No. 08-1280

In the Supreme Court of the United States

RONALD MIKOS, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecutor, in his rebuttal argument to the jury during the guilt phase of petitioner's trial, improperly commented on petitioner's failure to testify.

2. Whether the district court abused its discretion by denying petitioner's motion for leave to hire at public expense his ballistics expert of choice because the expert's fee would have exceeded the presumptive statutory limit of $7500, with the result that petitioner was required to hire another ballistics expert.

3. Whether the prosecutor's closing argument discussing petitioner's lack of remorse, during the penalty phase of petitioner's trial, improperly commented on petitioner's failure to testify and constituted reversible plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 539 F.3d 706.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2008. A petition for rehearing was denied on November 17, 2008 (Pet. App. 42a). On January 23, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 16, 2009, 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 Northern District of Illinois, petitioner was convicted on one count of murdering a witness with intent to prevent her from testifying at a grand jury proceeding, in violation of 18 U.S.C. 1512(a)(1)(A); 14 counts of mail fraud, in violation of 18 U.S.C. 1341; five counts of health care fraud, in violation of 18 U.S.C. 1347; one count of obstructing justice, in violation of 18 U.S.C. 1503; one count of attempting to influence a grand jury, in violation of 18 U.S.C. 1505; and three counts of witness tampering, in violation of 18 U.S.C. 1512(b)(1). He was sentenced to death on the murder count, to a total of 78 months of imprisonment on the other counts, and to pay restitution in the amount of $1.8 million. The court of appeals vacated the restitution order and affirmed in all other respects. Pet. App. 1a-40a.

1. Petitioner was a podiatrist who performed only routine procedures, such as trimming the toenails of people unable to clip their own, that were not covered by Medicare. Yet petitioner billed Medicare for thousands of surgeries. After the authorities became suspicious, petitioner arranged for some of his elderly patients, many of whom were not mentally competent, to submit affidavits stating that he had performed surgery on them. When some patients declined to do so, petitioner prepared affidavits for them and had their signatures forged. He visited seven patients who had received grand jury subpoenas in order to dissuade them from testifying. None of those patients appeared to testify, whether because of petitioner's actions or because of their own mental or physical limitations. Pet. App. 1a-2a.

One of petitioner's patients, Joyce Brannon, cooperated with the authorities and was subpoenaed to testify before the grand jury. Brannon was partially disabled, walking with canes due to arthritis and obesity. Gov't C.A. Br. 11-12.

On January 27, 2002, four days before she was to testify, Brannon was shot to death in her basement apartment in the church where she worked as a secretary. She was shot six times; the bullets were .22-caliber, brass-coated rounds fired from long-rifle, rim-fire cartridges. The lack of shell casings led the police to believe that the killer had used a revolver, which does not eject spent cartridges after firing. Brannon's valuables were undisturbed, and there was no sign of robbery. Pet. App. 2a; Gov't C.A. Br. 11-12, 15-16.

Three weeks before Brannon's murder, the police in Skokie, Illinois, had been called to the house of one of petitioner's four girlfriends, where they discovered that petitioner kept multiple firearms and ammunition. Because petitioner could not produce a current firearm owner's identification card, the police confiscated the guns and ammunition and gave petitioner a detailed inventory. After renewing his firearm owner's card, petitioner retrieved the guns and ammunition. Pet. App. 3a; Gov't C.A. Br. 9-10 & n.3.

Following the murder, the police searched the storage unit to which petitioner had transferred the guns and found every firearm and round of ammunition on the inventory—except for one .22-caliber Herbert Schmidt revolver. They also found an empty leather holster. Despite an extensive search of homes, offices, forest preserves, and the waters of Lake Michigan, that revolver was never found. A search of petitioner's car turned up a box of Remington .22-caliber, brass-coated, long-rifle,

rim-fire rounds consistent with the bullets that had been used in the murder. Twenty shells were missing from the box. The car also contained one spent .22-caliber casing, consistent with the 80 unfired rounds, on which the firing pin had left a hemispherical mark. A government expert test-fired another Herbert Schmidt .22-caliber long-rifle revolver, which left a similar hemispherical mark on spent casings. Pet. App. 3a; Gov't C.A. Br. 11, 16-17.

A member of the staff of the church where Brannon lived saw petitioner or someone who looked like him in the church a week before the murder. The witness described the person's hair as gray. Although petitioner does not have gray hair, the police found a bottle of gray hair coloring in his car. The car also contained handwritten details of the church's schedule. The details revealed when a person could enter Brannon's apartment without being seen. Data on petitioner's smart phone showed that he placed and received calls that went through cell towers near the church at approximately the time that petitioner was identified as being in the church the week before the murder, and again one or two days before the murder. Pet. App. 3a-4a.

