No. 10-7564

IN THE SUPREME COURT OF THE UNITED STATES

LEN DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Miller-El v. Dretke, 545 U.S. 231 (2005), and Snyder v. Louisiana, 552 U.S. 472 (2008), changed the legal standards for claims under Batson v. Kentucky, 476 U.S. 79 (1986), requiring the court of appeals to make an exception to the law-of-the-case doctrine and to reconsider its 1999 decision rejecting petitioner's Batson challenge.

2. Whether, in light of Ring v. Arizona, 536 U.S. 584 (2002), and reading the indictment with maximum liberality, the indictment in this case adequately alleged petitioner's mental state and a statutory aggravating factor that made petitioner eligible for the death penalty.

3. Whether, if not, the failure of an indictment to allege statutory factors for death-eligibility under the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 et seq., is harmless error, where a reviewing court can conclude from the allegations in the indictment that the grand jury would have alleged those additional factors if it had been asked to do so.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 52a-90a) is reported at 609 F.3d 663. Earlier opinions of the court of appeals (Pet. App. 1a-41a, 42a-51a) are reported at 185 F.3d 407 and 380 F.3d 821.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2010. A petition for rehearing was denied on August 16, 2010 (Pet. App. 91a-92a). The petition for a writ of certiorari was filed on

November 15, 2010. 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 Louisiana, petitioner was convicted of conspiracy to violate civil rights, in violation of 18 U.S.C. 241 (Count 1); deprivation of civil rights under color of law resulting in death, in violation of 18 U.S.C. 242 and 2 (Count 2); and tampering with a witness, in violation of 18 U.S.C. 1512(a)(1)(C) and 2 (Count 3). Petitioner was sentenced to death. The court of appeals affirmed petitioner's convictions on Counts 1 and 2, reversed as to Count 3, and remanded for resentencing. Pet. App. 1a-41a. On remand, the district court held that petitioner was eligible only for a sentence of imprisonment. The court of appeals reversed. Id. at 42a-51a. After a second penalty-phase hearing, petitioner was sentenced to death. The court of appeals affirmed. Id. at 52a-90a.

1. Petitioner was a New Orleans police officer. On October 10, 1994, Kim Marie Groves witnessed petitioner and his partner pistol-whip a suspect; she then filed a complaint against petitioner with the New Orleans Police Department's internal-affairs office. Petitioner learned of Groves's complaint on October 12, and the next day, he contacted Paul Hardy, a drug dealer who had done favors for him in exchange for police

protection, to discuss a plan to murder Groves to prevent her from testifying against him. Petitioner arranged to meet Hardy and Damon Causey, one of Hardy's associates, at the police station so that he could take them to find Groves. Throughout the day, petitioner had several conversations with Hardy, and they repeatedly tried to locate Groves. When petitioner finally saw Groves, he paged Hardy to notify him of Groves's location, to provide a description of her clothing, and to order her murder. At approximately 11:00 p.m., Hardy shot Groves in the head, killing her. Pet. App. 10a-11a, 63a-64a.

2. Petitioner, Hardy, and Causey were indicted in December 1994. Pet. App. 64a. In July 1995, the government gave notice of its intention to seek the death penalty against petitioner under the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq. The notice informed petitioner that the government would seek the death penalty based on proof of mental culpability, 18 U.S.C. 3591(a)(2)(A)-(C), and the statutory aggravating factors of substantial planning and premeditation, 18 U.S.C. 3592(c)(9), and procuring the offense by payment and promise of payment, 18 U.S.C. 3592(c)(7). 94-381 Docket entry (July 31, 1995).

In August 1995, the grand jury returned a third superseding indictment. Count 1 charged that petitioner, Hardy, and Causey "willfully * * * conspire[d]" to violate the civil rights of Kim Marie Groves and another unnamed individual, resulting in

death, in violation of 18 U.S.C. 241, and that it was "part of the plan and purpose of this conspiracy that Kim Marie Groves and the other individual known to the grand jury would be killed." Third Superseding Indictment 1-2. Count 2 charged that petitioner and Hardy "did willfully deprive" Groves of her civil rights by use of excessive force, i.e., "by shooting [her] in the head with a firearm, resulting in her death," in violation of 18 U.S.C. 242 and 2. Third Superseding Indictment 4. Count 3 charged petitioner and Hardy with willfully killing Groves to prevent her communications to a law enforcement officer regarding a possible federal crime, in violation of 18 U.S.C. 1512(a)(1)(C) and 2. Third Superseding Indictment 4.

