No. 10-1010

# In the Supreme Court of the United States

KENNETH JAMAL LIGHTY, PETITIONER

*v.*

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**CAPITAL CASE**

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, during the guilt phase of petitioner's capital trial for kidnapping resulting in death, it was harmless error to admit evidence of a subsequent shooting in which petitioner participated.

2. Whether the court of appeals correctly held that, during the penalty phase of the trial, it was harmless error for the government to state in closing argument that the victim's family was asking for the death penalty.

3. Whether, during the penalty phase of the trial, the district court was required to instruct the jury that, "[r]egardless of your findings with regard to aggravating and mitigating factors, you are never required to impose a sentence of death."

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-95a) is reported at 616 F.3d 321.

## JURISDICTION

The judgment of the court of appeals was entered on August 11, 2010. A petition for rehearing was denied on September 8, 2010. Pet. App. 96a-97a. On November 1, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 4, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of kidnapping resulting in death, in violation of 18 U.S.C. 1201(a), conspiracy to kidnap, in violation of 18 U.S.C. 1201(c), and three counts of using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c). The jury recommended a sentence of death on the count of kidnapping resulting in death. Petitioner was sentenced to death on that count, a concurrent term of life imprisonment on the conspiracy count, and a consecutive term of 55 years of imprisonment on the firearm counts. The court of appeals affirmed. Pet. App. 1a-95a.

1. On the evening of January 3, 2002, Eric "Easy" Hayes was sitting at an apartment building near Eighth Street and Alabama Avenue in Southeast Washington, D.C. Accompanied by James Flood and Lorenzo Wilson, petitioner approached Hayes and forced him into a car at gunpoint. The three men drove Hayes to the Hillcrest Heights area of Temple Hills, a few miles away in Prince George's County, Maryland, where petitioner fatally shot him. Pet. App. 5a-8a.

a. On the night of the murder, Hayes had been sitting with his friend Antoine Forrest. Hayes was wearing an Eddie Bauer coat and Nike shoes with "swirls" on them, and he was carrying a pager. A dark, older-model Lincoln Continental pulled up, and the driver and a passenger got out and asked for drugs. Hayes walked with the two men to a nearby alley to conduct a drug transaction. When Hayes did not return, Forrest went to check on him. Approaching the alley, Forrest saw the driver holding Hayes at gunpoint, and Forrest fled. When he

returned to the alley, the car, its occupants, and Hayes were gone. Pet. App. 5a-6a; Gov't C.A. Br. 4-5.

The same evening, Michael Davis was at home in Hillcrest Heights. Looking out his window, he saw an older-model four-door car stopped nearby. Davis watched two passengers exit the car and forcibly pull a man, later identified as Hayes, from the car. Davis saw Hayes on his knees and heard gunshots. Hayes fell over and the two passengers reentered the car, which left the scene. Davis went outside, saw Hayes lying on the ground, and called 911 at about 8:51 p.m. Pet. App. 7a-8a; Gov't C.A. Br. 7; C.A. App. 1083-1087. Police officers arrived a few minutes later, and Hayes was pronounced dead at the scene. He had suffered multiple gunshot wounds, including three head shots that would have been independently fatal. Pet. App. 8a & n.10; Gov't C.A. Br. 7-8, 18-19.

b. Earlier that day, Eugene "Yogi" Scott, one of Flood's friends, had had his car stolen. Pet. App. 5a; Gov't C.A. Br. 6. Scott reported the car stolen and then went to Keating Street in Hillcrest Heights. Pet. App. 7a; Gov't C.A. Br. 6. At about 8:30 p.m., minutes before Hayes was killed, an older-model car sped down Keating Street and came to a "screech[ing]" halt near Scott. Pet. App. 7a; Gov't C.A. Br. 6. One of the occupants yelled "Yogi," and asked, "[I]s this him?"—an apparent question to Scott about who had stolen his car. C.A. App. 1364; see Gov't C.A. Br. 6-7. Because Scott had been robbed in the Keating Street vicinity before, and because the car had pulled up so quickly, he left the area with his back turned rather than determine who had asked the question. C.A. App. 1361-1366; see Pet. App. 7a; Gov't C.A. Br. 7.

c. Between 8:43 p.m. and 9:03 p.m. on the night of the murder, Wilson called Krystal Phauls, his girlfriend, several times. Pet. App. 9a. Phauls then picked up petitioner, Flood, and Wilson about two miles from where Hayes had been killed. *Ibid.* Petitioner was carrying a pair of Nike shoes with "squiggly lines" on them and had blood on his shirt. *Ibid.* The three men discussed having done "something to some boy." *Ibid.* Wilson told Phauls to drive to Keating Street, and the three men checked Keating Street for blood. *Ibid.* Thereafter, on returning to her house with Wilson (who did not own a pager), Phauls saw Wilson pull out a pager with the message "Easy" "going across it" (C.A. App. 1179; Pet. App. 10a)—an apparent reference to Hayes's nickname (Pet. App. 5a).

