only two courts of appeals have considered the issue. The court of appeals in this case resolved it correctly, and the government has adopted prophylactic procedures in the other court to protect against adverse results. Consequently, it is, at present, unlikely that any defendant will prevail on a deficient-notice claim under the current state of the law. While national uniformity in the administration of the federal death penalty is desirable and this Court's review may be warranted if the conflict grows wider or generates in the future actual conflicting outcomes, at present the issues do not warrant this Court's review.

1. The court of appeals held that the district court's order denying petitioner's motion to strike the government's death penalty notice as untimely was subject to immediate review as a collateral order under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Pet. App. 20a-21a. The court of appeals expressed its agreement with the Fourth Circuit's reasoning that such orders "are conclusive, collateral to the merits, and if wrongly decided will irreparably deprive capital defendants of an important right." *Id.* at 21a (quoting *Ferebe*, 332 F.3d at 730). The court of appeals erred in so holding. Even if petitioner were correct about the proper method for determining the adequacy of notice (*i.e.*, by reference to the scheduled trial date, rather than any continued trial date), he cannot establish that an order denying a motion to dismiss for the untimely filing of a capital notice qualifies for review under the collateral order doctrine.

An order meets the requirements of that doctrine only if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits, and (3) is effectively unreviewable in an appeal from a final judgment. *Sell* v. *United States*, 539 U.S. 166, 176 (2003); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Petitioner fails at least the third criteria for review, and, on a proper understanding of the right conferred by Section 3593(a), fails the first and second as well.

Even assuming petitioner is correct that a court must consider the scheduled trial date at the time the notice is filed, despite the rescheduling of the trial to a later date, an order denying a motion to strike a death penalty notice is subject to review at the conclusion of the case. The reasonable time requirement under the FDPA does not give the defendant a right not to be tried on a capital offense; it provides instead the right to have adequate time to prepare for a capital trial. It is therefore subject to review after the entry of judgment in a capital trial. As this Court has made clear in a variety

of contexts, virtually any defense could be described as a right not to stand trial, yet the Court has closely guarded the category of claims that so qualify in order to avoid erosion of the final judgment rule. See *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982) (per curiam); *United States* v. *Robinson*, 473 F.3d 487, 491 (2d Cir. 2007) (citing *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994)).

The final judgment rule is of particular force in criminal cases. *Midland Asphalt Corp.*, 489 U.S. at 799; accord *Hollywood Motor Car Co.*, 458 U.S. at 265 (policy against "piecemeal appellate review * * * is at its strongest in the field of criminal law"); *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978) ("The rule of finality has particular force in criminal prosecutions because encouragement of delay is fatal to the vindication of the criminal law.") (internal quotation marks omitted). This Court has recognized only three general types of decisions in criminal cases that are reviewable under the collateral order doctrine: the denial of a motion to reduce bail, *Stack* v. *Boyle*, 342 U.S. 1 (1951), the denial of a motion to dismiss an indictment under the Double Jeopardy Clause, *Abney* v. *United States*, 431 U.S. 651 (1977), and the denial of a motion to dismiss under the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U.S. 500 (1979).

The FDPA's notice provision is not akin to those types of decisions. Rather it is akin to other notice provisions in federal law: it protects against a defendant's being tried without sufficient time to prepare. *Ferebe*, 332 F.3d at 747 (Niemeyer, J., dissenting) ("[T]he protection afforded to the defendant by § 3593(a) is not a right not to be tried as a capital defendant. Instead, it

is a procedural guarantee ensuring that the defendant has a sufficient time for preparation between the government's death penalty notice and trial."); accord *Robinson*, 473 F.3d at 492. Unlike a double jeopardy or speech and debate claim, a deficient-notice claim does not challenge the government's power to try the defendant for a crime or to impose a punishment. Nothing in Section 3593(a) explicitly guarantees a defendant that "trial will not occur" absent the requisite notice. *Midland Asphalt*, 489 U.S. at 801. Rather, because Section 3593(a) is a notice provision, violations can be fully vindicated on post-trial review, where the court of appeals can assess whether there was any deficient notice and, if so, what remedy is appropriate. Accordingly, because error under Section 3593(a) is effectively reviewable on appeal from a final judgment, it does not qualify for interlocutory review under the collateral order doctrine.[6]

The availability of effective review after entry of a final judgment is sufficient to preclude appeal under the collateral order doctrine even on petitioner's interpretation of the FDPA. But petitioner cannot satisfy the re-

