No. 13-254

In the Supreme Court of the United States

DAVID ANTHONY RUNYON, 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 applied the correct harmless-error standard in concluding that errors committed during the penalty phase of petitioner's trial were harmless beyond a reasonable doubt.

2. Whether the court of appeals applied the correct test in rejecting petitioner's contention that the cumulative impact of errors during the trial's penalty phase required reversal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-89a) is reported at 707 F.3d 475.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2013. A petition for rehearing was denied on March 25, 2013 (Pet. App. 1a). On May 21, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 22, 2013, and the petition was filed on August 21, 2013. 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 Eastern District of Virginia, petitioner

was convicted of conspiring to commit murder for hire, in violation of 18 U.S.C. 1958(a); murder with a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) and (j) and 2; and carjacking resulting in death, in violation of 18 U.S.C. 2119 and 2. The district court imposed a capital sentence for the conspiracy and firearm counts and a sentence of life imprisonment for the carjacking count. The court of appeals affirmed. Pet. App. 2a-89a.

1. a. This case concerns the murder for hire of an officer in the United States Navy, Cory Allen Voss, in Newport News, Virginia. Pet. App. 3a. In 2006, Voss's wife, Catherina Voss (Cat), began an extramarital affair with Michael Draven while Voss was deployed at sea. *Id.* at 5a. Cat and Draven subsequently hired petitioner, one of Draven's acquaintances and a former law-enforcement officer and former member of the United States Army, to murder Voss in order to obtain Voss's Navy death benefits and life-insurance proceeds. *Id.* at 5a, 43a.

On April 29, 2007, the day of Voss's murder, petitioner made an ATM withdrawal in West Virginia, where he lived; purchased a .357 magnum and ammunition; and drove his truck from West Virginia to Newport News, Virginia. Pet. App. 5a-6a, 16a-17a. Shortly before midnight, Cat sent Voss to the Langley Federal Credit Union (LFCU) in Newport News, with instructions to withdraw cash from its ATM. *Id.* at 5a-6a. Cat had opened a LFCU account a few days earlier with a mere $5 deposit that was insufficient to permit an ATM withdrawal. *Ibid.* Video surveillance showed that while Voss unsuccessfully attempted to make a withdrawal, an unidentifiable intruder entered his pickup truck. *Id.* at 6a.

The next morning, Voss was found dead in his truck in a parking lot near the credit union, shot five times at close range. Pet. App. 6a. Four bullets from a ".38 class" gun, a category which includes .357 magnums, were recovered from the body. *Ibid.* Several months later, one of petitioner's friends pawned petitioner's .357 magnum. *Ibid.*

Petitioner utilized knowledge he obtained as a law-enforcement and correctional officer, during criminal justice coursework, and as a member of the United States Army and Kansas National Guard to kill Voss. Pet. App. 9a. Petitioner's familiarity with forensic methods and their circumvention also initially slowed the ensuing murder investigation. *Id.* at 48a. But by early December 2007, investigators in Newport News had obtained search warrants for, *inter alia*, petitioner's truck. C.A. App. 3064.

On December 11, 2007, investigators traveled to Morgantown, West Virginia, to execute the warrants. C.A. App. 3064. The search of petitioner's truck revealed "a map of Newport News showing the location of the LFCU" and containing handwritten references to Voss and Voss's vehicle, and a photograph of Cat and Draven with notes on the back listing Cat's and Draven's names, addresses, and a social security number. Pet. App. 6a, 17a, 48a. Petitioner agreed to go voluntarily to the Morgantown Police Department for an interview. C.A. App. 3064, 3066. The 42-minute video recording of the December 11 interview (Gov't Penalty Ex. 330) was later played to the jury and admitted during the government's penalty-phase rebuttal case. C.A. App. 3065; *id.* at 3249 (sleeve with DVD containing Ex. 330); see Pet. App. 21a-22a.

b. The interview video shows that investigators read petitioner his *Miranda* rights and made multiple attempts to convince petitioner to admit his role in Voss's murder until the interview ended when petitioner clearly expressed a desire to speak to an attorney. See Pet. App. 21a-22a; Gov't Penalty Ex. 330. The investigators first explained to petitioner that, although he had previously denied knowing either Cat or Draven, they had found in his truck a picture of the two that included their names and addresses. Gov't Penalty Ex. 330, at 2:57 p.m. (C.A. Doc. 62-2 (Tr.) 3-4).[1] They also told petitioner that they had found in his truck a map of Newport News, Virginia on which was written "Langley Federal Credit Union," the victim's name (Cory), and a description of the victim's truck. *Id.* at 2:58 p.m. (Tr. 4-5). Petitioner then admitted knowing Draven, admitted that the map was his, and stated that he "suppose[d]" that the writing was his but that he did not remember writing on the map. *Id.* at 2:57-2:58 p.m. (Tr. 4-5).

Petitioner did not respond when asked whether he could "explain that" and "[w]hy would [he] have written that down" on the map. Gov't Penalty Ex. 330, at 2:58-2:59 p.m. (Tr. 5). Detective Larry Rilee interrupted the silence by saying, "You're thinking hard,

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[1] This brief cites statements made in the video (Gov't Penalty Ex. 330) by using the time indicated on the video's time stamp. A transcript of the video was not produced or considered in district court, but petitioner later moved to include his own 28-page transcript of the video (C.A. Doc. 62-2) as an addendum to his appellate brief. C.A. Doc. 62. The government opposed and the court of appeals denied petitioner's request. C.A. Docs. 64-65. If this Court wishes to utilize petitioner's generally accurate transcript in conjunction with the video itself, this brief includes parenthetical citations to that transcript.

aren't you? You know what you're thinking? What you're thinking is do I want to tell them the truth? And the answer should be yes, I do." *Id.* at 2:59 p.m. (Tr. 5-6). The detective then asked, "You're Asian, right? Asian-American? You're an honorable Asian man, aren't you?" *Ibid.* (Tr. 6). Petitioner responded affirmatively. Detective Rilee then stated that petitioner had to make a decision affecting the rest of his life, because the investigators were investigating the murder of a Navy officer that potentially carried a capital sentence. *Id.* at 2:59-3:00 p.m. (Tr. 6). He continued by adding, "you know, if you're an honorable Asian man and your integrity is intact and you have any respect for anybody at all, then you'll do the right thing today." *Id.* at 3:00 p.m. (Tr. 6).