Later that night, petitioner called his friend Ebony Miller and told her "he had just slumped somebody," meaning "killed somebody." Pet. App. 10a. He said he had "got[ten]" the person who "tried to steal his man's car," had "put him in the trunk" of a vehicle, and had taken him "around the way" and "shot" him. *Ibid.*[1] Still later that night, petitioner met Miller and explained that he had gotten the "boy" "off of Alabama Avenue," had "put him in the trunk," and had taken him "around his friends" because the "boy" had "tri[ed] to steal his man's car." C.A. App. 1246; see Pet. App. 10a. Petitioner said that when he pulled the "boy" out of the trunk, the "boy" "kept saying, 'On my mother,'" meaning he had not stolen the car. C.A. App. 1246-1247; see Pet. App. 10a. Petitioner told Miller to drive him to Keating Street, where he showed her blood stains on the street.

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[1] As it turned out, someone else had stolen Scott's car, and it was found in Virginia the next day. Pet. App. 7a n.6.

*Id.* at 11a. He then directed her to Hillcrest Parkway, the scene of Hayes's murder. *Ibid.* Upon seeing police tape but no officers, petitioner commented: "[T]hey work fast," "they got him already." *Ibid.*

The next morning, Miller saw on the news that Hayes had been murdered. Pet. App. 11a. Miller knew Hayes and recognized his picture on the news. C.A. App. 1251-1253. She also remembered that Hayes frequently said "[o]n my mother," so she asked petitioner over the phone whether he had killed Hayes. Pet. App. 11a. Petitioner responded that "he shouldn't have tried to steal his man's car." C.A. App. 1252-1253; see Pet. App. 11a.

Later in January 2002, petitioner visited his friend "CW." Pet. App. 11a. Petitioner told CW that he had gone "up 8th Street," found the "dude" "he was looking for," asked him for drugs, "put [a] gun to him," "threw him in the trunk," "took him back on the Maryland side," and "shot him in the head." C.A. App. 1477-1478; see Pet. App. 11a-12a. Petitioner also told CW that he had taken the victim's shoes and coat so that the incident would look like a robbery. C.A. App. 1478-1479; see Pet. App. 12a.

The next month, Flood asked his girlfriend, Tynika Marshall, to help him take his dark blue 1970s Lincoln Continental to North Carolina. C.A. App. 1400, 1404, 1420-1422; see Pet. App. 13a. Flood directed Marshall to a house near the place where Phauls had picked up petitioner, Flood, and Wilson on the night of the murder. *Ibid.* Flood got the Lincoln out of the house's garage, and he and Marshall drove to North Carolina, where Flood gave the car to his parents. *Ibid.*

Police found the car in North Carolina about a year later. Pet. App. 13a n.21. They found some of Hayes's

blood in the car, and they discovered that fibers from the carpet in the car matched fibers found earlier on Hayes's clothing. *Ibid.* Separately, officers found petitioner in possession of a .380-caliber handgun, the same caliber of gun that was used to kill Hayes. *Id.* at 8a, 15a, 46a; see Gov't C.A. Br. 17. Although shell casings found at the murder scene and the bullets recovered from Hayes's body lacked sufficient microscopic markings to allow a firearms examiner to say definitively whether petitioner's .380 handgun had been used to shoot Hayes (Pet. App. 15a-16a), test-fire casings from that gun were forensically similar to the shell casings at the scene and to the bullets recovered from Hayes (*id.* at 15a, 46a). And a medical examiner determined that an abrasion on Hayes's head matched the barrel portion of petitioner's .380 handgun and that another abrasion matched the gun's clip release. *Id.* at 16a; see Gov't C.A. Br. 18-19.

2. In October 2003, a grand jury in the United States District Court for the District of Maryland returned an indictment charging petitioner, Flood, and Wilson with kidnapping resulting in death, in violation of 18 U.S.C. 1201(a); conspiracy to kidnap, in violation of 18 U.S.C. 1201(c); and three counts of using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c). C.A. App. 37-42. Petitioner and Flood were tried together, and Wilson was tried separately. Pet. App. 3a.

At petitioner and Flood's trial, the government introduced the evidence described above. In addition, in an effort to reinforce the evidence that petitioner's .380 handgun was used to kill Hayes, the government introduced evidence of a January 30, 2002, shooting incident (the "Afton Street" shooting) in which petitioner had participated. C.A. App. 1484-1485. The Afton Street

evidence was in the form of testimony from eyewitnesses to the shooting; testimony from CW, who discussed the incident with petitioner afterward; and ballistics evidence.

According to the testimony, petitioner, Wilson, and two other men went to Afton Street in Temple Hills, Maryland. Petitioner, who was driving, gave his gun to Wilson. Wilson and the two other passengers then began shooting at a group of men, one of whom had been involved in a prior altercation with petitioner and Wilson. That man was not injured, but a man standing with him was killed. Pet. App. 13a-14a; Gov't C.A. Br. 15-17. A firearms examiner was able to conclude that a shell casing recovered from the scene of the Afton Street shooting was fired by petitioner's gun, to the exclusion of all other firearms. Pet. App. 15a; Gov't C.A. Br. 17-18. He further concluded that that shell casing had several characteristics in common with the shell casings from the Hayes murder scene. *Ibid*.