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[6] For related reasons, even on petitioner's theory of the timing analysis, a denial of a motion to strike a death penalty notice as untimely under Section 3593(a) does not raise an issue completely separate from the merits—the second criteria for collateral-order review. If a capital trial does take place without affording the defendant a "reasonable time" after the filing of the Section 3593(a) notice, the error would be subject to harmless-error review. Developments that unfold at trial can make clear that the defendant was not and could not have been prejudiced by any alleged deficiencies in notice. If a notice-related error can be rendered harmless, then the alleged error does not "resolve an important issue completely separate from the merits," *Coopers & Lybrand*, 437 U.S. at 468, because assessment of the notice error could be affected by events during the trial. *Midland Asphalt*, 489 U.S. at 800.

quirements for collateral order review for additional reasons if, as the court of appeals correctly held, a claim of deficient notice under Section 3593(a) is properly assessed by comparing the date of the notice to the scheduled date of a trial as continued. Under that interpretation of the FDPA, a denial of a motion to dismiss a notice as untimely is not conclusive on the disputed question whether the government has given petitioner a reasonable notice of its intent to seek the death penalty in advance of trial. "If [petitioner], during or after trial, renews his motion to strike, the court will be able to evaluate the merits of his motion in light of the period between the government's death penalty notice and the trial date to determine whether the notice was filed a reasonable time before the trial." *Ferebe*, 332 F.3d at 751 (Niemeyer, J., dissenting).

The reasonableness of the notice, in light of the actual trial date, is also not completely separate from the merits of the criminal case against the defendant. In many cases, whether a defendant received reasonable notice will depend on whether the timing of the government's notice denies or adversely affects his ability to prepare his defense, and that determination "can only be measured by the defense that the defendant presented at trial" as well as "the nature and complexity of the case" in light of what proceeds at trial. *Ferebe*, 332 F.3d at 748 (Niemeyer, J., dissenting).

In finding jurisdiction to review the trial court's order, the court of appeals reasoned that a post-trial determination that the government's notice was unreasonable would result in a "colossal waste of time, effort and expense for both litigants and the courts." Pet. App. 21a n.17 (quoting *United States* v. *McGriff*, 427 F. Supp. 2d 253, 267 (E.D.N.Y. 2006)). But petitioner "may be tried

on the substantive charges on which he was indicted, regardless of whether or not the death penalty may be imposed." *Robinson*, 473 F.3d at 491. In any event, the same practical concerns relied upon by the court of appeals "might be cited in the context of a number of rights for which pretrial dismissal is a permissible remedy," such as the Sixth Amendment right to a speedy trial, yet the defendant must undergo a full-blown trial and wait until the criminal case is concluded before seeking an appeal. *Id.* at 492; see *Midland Asphalt Corp.*, 489 U.S. at 801.

2. Although it should not have reached the merits, the court of appeals correctly held that, in determining the reasonableness of the government's notice, a court is not required to consider only the scheduled trial date at the time the original death notice was filed. When the district court continues the trial date for an additional period of time, the analysis logically focuses on whether the defendant has a "reasonable time" before the actual trial date to prepare. "[T]here is nothing in § 3593 that restricts courts to counting only the days between the Death Notice and a scheduled trial date at the time of the filing of the Death Notice." Pet. App. 25a-26a. And given the manifest purpose of the reasonable notice requirement to provide the defendant with sufficient time to prepare for a capital trial, nothing in the Act prevents a district court from responding to a defendant's claim of untimely notice by continuing the trial date to ensure that his interests in adequate preparation thus are protected. *Id.* at 21a n.17, 27a.

Petitioner argues (Pet. 27) that the Act "implicit[ly]" mandates reference to the scheduled trial date at the time the death notice was filed because the scheduled trial date "is the only one known when the government

takes the action the statute directs." That argument incorrectly assumes that whether the defendant has received reasonable notice must be ascertained at the time the government files the notice. But the Act directs courts to consider the time period before "the trial," not the time period before "a scheduled trial date when the notice is filed." And, as discussed, in light of the provision's purpose to protect against the risk of lack of preparedness at trial, it would make no sense to ignore a rescheduled trial date.

3. Notwithstanding the existence of circuit conflicts on both the jurisdictional and the merits issue, the narrow issues implicated in the present petition do not warrant this Court's review. Indeed, if this Court were to resolve the jurisdictional issue in the government's favor (by finding the collateral order doctrine inapplicable), it would have no occasion to reach the merits of the question presented by petitioner.

a. As discussed, both the Fourth Circuit in *Ferebe* and the court of appeals below have held that a district court order denying a motion to strike the death penalty on grounds of untimeliness under the Act is subject to an immediate appeal as a collateral order.[7] After the petition was filed, the Second Circuit in *Robinson*, *supra*, issued an opinion reaching the opposite conclusion, holding that courts of appeals lack jurisdiction to review an order denying a motion to strike a death notice as untimely.