Petitioner acknowledged that he did not bank at LFCU and investigators asked if petitioner had "any reason to have the victim's truck described on [his] map" and whether petitioner had "[Voss's] name written down for any other reason." Gov't Penalty Ex. 330, at 3:01 p.m. (Tr. 7-8). After petitioner again failed to respond, investigators stated, "David, you got to realize it's over," and "It's done, son. It's done, okay? You've got the victim's name written on your map along with the description of his truck and where he was murdered." *Id.* at 3:01-3:02 p.m. (Tr. 8). The investigators explained that "the time has come" and that petitioner needed to "be honest" and "cooperate with [them]" in order to "try to help [him]self." *Id.* at 3:02 p.m. (Tr. 8). Petitioner again gave no response. *Id.* at 3:02-3:03 p.m. (Tr. 8-9).

During the 42-minute video, the investigators unsuccessfully tried numerous other approaches to convince petitioner to tell them the truth. Near the end

of the interview, Detective Rilee asked petitioner if he had religious beliefs; petitioner stated that he was Christian; and the Detective discussed forgiveness and asked whether one could "repent your sins." Gov't Penalty Ex. 330, at 3:45-3:46 p.m. (Tr. 26-27). After petitioner responded that, "yes, anybody can repent their sins," the detective stated that, "having that in mind," "don't you think it's time to repent? To say you're sorry for what happened?" *Id.* at 3:46 p.m. (Tr. 27). That course of inquiry, like the others, was unsuccessful in prompting petitioner to discuss his role in Voss's murder.

c. Investigators collected "a variety of telephone and email evidence show[ing] that Cat, Draven, and [petitioner] had arranged the contract killing," petitioner was paid to commit the murder, and the three "attempted to orchestrate a cover-up." Pet. App. 6a-7a. Investigators further found in petitioner's current and former homes a box of .357 magnum bullets with five bullets missing (Voss was shot five times); phone numbers for Cat and Draven; papers mentioning the LFCU; and "a checklist of items to be used in the murder," including a taser, a Spyderco knife, a tarp, a trash bag, boots, gloves, a black hoodie sweatshirt, and military-style pants. *Id.* at 6a, 48a. In addition, several witnesses testified that petitioner boasted about killing Voss or an unidentified member of the military for money. *Id.* at 7a.

2. Under the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.*, before a jury may recommend a capital sentence for an offense involving homicide, 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 a degree of culpability

sufficient to justify that sentence. The jury must also find the existence of at least one of the aggravating factors enumerated in 18 U.S.C. 3592(c). See 18 U.S.C. 3593(e)(2). If the jury finds both requirements satisfied the defendant is deemed eligible for a capital sentence. The jury then may consider any non-statutory aggravating factors for which notice has been given, and each juror must weigh all aggravating factors found by the jury against the mitigating factors that the individual juror finds to exist. 18 U.S.C. 3593(c) and (d). The jury may recommend a capital sentence if it unanimously concludes that all the aggravating factors sufficiently outweigh all the mitigating factors so as to justify a capital sentence, or, in the absence of any mitigating factor, that the aggravating factors are sufficient to justify a capital sentence. 18 U.S.C. 3593(e).

a. The jury in this case unanimously found petitioner guilty of conspiring to commit murder for hire, murder with a firearm in relation to a crime of violence, and carjacking resulting in death. C.A. App. 327. Based on the guilt-phase evidence, the jury further determined that petitioner was eligible for a capital sentence, unanimously finding that he intentionally killed Voss, 18 U.S.C. 3591(a)(2)(A), and satisfied two statutory aggravators because he committed the murder in exchange for money and did so after substantial planning and premeditation, 18 U.S.C. 3592(c)(8) and (9). Pet. App. 7a-8a.

b. The parties thereafter presented guilt-phase information on the government's non-statutory aggravating factors and petitioner's mitigating factors. C.A. App. 2322-3077. Petitioner sought to establish, *inter alia*, that other "defendants, equally culpable in

the crime, will not be punished by death," 18 U.S.C. 3592(a)(4), by showing that Cat (who pleaded guilty) and Draven (who, before electing a jury trial, had cooperated with investigators and admitted his role in the murder two days after petitioner's December 11 interview) received only life sentences. See Pet. App. 4a, 10a; C.A. App. 3066-3067. In its rebuttal case, the government offered the video of petitioner's December 11 interview to show that petitioner was not equally culpable because, unlike Cat and Draven, petitioner neither admitted his involvement nor cooperated with investigators. C.A. App. 3051-3052. Petitioner objected to the video solely on the ground it was not proper rebuttal material, arguing that the video "would not rebut anything" that he had submitted during his mitigation case because petitioner had never attempted to show that he had "admitted his involvement" or "expressed remorse." *Id.* at 3045, 3047; see *id.* at 3044-3050. The district court overruled that objection, *id.* at 3049-3050, 3052, and admitted the video, which was played to the jury, *id.* at 3064-3065.