The district court admitted the Afton Street evidence over petitioner's objection (C.A. App. 447-453) that it was improper propensity evidence barred by Federal Rule of Evidence 404(b). In doing so, the court instructed the jurors at length that petitioner was not charged with the Afton Street shooting and that they could not consider the evidence as proof that petitioner "has a propensity to commit crimes or is otherwise a bad character." C.A. App. 1489.

During closing argument, the government contended that the Afton Street evidence linked petitioner's gun to Hayes's murder. C.A. App. 2022-2023. Like the district court, however, the government emphasized that the evidence was "not to show because [petitioner] might

shoot one person, he might shoot another." *Id.* at 2022; see *ibid.* ("[Y]ou're not to consider it for that reason.").

The jury found petitioner and Flood guilty on all counts. Pet. App. 3a. At his separate trial, Wilson was found guilty of conspiracy to kidnap but was acquitted on the other counts. *Ibid.*

3. The government sought the death penalty against petitioner only. Pet. App. 3a.

a. At petitioner's request, the district court instructed the jury at the outset of the penalty phase that, "[r]egardless of your findings with regard to aggravating and mitigating factors, you are never required to impose a death sentence." C.A. App. 2272.

b. For its case in aggravation, the government largely relied on the guilt-phase evidence, but it offered additional evidence that petitioner was on probation for a drug offense and was on bond for a robbery charge when he kidnapped and killed Hayes. Pet. App. 20a-21a. It also presented evidence about the effect of Hayes's death on his family, particularly on his child, who was born after his murder. *Id.* at 21a. In mitigation, petitioner presented evidence about his difficult upbringing, his good behavior while incarcerated, and the effect that his execution would have on his family. *Id.* at 21a-22a; Gov't C.A. Br. 22-23.

c. Petitioner asked the district court to instruct the jury again at the close of the penalty phase that "[r]egardless of your findings with regard to aggravating and mitigating factors, you are never required to impose a sentence of death." Pet. App. 103a. The court declined to do so. Instead, the court instructed:

> After you have decided upon the aggravating and mitigating factors that are present as to this defendant, the law requires you to weigh these factors and

> decide whether you are unanimously persuaded that the aggravating factors sufficiently outweigh any mitigating factors to justify imposing a sentence of death.
>
> * * * * *
>
> This is not a mechanical process. You should not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater, instead you must consider the weight and value of each factor in making your decision.
>
> * * * * *
>
> You are called upon to make a reasoned moral judgment based on all the evidence before you as to whether the death penalty is justified as punishment for the defendant.

C.A. App. 3297-3299.

d. In closing argument, the prosecutor stated: "And let there be no doubt what the United States is asking you to do in this case, on behalf of the Hayes[] family and with the law in support, [which is] to impose * * * a sentence of death." C.A. App. 3309. Later, the prosecutor said: "And with that evidence to guide you and with the law to guide you, you will do what the Hayes[] family asks you to do, what the government tells you to do, * * * and that is to impose" a sentence of death. *Id.* at 3335; see Pet. App. 53a-54a.

Petitioner objected to the second comment (but not the first), asking that it be struck and seeking a mistrial because there was not "a shred of evidence in the record" to show that Hayes's family supported the death penalty for petitioner. C.A. App. 3335-3337. The district court denied the motion for a mistrial, but it in-

structed the jury: "There was a remark at the end of [the prosecutor's] statement about what the Hayes[] family was asking for. You're to disregard this. It's the United States that is asking for the death penalty in this case." *Id.* at 3337-3338.

e. The jury recommended a sentence of death on the count of kidnapping resulting in death. The district court imposed that sentence, as well as a concurrent term of life imprisonment on the conspiracy count and a consecutive term of 55 years of imprisonment on the firearm counts. Pet. App. 3a; Gov't C.A. Br. 3-4.

4. The court of appeals affirmed. Pet. App. 1a-95a.

a. Petitioner argued, and the court of appeals agreed, that the district court abused its discretion under Federal Rule of Evidence 404(b) in admitting evidence of the Afton Street shooting during the guilt phase. Pet. App. 35a-43a. The court of appeals assumed that the evidence was "to establish that [petitioner] was found in possession of a gun that was consistent with the [Hayes] murder weapon." *Id.* at 40a-41a (internal quotation marks omitted). But the court held that the evidence failed the test of "necessity" under Rule 404(b) because "[o]ther evidence established this link [of petitioner to the Hayes murder weapon] more *directly* and more reliably." *Ibid.*

The court of appeals went on to hold, however, that the admission of the Afton Street evidence was harmless. Pet. App. 43a-47a. The court observed that "the test for harmlessness" of a Rule 404(b) error "is 'whether we can say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Id.* at 43a (quoting *United States* v. *Madden*, 38 F.3d 747, 753 (4th Cir. 1994), and *United*