3. During jury selection, petitioner and his co-defendants argued that the prosecution had exercised its peremptory strikes in a racially discriminatory manner, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Pet. App. 84a. The district court held a hearing, considered the prosecutors' reasons for the strikes, and overruled the Batson challenge. Ibid.

The jury found petitioner guilty on all counts. At the conclusion of the penalty hearing, the jury unanimously found that petitioner had the requisite intent under 18 U.S.C. 3591(a)(2)(C), and it also found the statutory aggravating factor of substantial planning and premeditation under 18 U.S.C. 3592(c)(9). The jury

recommended that petitioner be sentenced to death, and the district court imposed a death sentence.

4. The court of appeals affirmed petitioner's convictions on Counts 1 and 2, but it reversed his conviction on Count 3, finding the evidence insufficient to support the conviction on that count. Pet. App. 1a-41a. Petitioner argued that the government had violated Batson during jury selection, but the court of appeals affirmed the district court's rejection of the Batson challenge, noting that the prosecutors' explanations for striking jurors were race-neutral and "not outside the realm of credibility" and that "the district court's decision on the ultimate question of discrimination is a fact finding, which is accorded great deference." Id. at 8a. Because the court of appeals had reversed the conviction on Count 3, and because the jury's recommendation of the death penalty for petitioner was not specifically tied to conviction on a particular count, the court vacated petitioner's death sentence and remanded for resentencing. Id. at 18a.

This Court denied certiorari. 530 U.S. 1277 (2000) (No. 99-8285).

5. On remand, the government filed a revised notice of its intent to pursue the death penalty against petitioner. Before petitioner's resentencing hearing, this Court issued its decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). Relying on Ring, petitioner moved to

dismiss the indictment for failure to allege the requisite FDPA elements establishing his eligibility for a death sentence. The district court agreed that, under Ring, a federal indictment must allege mental culpability and a statutory aggravating factor in order to render a defendant death-eligible. Pet. App. 114a. The district court further concluded that the indictment had not sufficiently alleged those factors and, thus, petitioner was not eligible for a death sentence. Id. at 115a-121a, 129a.

6. The court of appeals reversed. Pet. App. 42a-51a. While the appeal was pending, the court of appeals held in another case that an indictment that did not allege an aggravating factor under the FDPA was constitutionally deficient, but that the error was subject to harmless-error review. United States v. Robinson, 367 F.3d 278, 284-285 (5th Cir.), cert. denied, 543 U.S. 1005 (2004). In this case, the government argued that the indictment sufficiently alleged the mental culpability and statutory aggravating factor, especially in light of the liberal standard applicable to post-conviction challenges to an indictment. Pet. App. 47a-48a. The court of appeals did consider that argument but instead relied on Robinson to assess whether the omission was harmless. Id. at 48a.

The court of appeals' assessment of whether the alleged error in the indictment affected petitioner's substantial rights focused on the two "primary functions of an indictment: (1) providing the

defendant notice of the crime charged, thereby allowing him to prepare a defense, and (2) 'interpos[ing] the public into the charging decision, such that a defendant is not subject to jeopardy for a crime alleged only by the prosecution.'" Pet. App. 49a-50a (quoting Robinson, 367 F.3d at 287). The court determined that "the requisite notice was provided" to petitioner in light of his receipt of the government's notice of intent to seek the death penalty before trial, and again after the sentence was vacated. Id. at 50a. The court further concluded that, "[c]onsidering the overt acts alleged in the indictment returned by the grand jury, there is no doubt that a rational grand jury would have found probable cause that the FDPA intent element and substantial planning and premeditation aggravating factor were present, had those elements been presented to it." Ibid.

This Court denied certiorari. 544 U.S. 1034 (2005) (No. 04-7808).

7. In 2005, petitioner's resentencing trial took place before a new jury, which found that petitioner acted with the statutorily required intent and after substantial planning and premeditation. Pet. App. 65a. The jury recommended that petitioner be sentenced to death on both Counts 1 and 2, and the district court imposed that sentence. Id. at 65a-66a.