Government counsel delivered a lengthy penalty-phase summation (C.A. App. 3104-3142, 3172-3180), to which petitioner raised no objection. *Ibid.*

In its jury instructions, the district court specifically instructed that the December 11 video could be considered only for "the limited purposes of demonstration of remorse in regard to the alleged non-statutory aggravating factor to this effect, and for relevant culpability in regard to the alleged statutory mitigation factor to this effect." Pet. App. 31a (quoting C.A. App. 3184). The court further instructed that no statement made by the detectives during the interview constitutes evidence and that the jury should

disregard any statement of fact or opinion by the officers, including "any characterization * * * of [petitioner's] conduct or character," and not to consider such statements when deciding petitioner's sentence. *Id.* at 31a-32a (quoting C.A. App. 3184).

Although petitioner never objected to the limited references to his Asian ethnicity and Christian belief in the video, see C.A. App. 3044-3051, the district court instructed the jurors as required by 18 U.S.C. 3593(f) that they "must not consider the race, color, religious beliefs, national origin or sex of [petitioner] or the victim" and must not "recommend a sentence of death unless [they] have concluded that [they] would recommend [that] sentence * * * no matter what the race, color, religious beliefs, national origin, or sex of either [petitioner] or the victim might have been." Pet. App. 32a (quoting C.A. App. 3203-3204). The court further instructed that, "[t]o emphasize the importance of this consideration," the special verdict form contains a certificate that each juror must sign "only if this is so" to attest that "considerations of race, color, religious beliefs, national origin, or sex of [petitioner] or the victim w[ere] not involved in reaching [each juror's] individual decision" and that the juror would have recommended the same sentence "no matter what the race, color, religious beliefs, national origin, or sex of [petitioner] or [the] victim might have been." *Id.* at 32a-33a (quoting C.A. App. 3204) (third set of brackets in original).

c. The jury unanimously recommended that petitioner be sentenced to death on the murder-for-hire-conspiracy and murder-with-a-firearm counts, and it recommended life imprisonment on the carjacking count. Pet. App. 107a-108a. Each juror signed the

verdict form's certification that considerations of race and religious belief did not influence the verdict. *Id.* at 33a; *id.* at 109a (certification).

In addition to the two statutory aggravators previously discussed, the jury unanimously found all four of the government's non-statutory aggravators, including that petitioner (1) used his education, training, and experience gained in college courses on criminal justice, as a law enforcement and corrections officer, as an officer in the National Guard, and as a member of the United States Army to commit the murder, and (2) demonstrated a "lack of remorse." Pet. App. 9a. The jury also unanimously found seven of petitioner's proposed 14 mitigating factors, including that other equally culpable participants were not sentenced to death, and two additional mitigating factors; ten to 11 jurors found four further mitigators. *Id.* at 10a-11a. The jury determined unanimously that the six aggravating factors sufficiently outweighed the mitigating factors to warrant a capital sentence. *Id.* at 11a-12a.

3. The court of appeals affirmed. Pet. App. 2a-89a. The court rejected petitioner's challenge to his conviction, *id.* at 12a-17a, and largely rejected petitioner's numerous challenges to the relevant non-statutory aggravating factors, *id.* at 20a-54a, the prosecutor's penalty-phase summation, *id.* at 54a-74a, and other asserted errors, *id.* at 74a-87a. Three categories of those rulings are presently relevant.

a. First, the court of appeals held that certain statements about ethnicity and religious views in the December 11 video should not have been presented to the jury. Pet. App. 23a-26a. The court concluded that references to petitioner's Asian ethnicity by officers were "problematic," irrelevant to the issues before the

jury, and conveyed "stereotyping and insulting notions about how 'an honorable Asian man' is supposed to act." *Id.* at 25a. The court similarly found error in allowing the jury to hear officers' "legally [ir]relevant" remarks about petitioner's religious beliefs. *Id.* at 26a. The court noted that petitioner challenged other aspects of the video on appeal, *id.* at 26a-29a, but explained that it need not address those arguments because it would simply "assume that * * * the entire video" should have been excluded and then address whether such an error would constitute reversible error. *Id.* at 30a.

The court of appeals recognized that petitioner's only objection to the video in district court turned "predominantly, even exclusively, on the notion" that the video did not rebut his evidence on the equally-culpable mitigator and that, as a result, plain-error review could be warranted. Pet. App. 30a. The court nevertheless stated that it would apply the harmless-error standard for constitutional violations, even if "not necessarily required," because admitting the video "constituted harmless error even under the most stringent of standards." *Id.* at 31a. The court added that it had "no doubt" that any error in admitting the video "'did not contribute to the verdict obtained.'" *Id.* at 37a (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)).

The court of appeals framed its harmless-error analysis by explaining that the district court provided "detailed limiting instruction[s] specifically circumscribing the jury's consideration of the interrogation video" by directing the jury to consider it only to evaluate the lack-of-remorse aggravator and equally-culpable mitigator and by instructing the jury to dis-

regard the officers' statements of fact or opinion. Pet. App. 31a. The court further explained that the district court gave "equally unequivocal" instructions prohibiting jurors from considering petitioner's ethnicity or religious affiliation and that "[e]ach juror signed the certificate" certifying that such factors did not influence their decision. *Id.* at 32a-33a. Given those instructions and the signed juror certifications, the court found no reason in this case to disregard "the 'almost invariable assumption of the law that jurors follow their instructions.'" *Id.* at 33a (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987)).