2. Before trial, petitioner sought funds to retain David LaMagna, an expert on ballistics and firearm toolmarks who lived in Massachusetts. Pet. App. 11a; Gov't C.A. Br. 40; see also 18 U.S.C. 3599(f) and (g)(2) (formerly 21 U.S.C. 848(q)(9) and (10)(b) (2000)) (authorizing federal funding for expert services for federal capital defendants). The district court denied the motion "without prejudice." Pet. App. 41a. The court observed that petitioner had not presented any "explanation as to the need for an out-of-town expert," who would bill for "travel and related expenses," in that subject area. *Ibid.*

The court, however, "invite[d] a supplemental filing indicating the extent to which, if any, counsel has sought expert witnesses in these areas [i]n the Northern District of Illinois." *Ibid.*

Petitioner made no supplemental filing. Instead, petitioner sought authorization to hire John Nixon, a local expert. The district court granted that motion. Nixon examined the ballistics and toolmarks evidence, over several days, at his laboratory in Indiana, and he prepared an expert report concerning the evidence. Pet. App. 11a; Def.'s Mot. for Extension of Time for Filing of Report of Ballistics & Toolmarks Expert (Sept. 1, 2004). Petitioner ultimately did not call Nixon as a witness at trial.

The jury found petitioner guilty on all counts of the indictment.

3. After the verdicts, the district court conducted a separate hearing, pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, to determine petitioner's sentence on the murder count. Under the FDPA, before the jury may sentence a defendant to death, it must find the existence of at least one of the "intent" factors enumerated in 18 U.S.C. 3591(a)(2) to ensure that the defendant acted with the degree of culpability sufficient to justify the imposition of the death penalty. See 18 U.S.C. 3591(a). In addition, the jury must find the existence of at least one statutory aggravating factor enumerated in 18 U.S.C. 3592(c). If the jury finds that those requirements are satisfied, then it may consider any non-statutory aggravating factors for which notice has been given, and it must weigh all aggravating factors it has found against all mitigating factors that any individual juror has found to exist. See 18 U.S.C. 3593(c) and (d). The jury is to impose the death

penalty if it concludes that all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify a sentence of death. 18 U.S.C. 3593(e).

In this case, the jury found unanimously that the government had proved beyond a reasonable doubt all five statutory and non-statutory aggravating factors submitted to it: that petitioner committed the murder following substantial planning and premeditation, see 18 U.S.C. 3592(c)(9); that Joyce Brannon was vulnerable because of her infirmity, see 18 U.S.C. 3592(c)(11); that petitioner committed the murder to prevent Brannon's cooperation in the Medicare-fraud investigation; that the crime caused loss to Brannon's friends, family, and co-workers; and that petitioner had demonstrated a lack of remorse for the murder. Pet. App. 21a. Various jurors found some of the mitigating factors submitted by the defense. The jury then concluded unanimously that the aggravating factors found to exist sufficiently outweighed the mitigating factors found to exist to justify a death sentence. *Id.* at 21a-22a.

4. The court of appeals affirmed. Pet. App. 1a-40a.

a. The court of appeals rejected petitioner's contention that, during the summation in the guilt phase of the trial, the prosecutor improperly commented on petitioner's failure to testify by asking the jury to infer guilt from the fact that the Herbert Schmidt revolver was missing. The court of appeals concluded that the prosecutor had asked the jury to infer guilt not from petitioner's silence, but from his conduct in hiding the gun. Pet. App. 6a-7a. The court explained that "[i]t is entirely appropriate to draw an inference from the facts that (a) [petitioner] owned a particular weapon, (b) the weapon could have inflicted the fatal wounds, and (c) the

weapon vanished at about the time of the murder, even though other weapons known to have been in the same place are accounted for." *Ibid.*

b. The court of appeals also rejected as "a dud" petitioner's argument that the district court should have allowed him to hire the higher-priced LaMagna as his ballistics expert instead of the local expert Nixon. Pet. App. 11a; see *id.* at 11a-13a. The court observed that petitioner had not told the court "what LaMagna could have done that Nixon was unable to do," or "why he did not use Nixon as an expert" at trial. *Id.* at 12a. The court added that "[j]ust as a defendant who relies on counsel at public expense must accept a competent lawyer rather than Clarence Darrow, so a defendant who relies on public funds for expert assistance must be satisfied with a competent expert." *Ibid.* (citation omitted). The court then noted that petitioner had not argued that Nixon was not competent. *Ibid.*

c. The court of appeals also rejected petitioner's challenge to his sentence, by a divided vote. Petitioner challenged two of the five aggravating factors, only one of which (the lack of remorse) is relevant here. The prosecutor had referred in court to petitioner's demeanor as showing his lack of remorse, and petitioner contended that the comments amounted to a penalty for his failure to testify. The court of appeals stated that "[t]here is a sense in which 'lack of remorse' overlaps with 'the defendant did not plead guilty.'" Pet. App. 25a. But the court of appeals noted that this Court had approved the factor, "which differs in principle from a penalty for failure to incriminate oneself." *Id.* at. 26a (citing *Zant* v. *Stephens*, 462 U.S. 862, 886 n.22 (1983)). The court explained that "[i]f it is proper to take confessions, guilty pleas, and vows to improve one's life into