*States* v. *Nyman*, 649 F.2d 208, 211-212 (4th Cir. 1980)). The court emphasized that "[t]his inquiry is not whether, absent the improperly admitted evidence, sufficient evidence existed to convict," but "whether we can say that we believe it highly probable that the error did not affect the judgment." *Id.* at 43a (quoting *Madden*, 38 F.3d at 753). Applying that standard, the court concluded that the Afton Street evidence "did not affect the judgment," especially in light of the other "overwhelming" evidence of petitioner's guilt. *Id.* at 44a-47a. The court pointed in particular to petitioner's confessions to Miller and CW that he had "slumped" Hayes for "steal-[ing] his man's car." *Id.* at 44a-45a. The confessions, the court observed, coincided fully with the other testimony and physical evidence in the case, including that the test-fire casings from petitioner's .380 handgun were forensically similar to the shell casings from the Hayes murder scene; that petitioner and his accomplices had checked for blood on Keating Street, where someone had asked Scott who had stolen his car; that petitioner had blood on his shirt on the night of the murder; that on the same night, petitioner and his accomplices were seen walking away from the place where Flood's Lincoln was later retrieved; that the Lincoln matched Forrest's and Davis's descriptions of the car they had seen during Hayes's abduction and murder; and that petitioner was seen with Nike shoes that matched Forrest's description of Hayes's shoes. *Id.* at 44a-46a.

The court of appeals "recognized" that "admission of evidence of an uncharged murder" can be "extremely prejudicial." Pet. App. 47a. But the court "harbor[ed] no doubt" that the error here was harmless (*ibid.*), not only in view of the "ironclad" evidence described above (*id.* at 46a), but also because the district court had cau-

tioned the jury not to consider the Afton Street evidence for propensity purposes (*ibid.*), and because the government had made only "limited" use of the evidence in closing argument (*id.* at 46a-47a).

b. The court of appeals also agreed with petitioner that the government had improperly commented during closing argument that Hayes's family was "ask[ing]" for the death penalty. Pet. App. 51a, 53a-55a. The court concluded that the comments "violated the fundamental rule * * * that argument is limited to the facts in evidence." *Id.* at 54a. The court held, however, that the comments did not "prejudice" petitioner "to the point of denying him a fair" penalty proceeding. *Id.* at 55a. The court pointed out that the two comments were isolated; that the prosecutor did not explicitly "encourage[]" the jury to consider the Hayes family's wishes when weighing aggravating and mitigating factors; that the district court instructed the jury to "disregard" the prosecutor's "statement about what the Hayes[] family was asking for" (C.A. App. 3338); and that the aggravating factors were strong and the mitigation case weak. Pet. App. 56a-57a. Accordingly, the court of appeals "simply [had] no doubt that the jury would have returned a sentence of death absent the improper remarks." *Id.* at 56a.

c. Finally, the court of appeals rejected petitioner's contention that the district court had abused its discretion in declining to instruct the jury, at the close of the penalty phase, that "[r]egardless of your findings with regard to aggravating and mitigating factors, you are never required to impose a sentence of death." Pet. App. 65a-68a. The court of appeals observed that "a death-eligible defendant 'shall be sentenced to death if, after consideration of the [aggravating and mitigating] factors set forth in [18 U.S.C.] 3592 . . . [,] it is deter-

mined that imposition of a sentence of death is justified.'" *Id.* at 66a (quoting 18 U.S.C. 3591) (final pair of brackets in original). In the court's view, petitioner's proposed language "would have allowed the jury to impose a life sentence after it found the death sentence justified," which would in turn violate Section 3591's mandate that a defendant "'shall be sentenced to death'" if, as a result of the weighing process, the jury finds a death sentence justified. *Id.* at 67a.

5. The court of appeals denied a petition for rehearing en banc, with no judge calling for a vote. Pet. App. 96a-97a.

**ARGUMENT**

Petitioner contends that the court of appeals applied the wrong standards in evaluating the harmlessness of the district court's erroneous admission of evidence of petitioner's involvement in a subsequent shooting (Pet. 10-22) and of the prosecutor's suggestion, in closing argument, that the victim's family was asking for the death penalty (Pet. 22-27). The court of appeals correctly evaluated the harmlessness of each error and determined that there was "no doubt" that the errors were harmless. Pet. App. 47a, 56a. Petitioner further argues (Pet. 28-33) that the district court erred in declining to instruct the jury at the close of the penalty phase that it was "never required to impose a death sentence." The court of appeals correctly rejected that contention. The decision below does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. Contrary to petitioner's contentions (Pet. 10-22), the court of appeals applied the correct harmlessness

standard to his claim about the Afton Street evidence, and the admission of that evidence was indeed harmless.