Although the court of appeals concluded that the jury instructions would at least "neutralize the officers' statements in the video," it noted that petitioner also objected on appeal to admitting the "video in its entirety," including petitioner's own verbal and nonverbal responses to questioning. Pet. App. 34a. The court accordingly evaluated the video's impact in light of the "limited purposes" for which the jury was instructed to consider the video—"the lack-of-remorse aggravator and the equally-culpable mitigator," *ibid.*—and concluded that the video did not affect the verdict. *Id.* at 34a-35a. The court concluded "beyond a reasonable doubt" that the video did not alter the jury's determination on the lack-of-remorse aggravator and that "'the jury could not reasonably have reached another conclusion'" because petitioner himself "bragged about being a hitman" to multiple witnesses, attempted to collect his contract payment even "after the murder," schemed for months to "conceal evidence" and mislead investigators, and "groused crudely about the investigation." *Id.* at 34a (citation omitted). Moreover, petitioner himself never "at-

tempted to argue that [he] exhibited remorse in any way." *Ibid.* The court separately concluded that the video did not alter the jury's determination on the equally-culpable mitigator because the jury unanimously found in petitioner's favor on that factor. *Id.* at 35a.

The court of appeals additionally concluded that the jury's balancing of those two factors could not "have possibly produced a different result." Pet. App. 35a. The video, it explained, was not only quantitatively "an insignificant portion" of the trial, which lasted over three weeks and featured five days of penalty-phase evidence, *ibid.*, it was also "inconsequential from a qualitative perspective," *id.* at 36a. "[T]his was simply not a close case," the court explained, and "the evidence on each aggravator was overwhelming." *Id.* at 84a; see *id.* at 87a. What "drove the jury's decision," the court reasoned, "was not some video but the overpowering evidence of [petitioner's] guilt, his pivotal role in the crime, and the exceptionally callous nature of his conduct," which "robbed an innocent man of his life and two small children of their father" for the mere promise of money. *Id.* at 36a. Not only did the aggravators found by the jury illustrate "the utter heartlessness of this horrific homicide," the court stated, petitioner had the opportunity to present a "multitude of arguments for leniency" beyond just the equally-culpable mitigator, which were "entirely untainted by the interrogation video." *Ibid.* Petitioner's clemency plea, the court concluded, "simply did not overcome in the jury's eyes the case presented by the government." *Id.* at 37a. The court added that it had "no doubt" that any error

in admitting the video did not contribute to the verdict. *Ibid.*

b. Second, the court of appeals concluded that petitioner failed to identify reversible error in his challenges to the prosecutor's penalty-phase summation.

i. The court of appeals stated that the prosecutor's argument that Cat was not equally culpable because she showed remorse and admitted her actions in her guilty plea was "problematic" in light of petitioner's Sixth Amendment jury-trial right but added that the prosecutor merely rebutted the "equally-culpable mitigator" that petitioner himself made "a centerpiece of the proceeding." Pet. App. 56a-57a. The court also concluded that two statements in the prosecutor's summation about petitioner's "demeanor" and failure to express "regret," which "referenced [petitioner's] silence" in his videotaped interview, would be inappropriate given the court's earlier assumption that the video should have been suppressed, but that such statements would not necessarily infringe petitioner's Fifth Amendment right against self-incrimination. *Id.* at 58a-60a. The court concluded that it need not resolve either issue, however, because it would "assume for the sake of argument" that both were error, *id.* at 58a, 61a, and would then evaluate whether such errors would constitute reversible error, *id.* at 61a-63a.

The court of appeals explained that petitioner "did not object even once to the prosecution's closing argument." Pet. App. 62a. But rather than apply plain-error analysis, the court indicated that such analysis was unnecessary because any errors were harmless beyond a reasonable doubt. *Ibid.* The potentially erroneous portions of the prosecutor's summation, the court explained, "relate at most to the lack-of-remorse

aggravator and the equally-culpable mitigator" and, as such, the statements would not have changed "the jury's sentencing verdict": the "prosecution indisputably proved [petitioner's] absence of contrition" and the jury "voted *for* [petitioner]" on the equally-culpable mitigator. *Ibid.* Moreover, the court explained that the "comments that [petitioner] challenges for the first time on appeal" were "but a small fraction" of the summation and, when "set in the context of 'the overwhelming force of the aggravating factors" showing "the violent and predatory nature" of petitioner's character and actions, the government "established beyond a reasonable doubt" that the statements "did not contribute to the verdict." *Id.* at 62-63a (citations omitted).

ii. The court of appeals stated that the prosecutor's summation improperly asked the jury to "do your duty" and "send a message to the community" by returning a capital verdict. Pet. App. 71a-72a. But the court rejected petitioner's claim of error because the "isolated" comments did not rise to the level of a constitutional due-process violation. *Id.* at 73a-74a (citation omitted).

c. Finally, the court of appeals rejected petitioner's two-paragraph argument on appeal that "errors infected virtually every aspect of the sentencing proceeding" and "cannot collectively be deemed harmless beyond a reasonable doubt" because "the cumulative impact of the errors clearly 'exceeds their impact individually,' and violates the Due Process Clause." Pet. C.A. Br. 93 (citation omitted). Although the court had rejected most of petitioner's asserted errors underlying his contention that "the totality of th[ose] errors * * * rendered his entire sentencing hear-

ing fundamentally flawed," Pet. App. 84a, the court explained that the remaining errors did not "so fatally infect the trial" as to violate "fundamental fairness," *ibid.* (citation omitted). See *id.* at 84a-87a. The court explained that it had "recognized (and assumed) a few harmless errors" but that the sentencing as a whole was "thoroughly fair" and that the errors were not sufficiently "widespread or prejudicial" that they would have "play[ed] a role in the outcome." *Id.* at 85a (citation omitted). Given the "cumulative weight of all the evidence against [petitioner]," the court held that the cumulative effect of any errors would not "have caused the jury to weigh the relevant sentencing factors any differently." *Id.* at 85a, 87a (citation omitted).

d. Judge Niemeyer concurred. Pet. App. 88a-89a. He concluded that petitioner's interview video was properly admitted; the investigators' references to race and religion "were not inflammatory, unless any reference to race, ethnicity, and religion is considered inflammatory"; and, in any event, any error here "was harmless beyond a reasonable doubt" in light of the jury instructions and juror certifications. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 17-31) that the court of appeals employed the wrong harmless-error standard because it did not evaluate whether an error affected the "actual" jury in this case and, instead, applied an objective standard involving a "hypothetical, reasonable jury," Pet. *ii*. Petitioner further contends (Pet. 31-37) that the court of appeals applied the wrong standard for evaluating the cumulative effect of multiple errors. The court of appeals' decision is correct and does not conflict with any decision of this Court or any

other courts of appeals. No further review is warranted.