8. The court of appeals affirmed. Pet. App. 52a-90a. On appeal, petitioner challenged not only his death sentence but also

his convictions on Counts 1 and 2, which the court had affirmed more than a decade earlier. Petitioner argued that Miller-El v. Dretke, 545 U.S. 231 (2005), and Snyder v. Louisiana, 552 U.S. 472 (2008), required reconsideration of his Batson claim. Pet. App. 84a-86a. The court of appeals rejected that argument, holding that no intervening change in law justified a departure from the law-of-the-case doctrine. Ibid. The court noted that Miller-El "considered the type and quantum of record evidence required to demonstrate a Batson violation" but "did not announce any new elements or criteria." Id. at 85a (citation omitted). Similarly, the court of appeals explained that Snyder "did not change the law of review of peremptory challenges." Ibid.

ARGUMENT

Petitioner argues (Pet. 17-25) that the court of appeals should have reconsidered its earlier decision upholding the district court's finding that jury selection in his case complied with Batson v. Kentucky, 476 U.S. 79 (1986). He further contends (Pet. 25-33) that the court of appeals erred in holding that the failure of the indictment to expressly allege the statutory factors required for death-penalty eligibility was harmless error. The decision of the court of appeals is correct and does not conflict with any decisions of this Court or any other court of appeals. Moreover, in light of the unusual history of this case, neither of

the issues raised by petitioner is likely to recur. Further review is unwarranted.

1. Petitioner argues (Pet. 17-25) that the court of appeals erred in applying the law-of-the-case doctrine and refusing to reconsider its 1999 decision rejecting his Batson claim. Specifically, he contends that Miller-El v. Dretke, 545 U.S. 231 (2005), and Snyder v. Louisiana, 552 U.S. 472 (2008), changed the law governing Batson challenges, thus requiring reexamination of his claim. The court of appeals correctly rejected that argument.

a. In Batson, this Court held that the Constitution prohibits the use of peremptory challenges to strike prospective jurors based on their race. 476 U.S. at 89. Inquiry into a possible Batson violation consists of three steps. First, the defendant must make out a prima facie case of discrimination, such as a pattern of strikes against members of a particular racial group. Id. at 96-97. The burden then shifts to the government to offer race-neutral explanations for the challenged strikes. Johnson v. California, 545 U.S. 162, 168 (2005); Batson, 476 U.S. at 94. Finally, the trial court must evaluate the explanations and decide whether the opponent of the strike has proved purposeful racial discrimination. Johnson, 545 U.S. at 168. The "ultimate question of discriminatory intent represents a finding of fact" and is "accorded great deference on appeal." Hernandez v. New York, 500 U.S. 352, 364 (1991) (plurality opinion).

In its 1999 decision in this case, the court of appeals correctly rejected petitioner's Batson challenge, concluding that "the Government's explanations" for its peremptory challenges "were race-neutral and not outside the realm of credibility." Pet. App. 8a. Noting the deferential standard of review, the court "affirm[ed] the district court's assessment of the Government's explanations for the exercise of its peremptory strikes." Ibid.

Under the law-of-the-case doctrine, a court should ordinarily "refuse to reopen what has been decided" by that court in prior proceedings. Messinger v. Anderson, 225 U.S. 436, 444 (1912). Petitioner argues that the doctrine is inapplicable here because the law has changed since the original decision, but that is incorrect. As the court of appeals recognized, Miller-El and Snyder did not change the legal standards applicable to Batson challenges. Pet. App. 84a-86a. In both Miller-El and Snyder, this Court applied longstanding Batson principles to particular factual situations and concluded that Batson violations had occurred. See Miller-El, 545 U.S. at 240-266; Snyder, 552 U.S. at 485. Neither decision effected a change in controlling legal standards governing peremptory challenges.

This Court's disposition in Miller-El confirms that the decision did not establish a new legal standard. Because Miller-El arose on habeas review of a state conviction, it was decided under the restrictive standards of 28 U.S.C. 2254(d), which requires a

federal court to limit its review to a state court's compliance with Supreme Court precedent established at "the time of the state court's decision." Wiggins v. Smith, 539 U.S. 510, 520 (2003). Accordingly, the Court did not apply a new legal rule but expressly based its holding on the lower court's "unreasonable determination of the facts." Miller-El, 545 U.S. at 240 (quoting 28 U.S.C. 2254(d)(2)). This Court's "holding means that the principles expounded in Miller-El were clearly established Supreme Court law for [Section 2254] purposes at least by the time of the last reasoned state court decision in Miller-El, handed down in 1992." Kesser v. Cambra, 465 F.3d 351, 360 (9th Cir. 2006) (en banc).