account in deciding whether a murderer should be put to death—and it is unquestionably proper for a judge or jury to do so—then it must also be proper for the prosecutor to remind the jury when none of these events has occurred." *Ibid.* (citation omitted). The court observed that the lack-of-remorse factor, which is "built into the [Sentencing] Guidelines" for purposes of non-capital cases, is "equally appropriate" in the death-penalty context. *Ibid.*

Further, the court of appeals determined that "[t]he prosecutor's main theme was not the absence of a guilty plea, or [petitioner's] silence * * * in open court, but the fact that [petitioner] had not done anything to reduce or redress the hurt his crimes had caused." Pet. App. 26a-27a. The court explained that, "[i]nstead of taking steps to make good the losses for which he was responsible," such as by covering the costs of Brannon's funeral, petitioner had used his time in jail to try to defraud Medicare out of more money and to try to persuade prospective witnesses to remain silent or to lie in his behalf. *Id.* at 27a. The court concluded that "[s]omeone who carries on with crime, even after being caught and imprisoned, can be called remorseless without stretching the term." *Ibid.*

The court added that, even if the lack-of-remorse factor were defective, any error would be harmless. Pet. App. 27a-29a.[1] The statutory aggravating factor of premeditation was sufficient to establish petitioner's eligibility for the death penalty. See 18 U.S.C. 3592(c)(9). The court explained that "when an aggravating consideration other than one essential to death-eligibility is set

[1] Petitioner acknowledged that this claim could be reviewed only for plain error. Pet. C.A. Br. 41-42. The court of appeals opted to address the claim on the merits, as it discerned no error. Pet. App. 22a-23a.

aside, the sentence still may be affirmed if all of the evidence that supported this consideration would have been admitted anyway, or if the court conducts an independent review and concludes that the verdict remains appropriate without the invalid consideration." Pet. App. 28a. The court noted that petitioner did not contend that the lack-of-remorse consideration put before the jury any evidence that it should not have received. *Ibid.* The court further stated that, in light of the remaining aggravating factors and the facts surrounding "this cold-blooded execution of a potential witness," the prosecutor's comments about petitioner's in-court demeanor and lack of visible remorse struck it, and "likely struck the jurors," as "gilding the lily." *Id.* at 29a.

5. Judge Posner concurred in the affirmance of the convictions but dissented from the affirmance of the death sentence. Pet. App. 29a-40a. In Judge Posner's view, the vulnerable-victim aggravating factor (which petitioner does not challenge in this Court) was defective because the evidence failed to establish that Brannon's infirmities did not establish that she was vulnerable to being fatally shot. *Id.* at 31a-34a. In addition, Judge Posner concluded that the lack-of-remorse factor was not established because neither "[m]ere silence" nor the failure to take "extraordinary efforts" to show remorse is sufficient to demonstrate lack of remorse. *Id.* at 38a. In Judge Posner's view, while "[s]uch a failure might defeat the defendant's effort to plead remorse as a mitigating factor[,] * * * the absence of a mitigating factor cannot automatically be converted to the presence of an aggravating one." *Ibid.* Finally, Judge Posner concluded that, without the two aggravating factors he believed to be invalid, it is "uncertain" whether the jury would have voted for the death penalty. *Id.* at 39a.

(Judge Posner thought that the parties' agreement on the plain-error standard of review, see note 1, *supra*, was "fussing" that "misse[d] the point." Pet. App. 30a.)

ARGUMENT

1. Petitioner renews his contention (Pet. 10-13) that, in his rebuttal argument to the jury during the guilt phase, the prosecutor improperly commented on his failure to testify. The court of appeals correctly rejected this claim, and it does not warrant this Court's review.

In his closing argument, the prosecutor observed that, of all the firearms that petitioner had retrieved from the authorities and then placed in the storage unit, the Herbert Schmidt revolver was the only one that was missing. 5/4/2005 Tr. 2803. The prosecutor continued: "It wasn't misplaced. It wasn't lost. He didn't want law enforcement to find it and he didn't want you to hear about it." *Id.* at 2803-2804. Petitioner responded, in his closing argument, that although it was not his burden to prove anything, the gun could have been stolen from the trunk of his car, which did not lock securely. *Id.* at 2846-2848. Then, in rebuttal, after acknowledging that petitioner did not have to "say a word" about where the gun was, the prosecutor stated, "[b]ut this is not a game of hide-and-go-seek. And he had [a] two-day head start on this agent." Pet. App. 66a. The prosecutor added: "Where is that gun? Why is that gun not there[?] There is only one reasonable explanation. There were many unreasonable explanations, but one reasonable explanation, which is the only thing we're here about. It's gone because he wants it gone." *Id.* at 68a. Petitioner argues that the prosecutor improperly commented on his failure to testify by "highlight[ing] for the jury the fact that [he] did not 'say a word' and invit[ing] the jury to punish

him for 'hid[ing].'" Pet. 12 (final pair of brackets in original).