a. Petitioner asserts (Pet. 13) that there is "confusion among lower courts about whether to place the burden of proof on the prosecution upon finding that an error was committed during a criminal trial." That is incorrect. The court below, like every other federal court of appeals with jurisdiction over criminal cases, has adopted the rule that petitioner advocates—that is, that the government bears the burden of persuasion when it asserts, on direct review in a criminal case, that an evidentiary or other nonconstitutional error is harmless. See *United States* v. *Curbelo*, 343 F.3d 273, 286 (4th Cir. 2003); accord *United States* v. *Pakala*, 568 F.3d 47, 52-53 (1st Cir. 2009), cert. denied, 130 S. Ct. 1105 (2010); *United States* v. *Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010); *United States* v. *Lopez*, 271 F.3d 472, 485 (3d Cir. 2001), cert. denied, 535 U.S. 908 (2002); *United States* v. *Wells*, 262 F.3d 455, 463 n.9 (5th Cir. 2001); *United States* v. *Newsom*, 452 F.3d 593, 602 (6th Cir. 2006); *United States* v. *Carter*, 530 F.3d 565, 575-576 (7th Cir.), cert. denied, 555 U.S. 977 (2008); *United States* v. *Moore*, 129 F.3d 989, 991 (8th Cir. 1997), cert. denied, 523 U.S. 1067 (1998); *United States* v. *Gonzalez-Flores*, 418 F.3d 1093, 1099 & n.3 (9th Cir. 2005); *United States* v. *Stiger*, 413 F.3d 1185, 1190 (10th Cir.), cert. denied, 546 U.S. 1049 (2005); *United States* v. *Mathenia*, 409 F.3d 1289, 1292 (11th Cir. 2005) (per curiam); *United States* v. *Law*, 528 F.3d 888, 899 (D.C. Cir. 2008) (per curiam), cert. denied, 555 U.S. 1147 (2009).

Those decisions accord with this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), which held that an appellate court should not find a nonconstitutional trial error harmless unless it can say "with fair

assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Id.* at 765. Since *Kotteakos*, the Court has indicated that, on direct review in a criminal case, the burden of persuasion rests with the party claiming that the error was harmless. For example, in *United States* v. *Olano*, 507 U.S. 725 (1993), the Court "differen[tiated]" harmless-error review under Federal Rule of Criminal Procedure 52(a) from plain-error review under Rule 52(b) by pointing out that "the defendant rather than the Government * * * bears the burden of persuasion with respect to prejudice" under Rule 52(b), thus suggesting, by negative implication, that the government bears the burden under Rule 52(a). 507 U.S. at 734. More recently, in *Shinseki* v. *Sanders*, 129 S. Ct. 1696 (2009), the Court distinguished harmlessness analysis in civil cases from harmlessness analysis on direct review in criminal cases. In the former context, the Court explained, "the party seeking reversal normally must explain why the erroneous ruling caused harm." *Id.* at 1706. In rejecting a rule that would "plac[e] upon [an administrative] agency the burden of proving that [an] error did *not* cause harm," the Court observed that "we have placed such a burden on the appellee only when the matter underlying review was criminal." *Ibid.* (citing *Kotteakos*, 328 U.S. at 760).

Petitioner cites no case holding otherwise. In a case he does cite (Pet. 13), the California Supreme Court stated that "the burden remains with the defendant to demonstrate prejudice under the usual standard for ordinary trial error." *People* v. *Gamache*, 227 P.3d 342, 387 (Cal. 2010). But the error in *Gamache* was a constitutional one, not a mere "*Kotteakos* [e]rror[]" (Pet. 10),

because the jury was given access to materials that were not in evidence, in violation of the Fourteenth Amendment's Due Process Clause. 227 P.3d at 386 (citing *Turner* v. *Louisiana*, 379 U.S. 466, 472 (1965)). And in opining, erroneously, on the harmlessness standard that applies to federal constitutional errors that occur in the California courts, the California Supreme Court had no occasion to consider which party, on direct review in a federal criminal case, bears the burden of showing the harmlessness of a nonconstitutional error under Rule 52(a).

b. Even if there were disagreement about the allocation of the burden of showing harmlessness, this case would be a poor vehicle for considering the issue. Although the court of appeals did not expressly state which party bore the burden of persuasion, it made clear that it would have found the admission of the Afton Street evidence harmless under any standard. As the court put it, "we harbor *no* doubt" that the evidence "did not affect the jury's verdicts." Pet. App. 47a (emphasis added). Unlike the court of appeals here, the California Supreme Court in *Gamache*—a capital case involving a constitutional error—explicitly placed the burden of showing harmlessness on the defendant. 227 P.3d at 387. This Court nevertheless denied the defendant's certiorari petition, with several Justices emphasizing that "the burden allocation would not have altered the court's prejudice analysis." *Gamache* v. *California*, 131 S. Ct. 591, 593 (2010) (Sotomayor, J., respecting the denial of certiorari). The same is true here.

c. Petitioner suggests (Pet. 16) that the court of appeals misapplied *Kotteakos* by examining the government's evidence "in a manner akin to" sufficiency-of-the-evidence review under *Jackson* v. *Virginia*, 443 U.S. 307