Similarly, Snyder did not change the legal standards for Batson claims; the Court simply applied Batson and its progeny to the facts presented in that case. See 552 U.S. at 474-478. Indeed, in Thaler v. Haynes, 130 S. Ct. 1171 (2010) (per curiam), this Court recently reversed a Fifth Circuit decision that had construed Snyder to impose a new "blanket rule" that any peremptory strike based on demeanor must be rejected where the district court did not observe the juror's demeanor. Id. at 1174-1175 & n.2. This Court rejected that interpretation and emphasized the factbound nature of Snyder: "in light of the particular circumstances of the case, we held [in Snyder] that the peremptory challenge could not be sustained on the demeanor-based ground." Id. at 1174-1175 (emphasis added).

b. Petitioner claims (Pet. i, 19) that, in its 1999 decision, the court of appeals misapplied Batson because it "refused to consider" comparative juror analysis, evidence of jurors' demeanor, or disparate questioning as a means of showing purposeful discrimination. That is incorrect. The court's opinion summarized petitioner's Batson claims, demonstrating that the court reviewed and understood those claims. Pet. App. 7a-8a. In addition, petitioner and his co-defendants briefed their comparative juror analyses and other Batson arguments at length. The government presented a detailed, 32-page response to those claims, see 96-30486 & 96-31171 Gov't C.A. Br. 46-78, and acknowledged that, under circuit law, comparative juror analysis was one way to establish a Batson violation. Id. at 48 (citing United States v. Bentley-Smith, 2 F.3d 1368, 1373 (5th Cir. 1993)). In addition, the voir dire transcript and juror questionnaires relevant to the Batson claims were discussed extensively by the parties and by Judge DeMoss in his separate opinion. See 96-30486 & 96-31171 Gov't C.A. Br. 60-62; 96-30486 Causey C.A. Br. 8 n.8, 40; 96-31171 Hardy C.A. Br. 9 n.8; Pet. App. 25a-27a (DeMoss, J., concurring in part and dissenting in part). Those facts belie petitioner's assertion that the court of appeals "never examined" (Pet. 19) his Batson claim.

Although petitioner emphasizes the comparative juror analysis that this Court discussed in Miller-El and Snyder (see Pet. 21-24),

the idea of comparing minority jurors who were struck with white jurors who were not struck is not new; the court of appeals recognized comparative analysis long before it decided petitioner's first appeal.[1] In 1993, the court noted that, in trying to discredit a prosecutor's explanation for striking minority jurors, a defendant could show that "similar claims can be made about non-excluded jurors who are not minorities." Bentley-Smith, 2 F.3d at 1373-1374; accord United States v. Jimenez, 77 F.3d 95, 100-101 (5th Cir. 1996) (applying comparative juror analysis to Batson claims); see also Balentine v. Thayer, 626 F.3d 842, 855 n.1 (5th Cir. 2010) (citing 1998 precedent and noting that Miller-El's standards "regarding comparative juror analysis had much earlier been stated as the law by this court"). Absent an affirmative refusal to consider comparative juror analysis, the court should be presumed to have applied its own established law.

c. Petitioner incorrectly claims (Pet. 23-24 & n.22) that a circuit conflict exists on the Batson issue presented here. In fact, the question whether Miller-El and Snyder changed Batson law is not the subject of disagreement among courts of appeals. Several courts of appeals have properly concluded that Miller-El did not change the law, and none has decided otherwise. See

[1] The cases petitioner cites (Pet. 21 n.19) confirm that comparative analysis has long been established in the Fifth Circuit, and, contrary to petitioner's assertion (Pet. 21), none of those cases held that struck and non-struck jurors had to be "identical in all respects" in order for a Batson claim to succeed.