a. In *Griffin* v. *California*, 380 U.S. 609 (1965), this Court held that the Self-Incrimination Clause of the Fifth Amendment bars a judge or prosecutor from asking a jury to infer guilt from a defendant's failure to testify. Nor may a prosecutor, consistent with the Fifth Amendment privilege, refer *indirectly* to a defendant's failure to testify. Thus, a prosecutor's statement that the government's evidence is "uncontradicted," "unrebutted," or "undisputed" is improper if the only person who could have contradicted, rebutted, or disputed the government's evidence was the defendant himself. See, *e.g.*, *United States* v. *Cotnam*, 88 F.3d 487, 497 (7th Cir.), cert. denied, 519 U.S. 942 (1996).

The prosecutor did not comment adversely on petitioner's failure to testify, either directly or indirectly. As the court of appeals explained, the prosecutor did not ask the jury to draw an inference of guilt from petitioner's silence; rather, he asked it to draw such an inference from the disappearance of the gun. Pet. App. 7a. The prosecutor, like defense counsel in his closing argument, reminded the jury that petitioner did not have to testify, and he made no attempt to exploit defendant's choice not to do so. Contrary to petitioner, the reference to "a game of hide-and-go-seek" concerned petitioner's *conduct* in hiding the gun, not his failure to testify, as is made clear from the prosecutor's next sentence: "And [petitioner] had [a] two-day head start on this agent." *Id.* at 66a. Neither *Griffin* nor the cases that follow it bar a prosecutor from urging a jury to draw inferences from evidence of events merely because the defendant declines to take the stand to explain the events himself. The decision of the court of appeals

therefore does not contravene any precedent of this Court.[2]

Nor does the decision below create any circuit conflict warranting this Court's review. Petitioner takes issue (Pet. 10-11) with a test for applying the *Griffin* rule that the Seventh Circuit has employed in some other cases. That test inquires whether "1) it was the prosecutor's manifest intention to refer to the defendant's silence, or 2) the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's silence." *Cotnam*, 88 F.3d at 497 (citations omitted). But petitioner himself relied on that test in the court of appeals. See Pet. C.A. Br. 9-10. In any event, whatever the merit of the test, the court below did not invoke it or rely on any decision that did so. Further, petitioner is incorrect in asserting (Pet. 11) that the court below "looked only to the prosecutor's intent" and did not consider the impact of the

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[2] Petitioner also relies (Pet. 11) on several decisions of this Court that do not address the issue relevant here. In *Portuondo* v. *Agard*, 529 U.S. 61 (2000), the Court held that it was not unconstitutional for the prosecutor to call the jury's attention to the fact that the defendant had the opportunity to hear the other witnesses and to tailor his testimony accordingly. The Court rejected the defendant's reliance on *Griffin*, which it characterized as "prohibit[ing] comments that suggest a defendant's silence is 'evidence of *guilt*.'" *Id.* at 69 (quoting *Griffin*, 380 U.S. at 615) (emphasis in *Agard*). In *United States* v. *Hasting*, 461 U.S. 499 (1983), the issue was not whether *Griffin* error had occurred, but whether, in the exercise of its supervisory power, a federal court may decline to consider whether such an error was harmless. *Id.* at 505, 510-512. Finally, in *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), the Court held that the *Griffin* rule, which it described as "prohibit[ing] the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt," *id.* at 319, does not apply in the context of prison disciplinary proceedings, which are civil in nature, *id.* at 316-320.

prosecutor's remarks on the jury. Rather, the court's decision rested on its own "read[ing]" of the prosecutor's comments. Pet. App. 7a. Nothing in the opinion suggests that, in applying *Griffin*, courts should focus solely —or at all—on the prosecutor's intent.

2. Petitioner also renews his contention (Pet. 13-18) that the district court erred in denying his motion to hire ballistics expert LaMagna at public expense. That claim lacks merit.

Indigent federal capital defendants are entitled to retain experts whose services are "reasonably necessary" to the defense, subject to a presumptive cap (which the district court may set aside) of $7500 per case. 18 U.S.C. 3599(f) and (g)(2). That statute implements the due process requirement that the government assist indigent defendants in paying for necessary expert services. See *Ake* v. *Oklahoma*, 470 U.S. 68, 83 (1985).