(1979). It is true, as petitioner explains, that *Kotteakos* requires analysis of "all that happened without stripping the erroneous action from the whole." 328 U.S. at 765. But the court of appeals did not hold otherwise, nor did it conduct its review merely for sufficiency under *Jackson*, which it nowhere mentioned. Instead, it stated that the "test for harmlessness is 'whether we can say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" Pet. App. 43a. The two decisions from which the court quoted, *United States* v. *Madden*, 38 F.3d 747, 753 (4th Cir. 1994), and *United States* v. *Nyman*, 649 F.2d 208, 211-212 (4th Cir. 1980), drew that language directly from *Kotteakos*. And the court quoted *Madden* for the further proposition that "[t]his inquiry is not whether, absent the improperly admitted evidence, sufficient evidence existed to convict," but "whether we can say that we believe it highly probable that the error did not affect the judgment." Pet. App. 43a (quoting 38 F.3d at 753). In light of that properly stated standard, this Court should not assume a legal error merely because the court of appeals' recitation of "all that happened" seems "one-sided" to petitioner (Pet. 16). See *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008) ("An appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading.").

d. At bottom, petitioner's claim is really a fact-bound objection that the court of appeals' harmlessness analysis was wrong on the merits. Petitioner acknowledges (Pet. 11) "that this Court does not sit to review [such] errors" and instead invokes (Pet. 21-22) the Court's "sparingly deployed * * * tradition of exercis-

ing its supervisory power in death penalty cases to correct egregious errors." No such error occurred here.

As the court of appeals noted, Pet. App. 46a, the district court instructed the jury not to consider the Afton Street evidence as proof that petitioner "has a propensity to commit crimes or is otherwise a bad character," C.A. App. 1489. A jury is presumed to follow its instructions, see *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987), and petitioner offers no reason to think the jury did not follow this one. Following that instruction, the jury would have considered the evidence only "to establish that [petitioner] was found in possession of a gun that was consistent with the [Hayes] murder weapon." Pet. App. 41a (quotation omitted). And other strong evidence proved that point, including that officers found petitioner in possession of a .380-caliber handgun, the same caliber of gun used to kill Hayes (Pet. App. 8a, 15a, 46a); and that test-fire casings from petitioner's gun were forensically similar to the shell casings at the murder scene and to the bullets recovered from Hayes (*id.* at 15a, 46a); and that an abrasion on Hayes's head matched the barrel portion of petitioner's gun, while another patterned abrasion matched the gun's clip release (*id.* at 16a; see Gov't C.A. Br. 18-19).

The very fact that the remaining evidence established this firearm link "more *directly* and more reliably" than did the Afton Street evidence was what led the court of appeals to find error in the first place. Pet. App. 41a. It concluded that the Afton Street evidence was inadmissible because it was *unnecessary*, not because it was inherently unreliable or prejudicial. *Id.* at 41a-43a. To be sure, much as petitioner emphasizes the "devastating impact" of "evidence of an unrelated murder [admitted] against a defendant on trial for murder"

(Pet. 18-20), the court of appeals recognized that "admission of evidence of an uncharged murder" can be "extremely prejudicial." Pet. App. 47a. But that admonition shows that the court was fully aware of the potential for prejudice while finding insufficient cause for reversal on these particular facts.

Furthermore, even if there had been no other evidence to prove that petitioner's .380-caliber handgun was involved in Hayes's shooting, that was not the crucial inquiry at the guilt stage. Rather, the essential question was whether the evidence showed that petitioner conspired in or aided Hayes's abduction. See C.A. App. 1995.29-1995.45, 1995.52-1995.55 (district court's instructions about kidnapping, conspiracy to kidnap, and aiding and abetting). The evidence on that point was "ironclad," particularly because it included two confessions introduced via Miller and CW. Pet. App. 44a, 46a.

Petitioner faults the court of appeals (Pet. 17-18) for not considering the "damage" his counsel inflicted on Miller's and CW's credibility during cross-examination by raising questions about their motives for testifying. But whatever motivated Miller and CW, their accounts of petitioner's confessions were materially consistent with one another and with the rest of the evidence. For example, Miller testified that petitioner confessed to shooting Hayes for "steal[ing] his man's car." C.A. App. 1252-1253. Scott's car was in fact stolen, and independent circumstantial evidence established that petitioner, Flood, and Wilson approached Scott to ask whether Hayes was the culprit. Likewise, CW testified that petitioner confessed to kidnapping Hayes from "8th Street" and then "sho[oting] him in the head" after taking him "back down on the Maryland side." *Id.* at 1477-1478. Again, independent circumstantial evidence established

that petitioner, Flood, and Wilson kidnapped Hayes from Eighth Street and shot him in the head on Hillcrest Parkway in Maryland. Also, CW testified that petitioner confessed to taking Hayes's Nike shoes to make the shooting look like the result of a robbery. *Id.* at 1478-1479. Once again, independent circumstantial evidence proved that petitioner did indeed take Hayes's shoes: he was seen carrying similarly distinctive shoes.