1. Petitioner contends (Pet. 17-31) that harmless-error review requires an assessment of an error's "effect on the jury that actually decided the case" not its likely effect on "a hypothetical, 'reasonable' jury," Pet. 18. That contention is incorrect and does not warrant review.

a. Outside of the narrow category of "structural" errors, see *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999) (citation omitted), Rule 52(a)'s requirement that an error "affect substantial rights" to warrant reversal, Fed. R. Crim. P. 52(a), requires the reviewing court to examine "the district court record * * * to determine whether the error was prejudicial," *i.e.*, whether it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (discussing Rule 52(a)); see *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986).

This Court has established an objective test for harmlessness that asks whether "a rational jury would have found the defendant guilty absent the error," *Neder*, 527 U.S. at 18; eschews "a subjective enquiry into the [actual] jurors' minds," *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991); and disregards errors that should not have altered the trial's "outcome" even though they might have "altered the basis on which the jury [actually] decided the case," *Rose* v. *Clark*, 478 U.S. 570, 582 n.11 (1986). See *Pope* v. *Illinois*, 481 U.S. 497, 503 n.6 (1987); *Harrington* v. *California*, 395 U.S. 250, 254 (1969) ("probable impact" on an "average jury"). That test requires "weigh[ing] the probative force of th[e] evidence" properly admitted to determine whether the error was sufficiently "unimportant

in relation to everything else" that it would not have altered the verdict. *Yates*, 500 U.S. at 403-405; see *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986). That analysis is based on a "review of the entire record," a consideration of the jury instructions, and an application of the "presumption that jurors follow [those] instructions." *Yates*, 500 U.S. at 404-405.

The court of appeals correctly applied that objective analysis. Cf. Pet. 29 (admitting that court of appeals applied an "objective test" to analyze whether a "reasonable jury would have reached a different verdict" absent the error). For instance, after the court assumed that the district court erred in admitting the December 11 interview video, the court identified the relevant jury instructions and carefully analyzed whether the assumed error might have altered the jury's guilt-phase determinations in light of the limiting instructions that restricted its consideration of the video. See pp. 11-14, *supra*. Significantly, although petitioner contends (Pet. 30-31) that it would be "impossible for any reviewing court" to determine how the video affected the "actual jury['s]" subjective deliberations because "[n]othing in the record" reflects the particular jury's thought processes, petitioner does not contend that the court of appeals' objective assessment of harmlessness beyond a reasonable doubt was erroneous if an objective inquiry is the proper one.[2]

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[2] Petitioner appears to suggest (Pet. 20, 31) that the jury's unanimous recommendation of life imprisonment on the carjacking count and capital sentences on the conspiracy-to-commit-murder-for-hire and use-of-a-firearm-during-a-crime-of-violence counts shows that this was a close case. The jury's verdict, however, reasonably distinguished between the sentences for those distinct

b. Petitioner suggests (Pet. 18) that this Court has "never squarely addressed" whether harmless-error review turns on an objective analysis (a "hypothetical jury") or a subjective, "actual jury" approach. That is incorrect. *Yates* made clear that the proper analysis requires a "judgment about the significance of the [error] to *reasonable* jurors" and does not involve "a subjective enquiry into the [actual] jurors' minds." 500 U.S. at 404 (emphasis added). *Neder* subsequently confirmed that objective inquiry. *Neder* addressed a constitutional error that indisputably affected the actual jury's verdict because the error "prevent[ed] the jury from making a finding on [an] element" of the offense. 527 U.S. at 4, 10-11. Yet the Court held that error harmless in light of the "overwhelming record evidence of guilt," even though "the jury did not *actually* consider" such evidence under its instructions, because a "*rational* jury would have found the defendant guilty absent the error," *i.e.*, the "verdict would have been the same absent the error," *id.* at 17-18 (second emphasis added).

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offenses. The count of conspiracy to commit murder-for-hire required proof beyond a reasonable doubt that petitioner "inten[ded] to murder" Voss, see C.A. App. 2197 (jury instruction), and the count of murder with a firearm in relation to a crime of violence was itself established by petitioner's use of a firearm during that murder-for-hire conspiracy (a crime of violence), see *id.* at 2214. In contrast, the district court instructed the jury that the carjacking count did not require proof that petitioner "actually intended" to harm Voss as part of the offense of taking or attempting to take Voss's truck. See *id.* at 2204, 2206. That significant distinction between the nature of the offenses for which petitioner was convicted provides a rational explanation for the jury's sentencing verdict.

Petitioner bases his position primarily on statements in *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993). See Pet. 18-19. But *Sullivan* merely held that a defective reasonable-doubt instruction was a structural error that was *not* subject to harmless-error review because it "vitiate[d] *all* the jury's findings" such that no "jury verdict within the meaning of the Sixth Amendment" was ever rendered. 508 U.S. at 280-281; see *Neder*, 527 U.S. at 8, 10-11 (discussing *Sullivan*).