In this case, the district court agreed with petitioner that the services of a ballistics expert were "reasonably necessary" for his defense. But it denied petitioner's motion to hire LaMagna, "without prejudice," because LaMagna's fee would have exceeded the statutory limit of $7500, in a case in which the defense required (and was provided with) numerous different experts. Pet. App. 41a. Instead, the court told petitioner that he could hire at public expense a local ballistics expert whose rates or travel expenses would be lower, *or* make a further, particularized showing that he had tried and failed to locate a local expert who had the requisite qualifications. *Ibid.* Petitioner found a local ballistics expert, Nixon; the court approved his retention; and he proceeded to examine the ballistics and toolmark evi-

dence, the purpose for which he was retained. No more was required.

Petitioner argues (Pet. 16) that LaMagna was better suited than Nixon to refute the testimony of one of the government's ballistics experts because he had published on the topic of toolmark analysis on fired bullets, because he was familiar with the FBI's rifling database, and because he was critical of using ballistics data to make unique matches of bullets to guns when the guns are not present. But the government did not argue at trial that there was a unique match between the bullets that killed Brannon and petitioner's missing revolver; rather, it contended only that petitioner's revolver *could* have fired the bullets that killed Brannon, and it affirmatively disclosed that at least 15 other models could have done so as well. See Pet. App. 9a-10a, 12a. Moreover, petitioner does not explain why Nixon was incapable of making the same points that LaMagna would have made, especially with the aid of LaMagna's published work. See *id.* at 12a. Indeed, petitioner does not indicate what LaMagna's testimony would have been, which led the court below to observe that, for all it knew, LaMagna might have agreed with the conclusions of the government's experts. *Ibid.* Although petitioner asserts (Pet. 15) that LaMagna had "*particular qualifications*" making his retention necessary, he does not address *Nixon*'s qualifications, nor does he undermine the district court's fact-bound conclusion that petitioner had failed to establish why LaMagna was uniquely needed for this case.

Petitioner contends that LaMagna's services were "reasonably necessary," as required for *any* funding for experts. But petitioner makes no effort to show that the district court erred in not finding LaMagna's services to

be of "an unusual character or duration," the requirement for an exemption from the $7500 statutory limit for expert services. 18 U.S.C. 3599(g)(2). Nor does petitioner dispute that Congress may place reasonable limits on the amount of money made available for expert services in a single case that does not involve these "unusual" circumstances. As the court of appeals stated, "[n]either the Constitution nor the Criminal Justice Act entitles a defendant to the best (or most expensive) expert," just as a defendant is not entitled to the best (or most expensive) appointed attorney. Pet. App. 12a. Rather, upon showing that particular expert services are "reasonably necessary," a defendant is entitled only to an expert who is competent to provide those services, and petitioner has never argued that Nixon failed to meet that standard. See *ibid.* Such a showing would be necessary to show that retaining Nixon rather than LaMagna prejudiced petitioner's defense.

Petitioner's reliance (Pet. 15) on *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is unavailing. Indeed, the district court in this case conducted a *Daubert* hearing into the expertise of Special Agent Paul Tangren, the witness about whom petitioner now complains, and petitioner had ample opportunity for "[v]igorous cross-examination." Pet. 15-16 (quoting *Daubert*, 509 U.S. at 596).

Accordingly, petitioner has not established that the district court abused its discretion or committed a clear factual error when it found that petitioner had not justified the retention of LaMagna at a rate in excess of the presumptive statutory cap. Nor does petitioner allege any conflict on this issue. Further review therefore is not warranted.

3. Petitioner contends (Pet. 19-23) that the prosecutor improperly commented on petitioner's failure to testify in arguing to the jury during the penalty phase of the trial that petitioner lacked remorse for his crime. Petitioner focuses (Pet. 6-7) on two of the prosecutor's comments: first, "[h]e's sitting 20 feet away from you and there's nothing, no remorse whatsoever, because he thinks he got away with it," Pet. App. 71a; and second, "[H]e's sorry he got caught, but he's not sorry that he shot Joyce Brannon. The only ramification of that as he's sitting opposite you right now, nothing else in this man's heart, not a single thing. He has no remorse for what he did," *id.* at 72a-73a.

a. As a threshold matter, petitioner failed to preserve his *Griffin* claim: although he was represented by learned and experienced counsel, see 18 U.S.C. 3005, 3599(b), petitioner made no objection to the prosecutor's comments. Accordingly, as petitioner acknowledged in the court of appeals (Pet. C.A. Br. 41-42), the applicable standard of review is plain error. See Fed. R. Crim. P. 52(b). As discussed below, the prosecutor's statements did not violate petitioner's rights, but even if they did, petitioner could not establish reversible plain error. Petitioner cannot demonstrate any effect on his substantial rights from a few sentences of closing argument that pertained to only one of five aggravating factors. See *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993). Nor can he show that the prosecutor's comments "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 736 (citation omitted).