Golphin v. Branker, 519 F.3d 168, 186 (4th Cir.) ("[Miller-El] did not alter Batson claims in any way."), cert. denied, 129 S. Ct. 467 (2008); Boyd v. Newland, 467 F.3d 1139, 1146 (9th Cir. 2006) (Miller-El did not "create a new rule of criminal procedure" but "simply illustrates the means by which a petitioner can establish * * * a Batson error"), cert. denied, 550 U.S. 933 (2007). Nor has any court of appeals held that Snyder changed the legal standard governing Batson claims. And, as far as the government is aware, the specific issue presented here -- whether Miller-El and Snyder changed the law in a way that requires an exception to the law-of-the-case doctrine -- has not even arisen in other circuits, much less produced an intercircuit conflict.

Moreover, the narrow issue in this case is of diminishing significance. Petitioner's case is unusual in that it involves two appeals some ten years apart, with his conviction affirmed before Snyder and Miller-El and his sentence affirmed afterwards. For cases on direct review, the question whether Snyder and Miller-El represent a change in law for purposes of the law-of-the-case doctrine would only be relevant where a defendant seeks reconsideration of a Batson determination predating the two decisions. Cases in that posture are rare (petitioner has identified no similar cases) and will be even more so in the future. The issue therefore does not call for this Court's intervention.

d. Even if there were a circuit conflict, this case would be an inappropriate vehicle for resolving it because petitioner forfeited many of his Batson arguments by failing to raise them in his first appeal. In his most recent appeal, petitioner presented a Batson analysis significantly different from that on which he relied in the earlier appeal. His Batson claim in the recent appeal focused primarily on a comparative juror analysis, but he greatly expanded the pool of white jurors he used as comparators. See Pet. C.A. Br. 142-172. He compared the struck African-American jurors to 27 allegedly similarly situated white jurors, only three of whom were mentioned in his brief in the previous appeal. See 96-30486 & 96-31171 Gov't C.A. Br. 69-71. Indeed, the comparative juror analyses in the two appeals overlapped in only one respect: the comparison of one African-American juror (Christina Dabney) with two white jurors (Sally Hunt and Jan Mansfield).[2] Petitioner

[2] Although petitioner compared Dabney (Juror No. 64) to nine white jurors in his recent appeal, Pet. C.A. Br. 154-156, he cited only two of those jurors -- Hunt (Juror No. 94) and Mansfield (Juror No. 40) -- in his first appeal. See 96-31171 Pet. C.A. Br. at 43-45. Unlike Dabney, neither Hunt nor Mansfield (nor any other jurors cited by petitioner) worked as a law-enforcement officer at the time of trial. See Pet. 8 n.8; Pet. C.A. Br. 154-155; 96-31171 Pet. C.A. Br. 44; 4/8/96 Tr. 381. Dabney was a deputy sheriff in New Orleans, her boyfriend was a local police officer, and she could reasonably be perceived as an expert on local police codes and other New Orleans police issues that would arise at trial. Pet. App. 102a.

Petitioner cited a third white juror -- Wallace Rodrigue, Juror No. 155 -- in both appeals, but compared him to a completely different set of jurors in each analysis. Compare Pet. C.A. Br. 145 & n.88, 164 (comparing Rodrigue to Norma Green (Juror No. 12) and Regina Bartholomew (Juror No. 6)), with 96-31171 Pet. C.A. Br. 44-45 (comparing Rodrigue with Jurors 2, 41, 70, 163, and 183).

also changed his analysis of alleged disparate questioning, citing in his recent appeal the questioning of six African-American jurors whom neither he nor his co-defendants mentioned in their disparate-questioning claims in the first appeal.[3] Compare 05-31111 Pet. C.A. Br. 173-175 with 96-31171 Pet. C.A. Br. 43-46 and 96-31171 C.A. Br. 64-65.

e. Finally, petitioner suggests (Pet. 17-18) that the Court should grant his petition, vacate the judgment of the court of appeals, and remand for reconsideration (GVR) in light of Snyder and Miller-El. A GVR is unwarranted here. That procedure is appropriate when the court of appeals did not have the opportunity to consider an intervening decision from this Court or where the court of appeals clearly failed to consider binding precedent. In contrast to the cases on which petitioner relies (Pet. 18), the court of appeals in the most recent appeal already considered the potential impact of Miller-El and Snyder. Pet. App. 48a-86a. There is accordingly no basis for a GVR.