In that structural-error context, *Sullivan* stated that the Sixth Amendment's jury-trial guarantee requires a court to consider "what effect [the error] had upon the guilty verdict in the case at hand," not simply the effect that it might have had "upon a reasonable jury." 508 U.S. at 279. *Neder* has since made clear that this aspect of *Sullivan*'s reasoning "cannot be squared with [the Court's] harmless-error cases" and does not apply where (as here) a jury instructed on the reasonable-doubt standard has rendered its verdict. *Neder*, 527 U.S. at 10-11, 17; see *Washington* v. *Recuenco*, 548 U.S. 212, 222 n.4 (2006) ("a broad interpretation of our language from *Sullivan* is inconsistent with our case law"). Petitioner suggests (Pet. 19) that *Neder* "did not purport to overrule *Sullivan*," but that contention is unavailing in this harmless-error context. *Sullivan* addressed only *structural* error for which harmless-error analysis is inapplicable and, as noted, this Court has rejected the application of *Sullivan*'s dicta to the harmless-error context.[3]

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[3] Harmless-error review does not displace any jury-trial guarantee. Cf. Pet. 4 n.3 (noting statutory right to capital sentencing jury). Such review applies only *after* the jury has rendered its verdict, and it therefore "addresses a different question: what is to

Petitioner states (Pet. 21-22) that a "substantial body of scholarship" supports his position, but he relies primarily on pre-*Neder* sources that did not survive *Neder*'s analysis. See, *e.g.*, Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1200-1201, 1204 (1995) (basing analysis on *Sullivan*'s "discussion of harmless-error review," which Judge Edwards mistakenly understood as breaking from this Court's harmless-error precedents). Petitioner cites (Pet. 22) only one post-*Neder* article, and that article confirms petitioner's lack of authority. The article's author acknowledges that *Neder* "clearly[] has come down in favor of" a harmless-error inquiry that turns on whether a "reasonable jury" would have reached the same result but asserts that *Neder* was "wrongly decided." Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. Kan. L. Rev. 309, 311-312 (2002).

c. Petitioner contends (Pet. 24-28) that an objective harmless-error standard is inappropriate when reviewing errors committed in the penalty phase of a capital case, because no "objective guidance" governs a jury's exercise of discretion when deciding whether aggravating factors sufficiently outweigh mitigating

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be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?" *Rose*, 478 U.S. at 582 n.11. Thus, as the Court held in *Neder*, "[a] reviewing court making th[e] harmless-error inquiry does not * * * 'become in effect a second jury'" that renders a new verdict. 527 U.S. at 19 (citation omitted). It simply performs a "typical appellate-court" function when deciding whether the asserted error was harmless based on the record of the case. *Ibid.*

factors to justify capital punishment. That contention disregards this Court's precedents.

Since *Chapman* v. *California*, 386 U.S. 18 (1967), this "Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless," even those in capital sentencing proceedings. *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991) (citing, *e.g.*, *Clemons* v. *Mississippi*, 494 U.S. 738, 752-754 (1990), and *Satterwhite* v. *Texas*, 486 U.S. 249 (1988)). In fact, "a number of [the Court's] harmless-error cases" have involved constitutional errors in "capital sentencing proceeding[s]." *Mitchell* v. *Esparza*, 540 U.S. 12, 16-17 (2003) (per curiam). In *Clemons*, for instance, the Court explained that it would be "permissible" for a reviewing court to find an error harmless if it concludes "beyond reasonable doubt that the sentence would have been the same" if an erroneous aggravating factor had been removed and the remaining aggravator was "balanced against the mitigating circumstances." 494 U.S. at 753. The Court in *Jones* v. *United States*, 527 U.S. 373 (1999), likewise concluded that an error concerning an aggravating factor will be harmless if the reviewing court is convinced that a jury would have returned the same verdict if the invalid aggravator had not been submitted to the jury. *Id.* at 402.

Petitioner's approach would not permit such analysis because "[n]othing in the record" would "indicate[] on what basis the actual jury determined that the aggravators 'sufficiently' outweighed [the mitigating factors]." Pet. 30. Federal Rule of Evidence 606(b)(1) broadly prohibits the admission of a juror's testimony about "the effect of anything on that juror's or anoth-

er juror's vote" and "any juror's mental processes concerning the verdict." Because "[t]he jury's deliberations are secret and not subject to outside examination," it would be mere "conjecture" to ascribe a basis for the actual jurors' decision using "speculation into what transpired in the jury room." *Yeager* v. *United States*, 557 U.S. 110, 122 (2009). Thus, as petitioner appears to suggest, his subjective, actual-jury test for harmlessness would effectively make it "*impossible* for any reviewing court" to conclude that the government established harmlessness "beyond a reasonable doubt" because "[n]othing in the record" will normally provide the requisite evidence of the actual jury's decision processes. Pet. 30 (emphasis added).

Although this Court has observed that harmless-error determinations for capital-sentencing errors "may be more difficult because of the discretion that is given to the sentencer," *Satterwhite*, 486 U.S. at 258, it has not indicated that the harmless-error standard is itself different. To the contrary, *Satterwhite* "applied the traditional appellate standard of harmless-error review set out in *Chapman*" to the capital-sentencing-error context, *Murray* v. *Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion), by conducting the same type of analysis applied by the court of appeals here: The Court examined the likely impact of the error on the jury in light of the entire trial record without attempting to evaluate the views of the actual jurors in the case. See *Satterwhite*, 486 U.S. at 258-260. Even petitioner does not contend that a special subjective harmless-error framework should apply to capital-sentencing errors. He instead appears to argue that a subjective, effect-on-the-actual-jury test

should govern all harmless-error analysis and that the sentencing context here merely "amplifies" the difference between that test and an objective, rational-jury approach. See Pet. 27; cf. Pet. 23-24 (asserting circuit split based on decisions in non-capital contexts). As explained above, the objective analysis applied by the court of appeals here reflects this Court's longstanding harmless-error analysis. See pp. 17-19, *supra*.

d. Petitioner contends (Pet. 20-21, 22-24) that the courts are divided over the applicable harmless-error standard. That is incorrect.