b. This Court has indicated that any lawful evidence that tends to show a defendant's lack of remorse is admissible in aggravation in a death penalty case. See

Zant v. *Stephens*, 462 U.S. 862, 886 n.22 (1983). In *Mitchell* v. *United States*, 526 U.S. 314 (1999), the Court held that, at sentencing, a court may not, consistent with the Fifth Amendment privilege, draw an adverse inference from a defendant's silence "in determining the facts of the offense." *Id.* at 330. The Court expressly left open in *Mitchell* the question "[w]hether silence bears upon the determination of a lack of remorse." *Ibid.*

This case does not present the question left open in *Mitchell* because the challenged comments of the prosecutor did not refer to petitioner's silence, *i.e.*, his decision not to testify. As the court of appeals recognized, the gravamen of the prosecutor's argument was not that the jury should infer lack of remorse from petitioner's *silence*, but that it should do so from the evidence of his *affirmative conduct*. Pet. App. 26a-27a. Thus, in his opening and closing statements at the penalty phase, the prosecutor recalled for the jury the evidence that, while in pre-trial detention following his arrest, petitioner had phoned one of his girlfriends and told her that, within a matter of weeks, his troubles with the law would be behind him and he could return to earning a living, 5/10/2005 Tr. 3105; that he continued to commit Medicare fraud by submitting documents in support of a false claim to a carrier who was unaware of his Medicare suspension, Pet. App. 71a; and that he continued to call his patients from jail in an attempt to thwart their cooperation with the authorities (the same motive that led him to murder Joyce Brannon), *id.* at 71a-72a.

In short, the evidence that petitioner looked forward to escaping the consequences of his misdeeds and quickly picking up his life where he had left off was strongly indicative of lack of remorse, as was his continuation of criminal activity from prison following his arrest. After

reviewing the evidence, the district court agreed: it held that the evidence of petitioner's post-arrest conduct provided "more than enough evidence" for the lack-of-remorse aggravator "to go to the jury." 5/18/2005 Tr. 3702. In the words of the court of appeals, "[s]omeone who carries on with crime, even after being caught and imprisoned, can be called remorseless without stretching the term." Pet. App. 27a. Petitioner's decision not to confess, plead guilty, or take the stand to express remorse did not bar the government from showing through his affirmative post-arrest *conduct* that he lacked remorse.

In neither of the comments on which petitioner focuses did the prosecutor advert directly or indirectly to petitioner's failure to testify. The prosecutor's remark about petitioner's "sitting 20 feet away from you" and showing "no remorse whatsoever" was a reference to petitioner's demeanor. Suggesting to the jury that a defendant's courtroom demeanor is reflective of lack of remorse is not tantamount to commenting on the defendant's silence. Jurors naturally take note of a defendant's demeanor in the courtroom, Pet. App. 29a, and there is nothing improper in the prosecutor's asking them to draw an inference from what they observe—a request they are of course free to reject. See *Bates* v. *Lee*, 308 F.3d 411, 421 (4th Cir. 2002) ("[P]rosecutorial comments about the lack of remorse demonstrated by a defendant's demeanor during trial do not violate a defendant's Fifth Amendment [privilege]."), cert. denied, 538 U.S. 1061 (2003); *Six* v. *Delo*, 94 F.3d 469, 476-477 (8th Cir. 1996) (same), cert. denied, 520 U.S. 1255 (1997).

Nor did the prosecutor advert to petitioner's silence in remarking that petitioner was "sorry he got caught" but "not sorry that he shot Joyce Brannon." The re-

mark followed immediately upon the prosecutor's discussion of petitioner's post-arrest conduct. See Pet. App. 71a-73a. In that context, the prosecutor's point was that the jury should infer remorselessness from petitioner's actions, not from his silence.

c. The federal appellate decisions on which petitioner relies (Pet. 21) do not help him. In each of the cases finding a *Griffin* violation at summation, the prosecutor had pointed to the defendant's decision not to testify about the crime, *not* simply to his conduct or to his courtroom demeanor. There is no disagreement among the courts of appeals or state supreme courts concerning the propriety of statements like those the prosecutor made here.

In *Beardslee* v. *Woodford*, 358 F.3d 560 (9th Cir.), cert. denied, 543 U.S. 842 (2004), the prosecutor, in asking the jury to find a lack-of-remorse aggravator, stated as follows: "Since you only heard the defendant through the tape recorder and his previous testimony, you were not able to observe his demeanor and sincerity at the time he testified so you, too, could judge if there was any feeling in the man"; and "Wouldn't you expect a man on trial for his life would, through his statements, cry out for forgiveness, cry out for pity? He did not. Never heard any in the statements." *Id.* at 586. On collateral review, the court of appeals held that the reference to the jury's not being "able to observe" whether "there was any feeling in the man" violated *Griffin*, because it "*went beyond mere demeanor*" and improperly "contrast[ed] the actual trial with a hypothetical one in which the defendant testified." *Id.* at 587 (emphasis added). In the instant case, the prosecutor made no comparable reference to petitioner's decision not to testify; rather,

he asked the jury to infer lack of remorse from petitioner's affirmative conduct and demeanor.