2. Petitioner also contends (Pet. 25-33) that the court of appeals erred in holding that the failure of the indictment to expressly allege the statutory sentencing factors required for death-penalty eligibility was harmless error. This Court need not

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[3] Those six jurors were Elliot Partman (Juror No. 50), Sheryl Goudy (Juror No. 24), Lionel Williams (Juror No. 32), Frank Williams (Juror No. 41), Christina Dabney (Juror No. 64), and Norma Green (Juror No. 12).

decide the issue because, when viewed under the proper standard, the indictment sufficiently alleged the death-eligibility factors and thus no error occurred. In any event, the court of appeals' decision does not conflict with other decisions applying harmless-error review to sentencing-factor indictment errors, and the court's specific analysis in this case warrants no further review.

a. In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In Ring v. Arizona, 536 U.S. 584 (2002), this Court applied Apprendi to Arizona's capital sentencing scheme, in which the trial judge conducted the post-conviction penalty hearing and determined the existence of aggravating factors. The Court held that Arizona's aggravating factors "operate[] as 'the functional equivalent of an element of a greater offense'" and, accordingly, must be found by a jury under the Sixth Amendment. Id. at 609. In United States v. Cotton, 535 U.S. 625 (2002), this Court made clear that, other than a prior conviction, "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum'" must, "[i]n federal prosecutions, * * * also be charged in the indictment." Id. at 627 (quoting Apprendi, 530 U.S. at 490). Taken together, those decisions necessarily imply that, in capital cases, federal grand juries must now allege

statutory sentencing-enhancement factors that render a defendant death-eligible.

b. In this case, petitioner did not challenge the sufficiency of the indictment until years after the jury's guilty verdict and its initial imposition of the death penalty. Pet. App. 45a-46a. The consequence of petitioner's failure to raise the issue before trial is that the indictment must be read liberally in favor of its sufficiency, and under that standard, the indictment is sufficient to withstand petitioner's challenge.

The courts of appeals agree that an indictment challenged after the completion of the government's case should be construed "liberally in favor of sufficiency." United States v. Sabbeth, 262 F.3d 207, 218 (2d Cir. 2001). Thus, "[w]here a defendant first challenges 'the absence of an element of the offense' after a jury verdict," the indictment is "sufficient unless it is so defective that by any reasonable construction, it fails to charge the offense for which the defendant is convicted." United States v. Avery, 295 F.3d 1158, 1174 (10th Cir.), cert. denied, 537 U.S. 1024 (2002) (quoting United States v. Gama-Bastidas, 222 F.3d 779, 786 (10th Cir. 2000)). An indictment that may be held insufficient if challenged before the verdict may survive a challenge that is first raised after the verdict, when the indictment must be read with "maximum liberality." Gama-Bastidas, 222 F.3d at 786 (quoting United States v. Fitzgerald, 89 F.3d 218, 221 (5th Cir.), cert.

denied, 519 U.S. 987 (1996)); accord United States v. Henry, 288 F.3d 657, 660 (5th Cir.), cert. denied, 537 U.S. 902 (2002); United States v. Gibson, 409 F.3d 325, 331 (6th Cir. 2005); United States v. White, 241 F.3d 1015, 1021 (8th Cir. 2001). After the verdict, the proper inquiry is whether the indictment "contains words of similar import to the element in question." Avery, 295 F.3d at 1174 (quoting United States v. Dashney, 117 F.3d 1197, 1205 (10th Cir.), cert. denied, 502 U.S. 951 (1991)).

The rule of "maximum liberality" or "any reasonable construction" applies to petitioner's challenge because he waited until four years after he was found guilty -- long after jeopardy had attached and the government lost its ability to obtain a superseding indictment -- to challenge the absence of specific FDPA elements from the indictment. See Pet. App. 46a. The court of appeals did not examine whether the indictment, when reviewed under the "maximum liberality" standard, was sufficient to allege the statutory aggravating factors because the court believed that its precedent dictated application of the harmless-error standard instead. Id. at 49a. There is no inconsistency, however, between application of a harmless-error standard to an indictment that failed to allege a necessary fact and the "maximum liberality" standard applicable here to determine whether an indictment is insufficient in the first place.