Despite that circuit conflict, this Court's review is unwarranted. To be sure, allowing interlocutory review of orders denying motions to strike the government's

[7] The First Circuit also has "assume[d] * * * without deciding that this is a correct interpretation of the collateral-order rule." *United States* v. *Ayala-Lopez*, 457 F.3d 107, 108 (2006).

notice of intent to seek the death penalty as untimely can impede the sound implementation of the death penalty by "encourag[ing] defendants to file * * * challenges to § 3593(a) notices as soon as the notices are filed." *Ferebe*, 332 F.3d at 749 (Niemeyer, J., dissenting). An immediate appeal delays the trial, with the attendant costs to the criminal justice system. *MacDonald*, 435 U.S. at 853-854. The policy against piecemeal appeals in criminal cases has special force in capital cases, because delay imposes significant burdens on the victim's families and undermines society's interest in exacting retribution for and deterring the most serious crimes.

It nonetheless does not appear that this Court's intervention is warranted at this time. The court of appeals suggested that, given the court's conclusion "that continuances of a trial can cure any issue about whether a particular § 3593(a) notice is untimely, there should be little need for future interlocutory appeals as to a § 3593(a) notice." Pet. App. 21a n.18. The court also explained that it "may always decline collateral order review where the appeal is clearly frivolous." *Ibid.* Accordingly, the Eleventh Circuit's jurisdictional ruling appears unlikely to have significant adverse consequences for federal capital cases.

In the Fourth Circuit, the government has responded to *Ferebe* by filing death penalty notices in certain cases before the Attorney General has made a final decision whether to seek capital punishment. See *Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. of the Judiciary*, 109th Cong., 2d Sess. 8, 13-14 (2006) (statement of Margaret P. Griffey, Chief, Capital Case Unit, Criminal Div., Dep't of Justice). In cases in which the Attorney General decides not to seek the death penalty, the

notice is then withdrawn. *Ibid*. Accordingly, the government has thus far adopted procedures to protect itself against adverse effects from *Ferebe*, albeit through a procedural device that is not optimal.[8]

b. Only two courts have reached the merits issue, *i.e.*, whether the reasonableness of the government's notice must be assessed by reference to the scheduled trial in existence at the time of the government's filing of the notice. The Fourth Circuit in *Ferebe* looked to the "scheduled trial date" in existence "at the instant the Death Notice was filed." 332 F.3d at 737 & n.6; accord *United States* v. *Breeden*, 366 F.3d 369, 374 (4th Cir. 2004). By contrast, the Eleventh Circuit held that the reasonableness of the government's notice is not frozen at the time of the filing of the government's notice, and that district courts can respond to a defense objection of

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[8] Although Section 3593(a) requires only that "the attorney for the government believe[]" that a sentence of death is warranted, and requires only that attorney to file a notice, 18 U.S.C. 3593(a), decisions to seek the death penalty in the federal system are made pursuant to the so-called "Death Penalty Protocol," which was promulgated by DOJ shortly after enactment of the FDPA and now appears in Title 9 of the *United States Attorneys' Manual* (June 2001) (*USAM*). Under the Protocol, a U.S. Attorney must initially decide whether to charge a defendant in his district with a capital-eligible offense. Once a defendant is charged with such an offense, the U.S. Attorney must make a detailed submission to DOJ that includes a recommendation for or against seeking the death penalty. *USAM* § 9-10.040. The submission is reviewed by the Attorney General's Review Committee on Capital Cases, which makes its own recommendation, but not before providing defense counsel with an opportunity to make a submission and to "present to the Committee the reasons why the death penalty should not be sought." *Id.* § 9-10.050. The Attorney General then makes the final decision whether or not to seek capital punishment, based on standards that track the factors a jury is required to consider under the FDPA. *Id.* §§ 9-10.050, 9-10.080; 18 U.S.C. 3591-3593.

untimeliness by extending the trial date. Pet. App. 21a n. 18, 26a-28a.[9]

Notwithstanding the conflict on the issue, this Court's review in this case is not warranted. Only two circuits have decided the issue and as discussed above, the government has adapted to the *Ferebe* decision with procedures to protect against adverse results. It is therefore not clear that defendants in any circuit will prevail on claims of untimely notice, regardless of the legal test applied. Further developments may clarify whether the conflicting legal standards lead to disparate results.

In any event, this case is not an ideal vehicle to decide the issue for two reasons. First, as the district court concluded (Pet. App. 42a-47a), the death penalty notice in this case was timely even using April 18 as the date of the trial. The two-month period between the February 18 filing of the death penalty notice and the scheduled April 18 trial date was objectively reasonable under the circumstances.[10] The parties began treating this case as a likely capital prosecution from the outset. *Id.* at 4a. Petitioner retained experts, an investigative firm, and a mitigation specialist well before the govern-

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[9] As petitioner also observes, Pet. 20, the First Circuit in *Ayala-Lopez*, 457 F.3d at 108, did not decide whether a trial court may postpone the trial in response to a defense claim of untimely notice but the court of appeals did express its skepticism about the Fourth Circuit's holding in *Ferebe* that prejudice is irrelevant to the inquiry whether the government's notice was reasonable. *Ibid.* (assuming "*dubitante*" that prejudice at trial is not required under Section 3593(a)).