In *Lesko* v. *Lehman*, 925 F.2d 1527 (3d Cir.), cert. denied, 502 U.S. 898 (1991), another capital case, the defendant testified at the penalty phase to present mitigating evidence about his background, but he did not address the merits of the charges. *Id.* at 1540. The prosecutor asked the jury to infer a lack of remorse because the defendant had testified about his own hardships but "didn't even have the common decency to say I'm sorry for what I did." *Ibid.* (citation omitted). The court of appeals concluded, on collateral review, that the comment violated *Griffin* because it constituted a "condemnation" of the defendant's refusal to give particular testimony—self-incriminating testimony. *Id.* at 1544. The court of appeals did not "reach the broad question of whether, and to what extent, a defendant's demeanor is relevant to the sentencing determination in a death penalty case," because the prosecutor's comments were not "a simple reference to demeanor." *Ibid.* Here, by contrast, the prosecutor did not comment on testimony or the failure to testify.

The remaining federal appellate decisions cited by petitioner involved errors by the *court* in *non-capital* sentencing proceedings, not improper comments in summation. In *Ketchings* v. *Jackson*, 365 F.3d 509 (2004), the Sixth Circuit held, on collateral review, that the trial judge had increased the defendant's sentence *not* based on his lack of "remorsefulness," but based on his refusal to admit guilt in allocution at the sentencing hearing. *Id.* at 514. Based on that *factual* conclusion (on which it disagreed with the state court), the court of appeals found *Griffin* error. In *United States* v. *Mezas de Jesus*, 217 F.3d 638 (9th Cir. 2000), the court of appeals

held that the sentencing judge had misapplied the burden of proving a Sentencing Guidelines enhancement for an uncharged kidnapping, in part because the court had remarked on the defendant's failure to offer any evidence to counter the government's proof, "like, for instance, a statement under oath from [the defendant] that [the kidnapping] didn't happen." *Id.* at 644 (citation omitted); see *id.* at 644-645. Finally, in *United States* v. *Rivera*, 201 F.3d 99 (2d Cir. 1999), cert. denied, 531 U.S. 901 (2000), the court of appeals held that the district court erred in increasing the defendant's sentence "quite explicitly * * * for his refusal to cooperate with the authorities following his conviction," rather than for a callous lack of concern about the injuries his crimes had inflicted on others. *Id.* at 102. None of those cases addressed the question of when prosecutorial comment to a jury concerning a defendant's lack of remorse crosses the line into *Griffin* error.[3]

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[3] Petitioner also is not aided by the three district court decisions on which he relies (Pet. 21), which in any event are not precedential and would not establish a conflict warranting review by this Court. In *United States* v. *Roman*, 371 F. Supp. 2d 36 (D.P.R. 2005), the court held that the government could not base the lack-of-remorse aggravator based on information that would encroach on a defendant's Fifth Amendment privilege, but that it could rely on evidence that the defendant's "affirmative conduct" reflected continuing remorselessness. *Id.* at 50-51. In *United States* v. *Cooper*, 91 F. Supp. 2d 90 (D.D.C. 2000), the court held that the aggravating factor of future dangerousness could be proved by evidence of "lack of remorse * * * that does not encroach on the defendant's right to remain silent," potentially including evidence that the defendant committed crimes after being arrested or convicted or that he made statements showing pride in his criminality. *Id.* at 113; see *id.* at 112. The court excluded, however, evidence of the defendant's failure to acknowledge his guilt in a post-arrest statement. *Id.* at 112-113. Finally, in *United States* v. *Davis*, 912 F. Supp. 938 (E.D. La. 1996), the court stated that the allegation of lack of re-

Nor is petitioner helped by the state cases he cites (Pet. 22). In the sole capital case, the court found *no* error in the prosecutor's reference to the defendant's lack of remorse because, as in the instant case, the prosecutor did not allude to the defendant's own failure to testify. *People* v. *Ervin*, 990 P.2d 506, 537 (Cal.), cert. denied, 531 U.S. 842 (2000). The remaining cases, all non-capital, merely stand for the proposition that, where a defendant has maintained his innocence throughout the proceedings, his sentence may not, consistent with his Fifth Amendment privilege, be based on his mere failure to express remorse at sentencing or at trial. See *State* v. *Shreves*, 60 P.3d 991, 996 (Mont. 2002); *Brake* v. *State*, 939 P.2d 1029, 1033 (Nev. 1997) (per curiam); *People* v. *Yennior*, 282 N.W.2d 920 (Mich. 1977) (three-sentence summary reversal); *People* v. *Young*, 987 P.2d 889, 894-895 (Colo. Ct. App. 1999); *State* v. *Hardwick*, 905 P.2d 1384, 1391 (Ariz. Ct. App. 1995); *State* v. *Williams*, 389 S.E.2d 830, 833-834 (N.C. Ct. App. 1990); cf. *State* v. *Burgess*, 943 A.2d 727, 732, 736 (N.H. 2008) (applying the state constitution).[4] But, as demonstrated above, in this case the prosecutor asked the jury to infer lack of remorse from factors other than petitioner's silence.