The compelling conflux of petitioner's confessions with the timing, distances, circumstances, ballistics testing, and other physical evidence readily distinguishes this case from *United States* v. *Murray*, 103 F.3d 310 (3d Cir. 1997) (Alito, J.), on which petitioner heavily relies (Pet. 18-20). And absent any significant legal issue or conflict of authority, petitioner seeks review on the theory that the court below "so far departed from the accepted and usual course of judicial proceedings" that its (unanimous) finding of harmlessness "call[s] for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Nothing in the court of appeals' careful opinion, however, suggests that it does.

2. Petitioner's contention (Pet. 22-27) that the court of appeals applied the wrong harmlessness standard to the government's comments about the Hayes family's desire for the death penalty likewise does not warrant further review.

a. Petitioner argues that, under *Chapman* v. *California*, 386 U.S. 18 (1967), the court of appeals should have required the government to show that its comments were harmless beyond a reasonable doubt. In petitioner's view (Pet. 22), the comments resulted in a "specific constitutional violation[]" under the Eighth Amendment, triggering a "more demanding harmless error standard" than the one ordinarily applicable to

improper prosecutorial remarks. *Chapman* does not apply to this case, however, because when petitioner objected in the district court to one of the comments, he did not argue that it violated the Eighth Amendment. Instead, he argued that the evidence did not support it. C.A. App. 3335-3338. That kind of argument sounds in due process, not the Eighth Amendment. On appeal, petitioner argued for the first time that the government's remarks also ran afoul of the Eighth Amendment and should be reviewed under *Chapman*. Pet. C.A. Br. 86-87. But his reliance on the Eighth Amendment was in support of his broader claim that the remarks "violated [his] right to a fair trial," *id.* at iii-iv, 2, 44, 86, and he cited *United States* v. *Higgs*, 353 F.3d 281, 330 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004), and *United States* v. *Alerre*, 430 F.3d 681, 689 (4th Cir. 2005), cert. denied, 547 U.S. 1113 (2006), cases applying the standard for prosecutorial misconduct established by this Court in *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974), and *Darden* v. *Wainwright*, 477 U.S. 168 (1986). Pet. C.A. Br. 86. Under that standard, the reviewing court must ask "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly*, 416 U.S. at 643). That is precisely the standard the court of appeals applied in this case. Pet. App. 51a, 55a-56a.

Petitioner cites no case holding that *Chapman* applies to prosecutorial remarks that implicate the Eighth Amendment. *Chapman* itself involved improper remarks about the defendants' "failure to testify." 386 U.S. at 19. The cases petitioner cites (Pet. 24) arose in that same context, not where a prosecutor made remarks implicating the Eighth Amendment. *United*

*States* v. *Whitten*, 610 F.3d 168, 194-200 (2d Cir. 2010) (prosecutor remarked on defendant's invocation of rights to jury trial and to remain silent); *United States* v. *Cotnam*, 88 F.3d 487, 497 (7th Cir.) (prosecutor indirectly commented on defendant's failure to testify), cert. denied, 519 U.S. 942 (1996). For that reason, none of the cases cited by petitioner (Pet. 23-25) establishes that any court of appeals would have decided this case differently.

b. Petitioner further argues (Pet. 25-26) that 18 U.S.C. 3595 independently requires the application of the beyond-a-reasonable-doubt standard.[2] That is incorrect. Section 3595, the statute governing appellate review in federal capital cases, states that the court of appeals shall remand a case if it finds, *inter alia*, that "the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure." 18 U.S.C. 3595(c)(2)(C). It goes on to say that the court "shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless." 18 U.S.C. 3595(c)(2).

Thus, the first provision of Section 3595(c)(2) affirmatively requires that a death sentence be vacated and the case remanded in the event of any unspecified "other legal error requiring reversal." The second prohibits an appellate court from vacating a death sentence if an

[2] Petitioner faults the court of appeals for "disregard[ing]" that statute (Pet. 25), but he did not cite it in the relevant portion of his brief, let alone advance any argument based on it. Pet. C.A. Br. 86-93. His forfeiture of the argument provides an independent reason for this Court to decline to review it.

error—particularly one involving a jury's consideration of an invalid aggravating factor—is shown to be harmless beyond a reasonable doubt. As the legislative history shows, the statute now codified at Section 3595(c)(2) was introduced "to tighten up the appeals process so that the sentence of death can have some meaning * * * as a deterrent" by making it less likely that the sentence will be overturned on appeal because of consideration of an invalid aggravating factor. See 140 Cong. Rec. 17,899 (1994) (statement of Rep. Gekas).