[10] Contrary to petitioner's assertion (Pet. 17), the court of appeals did not state or suggest that the notice "was likely untimely" based on a trial date of April 18. Pet. 17. Indeed, the court of appeals "expressly [did] not reach the issue." Pet. App. 28a n.29.

ment filed its notice. *Id.* at 5a. He had the benefit of two experienced capital defense attorneys even before the government charged petitioner with murder. *Ibid.* And the October 2004 superseding indictment gave petitioner actual notice of the statutory aggravators and culpability factors on which the government intended to rely. *Id.* at 5a-6a.

Regarding the nature of the charges and alleged aggravators, the three capital counts alleged in the second superseding indictment all stem from the same discrete set of facts—the shooting death of Deputy Sheriff Fatta—and are "rather basic." Pet. App. 44a. The October 2004 superseding indictment gave petitioner actual notice of the statutory aggravators and culpability factors that were later alleged in the notice. Those factors, which track the language of the FDPA, are "reflective of the same facts that are in the homicide charges themselves." *Id.* at 45a. Two of the four non-statutory aggravating factors (obstruction of justice and contemporaneous convictions) also involve the facts underlying other counts of the October 2004 indictment, and there is no indication in the record that any additional investigation required by the other two factors (future dangerousness and victim impact) could not have been completed in two months. When the death penalty notice was filed, moreover, discovery was "mostly complete from the government's side." *Id.* at 46a. Under those circumstances, even if the Fourth Circuit's test were applied, the filing of the death penalty notice two months before the April 11 trial date could be found reasonable. *Ferebe*, 332 F.3d at 737 (reasonableness turns

on, *inter alia*, "the status of discovery in the proceedings").[11]

Second, although the court below concluded that trial courts may cure otherwise unreasonable death notices by extending the trial date, Pet. App. 21a n. 18, 26a-28a, the trial court in this case continued the trial date to August 29 not to cure any perceived unreasonableness in the timing of the government's notice, but "for a variety of reasons unrelated to the timing of the Death Notice." *Id.* at 41a. The court explained that the trial needed to be extended because of pending motions filed by the defense, as well as because of the defendant's failure to disclose experts, including experts who would opine on petitioner's defense to the killing of the officer based on AIDS dementia. *Id.* at 39a-40a. Thus, the district court's extension of the trial date for reasons independent of the government's notice makes this case of

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[11] As petitioner notes (Pet. 14 n.3), the district court in *Ferebe* determined on remand that the death notice was filed 39 days before trial and ruled that, under the circumstances, 39 days was not a "reasonable time before the trial." See *United States* v. *Ferebe*, No. CRIM L-97-0329, 2005 WL 1429261, at *8 (D. Md. June 16, 2005). But, in contrast to the situation here, the parties in *Ferebe* had ceased trial preparation several months before the scheduled trial date because of a tentative plea agreement that would have resulted in a life sentence. 332 F.3d at 725-726; *id.* at 742 (dissenting opinion); 2005 WL 1429261, at *2-*4. Moreover, "discovery pertinent to the sentencing phase had not yet begun," the government had not provided the defendant with victim impact statements, and the defense had not developed psychiatric testimony on dangerousness. *Id.* at *7. Similarly, while the jury questionnaire in the instant case was complete more than a week before the April 18 scheduled trial date (Pet. App. 14a-15a), the district court in *Ferebe* found that the questionnaire could not have been completed in time. 2005 WL 1429261, at *3. In short, there was much more preparation remaining to complete in *Ferebe* with little more than half the time available here.

potentially limited value for addressing the broader (and more significant) question: whether district courts can cure otherwise untimely notices by continuing the trial date.

c. Finally, petitioner is not well positioned to argue that there is a pressing need for this Courts' resolution of the two conflicts in the circuits. He prevailed below on the jurisdictional issue, and his interlocutory appeal has already delayed the trial by a considerable period of time beyond even the continued trial date of August 29, 2005, thereby potentially hindering the government's ability to try petitioner. Moreover, even were petitioner correct that the April 18 trial date were the relevant focal point, he cannot claim any actual prejudice to his ability to defend against capital charges, given the substantial delay entailed by the appellate process. At the same time, petitioner remains free to contest the court of appeals' legal holding in this case after entry of final judgment, assuming that petitioner is convicted and sentenced to death, where a fuller record could assist this Court in conducting any appropriate analysis of prejudice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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