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morse "encroaches dangerously" on an offender's Fifth Amendment privilege, but it left open the possibility that a defendant's "affirmative words or conduct" indicating lack of remorse may be admissible. *Id.* at 946.

[4] In *Burgess*, the defendant had *not* maintained his innocence, but had confessed to the acts underlying his convictions while denying any criminal intent. The state supreme court therefore concluded that the defendant could have expressed remorse for the acts without further incriminating himself, and that his failure to do so was properly taken into account. 943 A.2d at 739. Contra *Brake*, 939 P.2d at 1033. That fact pattern is not present here.

None of the cited state cases suggests that prosecutorial comment of the sort at issue here violates the Fifth Amendment privilege. To the contrary, two of the cases make clear that lack of remorse is a valid sentencing factor when supported by evidence *other* than the defendant's silence. See *Burgess*, 943 A.2d at 738; *Shreves*, 60 P.3d at 996.

d. Even if the prosecutor's comments were somehow improper, there would still be no basis for further review by this Court. As the court below correctly concluded, any error in permitting the comments did not prejudicially affect the jury's sentencing decision. Pet. App. 29a. Petitioner does not take issue with the court of appeals' conclusion that any error was harmless or assert that the harmless-error finding involved some legal principle that would warrant this Court's review.

This Court has held that, on appeal from a federal death sentence, an error concerning an aggravating factor is harmless if the reviewing court is convinced that the jury would have returned the same verdict had the invalid aggravating factor not been submitted to the jury or had the invalid factor been precisely defined. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 402 (1999). The court of appeals properly applied that standard here. As the court explained:

> Take away those few pages of transcript, and the weight of evidence remains. Four aggravating factors or considerations are solid. The facts of this cold-blooded execution of a potential witness dominate. Prosecutorial comments about [petitioner's] demeanor in court and lack of visible remorse strike us, and likely struck the jurors, as gilding the lily.

Pet. App. 29a.

Indeed, the affirmative evidence of lack of remorse (independent of the prosecutor's comments) made that aggravating factor just as "solid" as the court of appeals found the other four aggravating factors to be, Pet. App. 29a. To the extent that the challenged comments referred to petitioner's silence at all, they were brief and indirect. As such, they could not have materially affected the result, especially given the evidence of petitioner's post-arrest conduct and statements that clearly established his lack of remorse. See *Beardslee*, 358 F.3d at 587 (holding that the prosecutor's penalty-phase comments about lack of remorse were harmless because they were not "extensive" and did not "stress" the equation of silence with remorselessness); *Six*, 94 F.3d at 477 (holding that any error in the prosecutor's penalty-phase comments regarding the lack-of-remorse aggravator "were not egregious or pervasive enough to render the result of the penalty phase unreliable").[5]

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[5] Judge Posner thought it "uncertain" whether removing *both* the lack-of-remorse factor *and* the vulnerable-victim factor from the jury's consideration would have affected the sentence. Pet. App. 39a. But petitioner does not advance in this Court Judge Posner's contention that the government failed to establish the vulnerable-victim factor. Nor does the dissent establish that any error in the closing argument about the lack-of-remorse factor was prejudicial. Judge Posner did not acknowledge the affirmative evidence of petitioner's lack of remorse, see *id.* at 30a-31a, and his statement that the lack-of-remorse factor occupied "the bulk of [the prosecutor's] closing argument," *id.* at 34a, is incorrect. See 5/18/2005 Tr. 3710-3718 (discussing all five aggravating factors). As for the law review articles that Judge Posner cited (and which petitioner cites for the distinct proposition that this case is an important one, Pet. 22 n.5), they simply support the proposition that lack of remorse can, in the abstract, be a weighty consideration. Indeed, one of the articles focuses on jurors' beliefs about the defendant's lack of remorse even when the State did *not* affirmatively argue that the lack of remorse was an aggravating factor. See Theodore Eisen-

Moreover, under the applicable plain-error standard, it is *petitioner's* burden to show that the error was not harmless, as well as that it "seriously affect[ed] the fairness, integrity or public reputation" of the proceedings. See p. 16, *supra*. Petitioner undertakes no effort to carry that burden in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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berg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1607-1608 (1998).