To support his claim of a division of authority, petitioner relies (Pet. 23-24) on decisions with language indicating that harmless-error review examines the effect of the error on the verdict in the case. But those decisions do not reject an objective analysis.[4] As the Court explained in *Neder*, if "a reviewing court concludes beyond a reasonable doubt" based on its review of the record that "a rational jury would have" reached the same verdict absent the error, then the

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[4] Petitioner cites (Pet. 23) the D.C. Circuit's 1998 decision in *United States* v. *Cunningham*, 145 F.3d 1385 (Edwards, C.J.), cert. denied, 525 U.S. 1059 (1998), and 525 U.S. 1128 (1999), which previously provided support for petitioner's position. *Cunningham* cited both *Sullivan* and Judge Edward's 1995 harmless-error article in concluding that harmless-error review evaluates whether the error had "an effect on the verdict"—not whether "a reasonable jury" would have reached the same result absent the error—and that the Sixth Amendment's jury-trial guarantee prohibits the latter inquiry's use of a "reasonable jury" standard because it "'hypothesize[s] a guilty verdict that was never rendered.'" *Id.* at 1394 (citation omitted). *Cunningham*'s reasoning, however, preceded—and did not survive the analysis in—the Court's 1999 decision in *Neder*. See pp. 20-21, *supra*. The D.C. Circuit thus now applies the objective, rational-jury test that petitioner contends is erroneous. See note 5, *infra*.

court has concluded that the "error 'did not contribute to the verdict obtained'" in the case. 527 U.S. at 17-18 (quoting *Chapman*, 386 U.S. at 24). Indeed, the same courts that petitioner contends (Pet. 22-24) are in conflict with the court of appeals in this case utilize an objective inquiry based on the reviewing court's assessment of the error's effect on a rational jury.[5]

This Court has repeatedly denied certiorari on similar questions addressing the harmless-error standard. See, *e.g.*, *Gomez* v. *United States*, 134 S. Ct. 784 (2013) (No. 13-5625); *Demmitt* v. *United States*, 134 S. Ct. 420 (2013) (No. 12-10116); *Ford* v. *United States*, 133 S. Ct. 2795 (2013) (No. 12-7958); *Acosta-Ruiz* v. *United States*, 133 S. Ct. 2795 (2013) (No. 12-6908). No different result is warranted here.

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[5] See, *e.g.*, *United States* v. *Marshall*, 753 F.3d 341, 346 (1st Cir. 2014) (Souter, J.) (error is "harmless if it is clear beyond a reasonable doubt that a *rational jury* would have found guilt absent the error") (emphasis added); *United States* v. *Taylor*, 745 F.3d 15, 27 (2d Cir. 2014) (same); *Townsend* v. *Benjamin Enters., Inc.*, 679 F.3d 41, 56 (2d Cir. 2012) (error is deemed not to have "influence[d] the jury's finding" when "no reasonable juror" would have concluded otherwise); *United States* v. *Korey*, 472 F.3d 89, 96-97 (3d Cir. 2007) (harmless error analysis turns on whether a "rational jury" or "reasonable jury" would have reached the same result absent the error) (citations omitted); *United States* v. *Blackwell*, 459 F.3d 739, 769 (6th Cir. 2006) ("[F]ederal courts must determine whether [an] error was harmless from the perspective of the rational juror, not from the perspective of the individual jurors in a particular case."), cert. denied, 549 U.S. 1211 (2007); *United States* v. *Green*, 254 F.3d 167, 171 (D.C. Cir. 2001) ("The dispositive question" in constitutional harmless-error review "is simply whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'") (citation omitted).

e. In any event, this case would be a poor vehicle to resolve the harmless-error question that petitioner presents because petitioner's failure to object to the asserted errors in district court warrants application of plain-error, not harmless-error, review.

Petitioner's sole objection to the December 11 interview video was his (unsuccessful) contention that the video did not rebut any evidence that he submitted in his mitigation case. C.A. App. 3044-3050. Petitioner thus never objected that the video (or any portion thereof) was inadmissible on the grounds that he would later assert for the first time on appeal. Petitioner likewise failed to object to any portion of the prosecutor's summation. *Id.* at 3104-3142, 3172-3180. The court of appeals recognized that plain-error review could be warranted in light of those failures, but it concluded that, in any event, petitioner could not prevail even under the harmless-error review applicable to properly preserved contentions. Pet. App. 30a-31a, 62a; see pp. 11, 14, *supra*. That conclusion, however, does not relieve petitioner of his burden of establishing plain error.

To secure relief, petitioner would have to demonstrate reversible plain error by establishing (1) an error that is (2) "clear or obvious, rather than subject to reasonable dispute," and that both (3) affected his "substantial rights" by "affect[ing] the outcome" of the proceedings and (4) "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (quoting *Puckett* v. *United States*, 556 U.S. 129, 135 (2009)). That inquiry, however, is materially distinct from the harmless-error question on which petitioner seeks review. Among other things, it is peti-

tioner who "bears the burden of persuasion with respect to prejudice" and must thus make a "specific showing" that any error "affected the outcome" of the sentencing proceedings. *Olano*, 507 U.S. at 734-735; see *Jones*, 527 U.S. at 394-395 (applying plain-error standard to jury instruction in capital sentencing proceeding and concluding that defendant failed to carry burden of establishing an effect on his substantial rights). It is unclear whether petitioner would contend that such a showing requires a defendant to present evidence that the "actual jury" that decided his case would have rendered a different verdict absent the error. Regardless, the proper inquiry would be significantly different than the harmless-error question on which petitioner seeks review.