Nothing in Section 3595(c)(2)'s language or in its underlying purpose suggests a congressional intent to mandate a universal standard of review that would make it easier than it would otherwise be for convicted capital defendants to challenge their sentences on appeal. Stated another way, nothing in Section 3595(c)(2)(C) displaces the varied harmless-error and plain-error standards that properly apply to the numerous issues that may arise during a capital prosecution. Cf. *Jones* v. *United States*, 527 U.S. 373, 388-389 (1999) (rejecting contention that "arbitrary factor" review under 18 U.S.C. 3595(c)(2) constitutes an exception to generally applicable principles of plain-error review). Petitioner cites no case holding that the statute imposes the standard he urges.

c. In any event, this case would be a poor vehicle for considering the appropriate standard of review because the court of appeals made clear that it would have found the prosecutor's remarks harmless under any standard. After reviewing a "mountain" of evidence against petitioner (Pet. App. 56a), "very strong" aggravating factors (*ibid.*), a "weak" mitigation case (*ibid.*), and a curative instruction telling the jury to "disregard" the "remark at the end of [the prosecutor's] statement about what

the Hayes[] family was asking for" (C.A. App. 3338; see Pet. App. 54a, 57a), the court concluded that "[t]here simply is no doubt that the jury would have returned a sentence of death absent the improper remarks." *Id.* at 56a. Accordingly, petitioner would not prevail even under a beyond-a-reasonable-doubt standard. Cf. *Gamache* v. *California*, 131 S. Ct. at 593 (Sotomayor, J., respecting the denial of certiorari) (although the California Supreme Court misstated the harmlessness standard, further review was unwarranted because "the burden allocation would not have altered the court's prejudice analysis").

3. Petitioner argues (Pet. 28) that this Court should grant review to consider whether a district court in a capital case must instruct the jury that "in the * * * process" of "weighing" aggravating and mitigating factors, the jury "has no obligation to impose the death penalty." That argument lacks merit.

a. As an initial matter, this case does not present the question suggested by petitioner because petitioner did not request the instruction he now advocates. Instead, petitioner's proposed instruction would have told the jury that "[r]egardless of your findings with regard to aggravating and mitigating factors, you are never required to impose a sentence of death." Pet. App. 103a. Under that instruction, even if the jury found that the aggravating factors so outweighed the mitigating factors that a death sentence would have been justified, it would have concluded that, "regardless," it could have nullified its "finding[]" because it was "never required to impose a sentence of death." *Ibid.*

That is an incorrect statement of the law. Under 18 U.S.C. 3591(a)(2), a defendant convicted of a capital crime "shall be sentenced to death" if, after jury consid-

eration of the aggravating and mitigating factors, "it is determined that imposition of a sentence of death is justified." The statute does not authorize the jury to decline to recommend a death sentence when it has unanimously concluded that the death penalty is justified because the aggravating circumstances sufficiently outweigh any mitigating circumstances. See *United States* v. *Allen*, 247 F.3d 741, 781 (8th Cir. 2001) (explaining that Section 3591(a)(2) "precludes the jurors from arbitrarily disregarding [their] unanimous determination that a sentence of death is justified"), vacated on other grounds, 536 U.S. 953 (2002).

That is not to say the jury may not consider mercy in its weighing process. Rather, as petitioner correctly points out (Pet. 30), consideration of mercy informs the weighing of aggravating and mitigating factors itself. The jury must consider whether aggravating factors "sufficiently outweigh" mitigating factors, or, if there are no mitigating factors, whether the aggravating factors alone are "sufficient" to justify a death sentence. 18 U.S.C. 3593(e). The Tenth Circuit pattern instruction that petitioner invokes (Pet. 28-30) embodies that principle by providing:

> Whatever findings you make with respect to aggravating and mitigating factors, the result of the weighing process is never foreordained. For *that* reason a jury is never required to impose a sentence of death.

Pet. App. 120a (emphasis added). As petitioner observes, that pattern instruction "informs jurors" that, "as part of the *weighing* process, * * * they are never required to impose the death penalty." Pet. 30 (emphasis added). Petitioner's proposed instruction, however,

was different because it failed to make clear that the jury could consider mercy in the weighing process itself but could not "[dis]regard[]" its "finding[]" that the aggravating factors so outweighed the mitigating factors that a death sentence was justified. Pet. App. 103a. At a minimum, petitioner's instruction could have confused the jurors about the scope of their discretion, and the district court was not required to read it to them.

b. In addition, petitioner cites no court of appeals decision holding that it is an abuse of discretion not to give a "no obligation to impose the death penalty" instruction where, as here, the district court's instructions are otherwise complete and correct. In this case, an instruction to that effect would have added nothing of substance to the charge the district court actually gave the jurors, which explained that the "law require[d]" them "to weigh the[] factors" to decide whether the "aggravating factors sufficiently outweigh[ed] any mitigating factors to justify imposing a sentence of death"; "based on all the evidence," they had to "make a unique individualized judgment about the appropriateness of imposing the death penalty on the defendant"; and their decision had to be "reasoned," "moral," "careful," "considered," and "mature." C.A. App. 3297-3299. The jurors could not have misunderstood those directives as requiring them to impose the death penalty *no matter what* decision their weighing process yielded, so an instruction telling them that they "ha[d] no obligation to impose the death penalty" was unnecessary.

c. Finally, even if such an instruction were required, the district court in this case told the jury at the outset of the penalty phase that "[r]egardless of your findings with regard to aggravating and mitigating factors, you are never required to impose a death sentence." C.A.

App. 2272. Petitioner does not explain how he was prejudiced by the court's mere failure to repeat that instruction at the close of the case.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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