2. Petitioner separately contends (Pet. 31-36) that the court of appeals erred in rejecting his "cumulative error" argument because the court concluded that the errors did not "so fatally infect the trial" as to violate "fundamental fairness," Pet. App. 84a (citation omitted), rather than determine that the errors were harmless as a group. The court of appeals correctly rejected petitioner's cumulative-error argument, and its decision warrants no further review.

The court of appeals simply responded to petitioner's two-paragraph cumulative-error argument on appeal. Petitioner argued that "errors infected virtually every aspect of the sentencing proceeding" and "cannot collectively be deemed harmless beyond a reasonable doubt" because "the cumulative impact of the errors clearly 'exceeds their impact individually,' and violates the Due Process Clause." Pet. C.A. Br. 93 (citation omitted); see *id.* at 92 ("cumulative effect" of errors can "violate[] the due process guarantee of fun-

damental fairness") (quoting *Taylor* v. *Kentucky*, 436 U.S. 478, 487 n.15 (1978)). The court of appeals thus directly addressed petitioner's due-process argument that invoked "fundamental fairness" by rejecting its premise.

Moreover, the court of appeals has explained that, under the "cumulative error doctrine," prejudice (*i.e.*, non-harmlessness) is established "if the combined effect of [multiple] errors affected [a defendant's] substantial rights, even if individually neither error is sufficiently prejudicial" by itself. *United States* v. *Martinez*, 277 F.3d 517, 532 (4th Cir.), cert. denied, 537 U.S. 899 (2002). The doctrine thus recognizes that "the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error" and that "this requirement" is satisfied when such errors "violate[] the trial's fundamental fairness." *United States* v. *Lighty*, 616 F.3d 321, 371 (4th Cir.) (citation omitted), cert. denied, 131 S. Ct. 846 (2010), and 132 S. Ct. 451 (2011). The court of appeals here thus focused its inquiry on whether petitioner's asserted errors as a whole would have affected the verdict. It concluded that "any possible error did not play a role in the outcome" and that, based on its review of the record, "cumulative error could [not] have caused the jury to weigh the relevant sentencing factors any differently." Pet. App. 85a (quoting *Lighty*, 616 F.3d at 371); see *id.* at 87a.

That approach is not materially different than that used by other courts. Petitioner suggests that the Sixth and Tenth Circuits "do not use this 'fundamental fairness' test" and apply a test that is the same as that for individual errors, Pet. 32, because they "consider[]

[the errors] as a group," *United States* v. *Caraway*, 534 F.3d 1290, 1302 (10th Cir. 2008) (dictum) (finding no basis to conduct "cumulative harmless-error analysis"), and focus on their "combined effect," *United States* v. *Parker*, 997 F.2d 219, 222 (6th Cir. 1993).[6] But both the Sixth and Tenth Circuits, like the court of appeals here, expressly conduct cumulative-error analysis by asking whether the errors collectively deprived the defendant of fundamental fairness. See, *e.g.*, *ibid.* ("The combined effect of these four errors was so prejudicial as to strike at the fundamental fairness of the trial" and thus deny "due process.").[7]

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[6] Petitioner mistakenly refers to the Sixth Circuit's decision in *Parker* as being a Fifth Circuit precedent. Pet. 32. Neither Fifth nor Sixth Circuit authority supports petitioner. See note 7, *infra*.

[7] See also, *e.g.*, *United States* v. *Willoughby*, 742 F.3d 229, 240 (6th Cir. 2014) ("To obtain a new trial based on cumulative error, [the defendant] must show that 'the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair.'") (quoting *United States* v. *Trujillo*, 376 F.3d 593, 614 (6th Cir. 2004)); *Stouffer* v. *Trammell*, 738 F.3d 1205, 1229 (10th Cir. 2013) (Cumulative error doctrine "consider[s] whether [the errors'] cumulative effect 'so infected the trial with unfairness as to make the resulting conviction a denial of due process, or rendered the sentencing fundamentally unfair in light of the heightened degree of reliability demanded in a capital case.'") (citation omitted); *Grant* v. *Trammell*, 727 F.3d 1006, 1025 (10th Cir. 2013) (similar; explaining that "our search turns up only two published cases in the last many years in which this circuit has found cumulative error"), cert. denied, 134 S. Ct. 2731 (2014).

Other courts, including the Second Circuit (cf. Pet. 34), are in accord. See, *e.g.*, *United States* v. *Isgar*, 739 F.3d 829, 841-842 (5th Cir. 2014) ("The cumulative error doctrine," which "provides for reversal when an aggregation of non-reversible errors * * * cumulatively deny a defendant's constitutional right to a fair trial," will justify reversal "only when errors so fatally infect the trial that they violated the trial's fundamental fairness.") (citations

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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omitted), petition for cert. pending, No. 13-10484 (filed June 4, 2014); *United States* v. *Cervantes*, 706 F.3d 603, 619 (5th Cir. 2013) (same); *United States* v. *Whitten*, 610 F.3d 168, 200-201 (2d Cir. 2010) (cumulative effect of errors will warrant reversal if they undermine "the fairness of the proceedings * * * even if no single error requires reversal") (quoting *United States* v. *Rahman*, 189 F.3d 88, 145 (2d Cir.) (per curiam), cert. denied, 528 U.S. 982 (1999), and 528 U.S. 1094 (2000)); *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 147 (2d Cir. 2008) ("The cumulative error doctrine comes into play only where 'the total effect of the errors found casts such a serious doubt on the fairness of the trial that the convictions must be reversed.'") (ellipses, brackets, and citation omitted), cert. denied, 556 U.S. 1283 (2009), and 558 U.S. 1137 (2010).