Viewed under the "maximum liberality" standard, the indictment in this case sufficiently alleged the factors necessary to subject a defendant to the death penalty under the FDPA. In particular, the mental-culpability factors that petitioner "intentionally killed the victim," 18 U.S.C. 3591(a)(2)(A), that petitioner "intentionally inflicted serious bodily injury that resulted in the death of the victim," 18 U.S.C. 3591(a)(2)(B), and that petitioner "intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person," 18 U.S.C. 3591(a)(2)(C), were adequately alleged. The indictment charged that petitioner conspired with co-defendants to, inter alia, injure Kim Marie Groves and that "[i]t was part of the plan and purpose of this conspiracy that Kim Marie Groves * * * would be killed." Third Superseding Indictment 1-2. Those factors were also established by the allegations in Counts 2 and 3, which alleged that petitioner called Hardy "to arrange [Groves'] murder," that petitioner "ordered * * * Hardy * * * to * * * murder * * * Groves," and that petitioner and Hardy "did willfully deprive Kim Marie Groves * * * of [civil rights] * * * by shooting [her] in the head with a firearm, resulting in her death." Third Superseding Indictment 2-4 (emphasis added).

The indictment also adequately alleged the statutory aggravating factor that petitioner "committed the offense after

substantial planning and premeditation to cause the death of a person." 18 U.S.C. 3592(c)(9). "Substantial planning and premeditation" requires only "a higher degree of planning * * * than the minimum amount sufficient to commit the offense." United States v. Tipton, 90 F.3d 861, 896 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997); accord United States v. McCullah, 76 F.3d 1087, 1110-1111 (10th Cir. 1996), cert. denied, 520 U.S. 1213 (1997). Here, the indictment alleged in substance that petitioner acted with substantial planning and premeditation. The overt acts alleged that "[a]fter learning that Kim Marie Groves had filed a civil rights complaint against him," petitioner contacted Hardy "on several occasions by cellular telephone on or about October 13, 1994, to arrange the murder of Kim Marie Groves." Third Superseding Indictment 2. The indictment also alleged that petitioner contacted defendant Causey "to arrange a meeting whereby [petitioner] would identify [Groves] to" Hardy and Causey, that petitioner "conducted surveillance of Kim Marie Groves for the purpose of reporting Groves' physical description and location to * * * Hardy," and that petitioner then called Hardy to "order[] [her] murder," which Hardy committed. Id. at 2-3.

In short, the indictment, especially when read under the applicable "maximum liberality" standard, reflects the grand jury's use of words of "similar import," Avery, 295 F.3d at 1174, to adequately allege the mental culpability and substantial planning

and premeditation necessary to make petitioner eligible for the death penalty under the FDPA. See Tipton, 90 F.3d at 896. Because petitioner's challenge can be resolved without addressing harmless error, this case is not an appropriate vehicle for considering the harmless-error standard.

c. In any event, the court of appeals correctly held that harmless-error analysis applies to an Apprendi/Ring indictment error -- i.e., the omission of a statutory sentence-enhancing factor from an indictment. The omission from an indictment of a sentence-enhancing fact should be reviewed for harmlessness because it bears no relation to the limited category of pervasive and fundamental errors that are so intrinsically harmful to the framework of a trial that this Court has deemed them structural -- that is, subject to reversal without regard to an assessment of prejudice. This Court "has found structural errors only in a very limited class of cases." Johnson v. United States, 520 U.S. 461, 468-469 (1997) (citing examples); see Rose v. Clark, 478 U.S. 570, 579 (1986) ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis."). In Neder v. United States, 527 U.S. 1, 8-15 (1999), this Court held that the failure to submit an offense element to the petit jury does not constitute structural error. And in Washington v. Recuenco, 548 U.S. 212, 220-222 (2006), this Court

reached the same conclusion with respect to a sentence-enhancing fact not submitted to the jury. It follows that the omission of a sentence-enhancing fact from the indictment does not constitute structural error either.

Indeed, the type of omission at issue here constitutes a weaker candidate for structural error than the omissions in Neder and Recuenco. This Court has held that errors at the charging stage may be rendered harmless by subsequent developments in the prosecution. See United States v. Mechanik, 475 U.S. 66, 70-72 (1986). And although the Court has recognized "the vital function" served by a grand jury as a check on prosecutorial power, that responsibility is no less than that served by a petit jury, and both functions can continue to be served fully by reviewing errors that limit a jury's decisionmaking process for harmlessness or for plain error. Cotton, 535 U.S. at 634.

Petitioner relies (Pet. 26, 32) on Stirone v. United States, 361 U.S. 212 (1960), and Russell v. United States, 369 U.S. 749 (1962), to argue that structural-error analysis applies. Both those cases, however, were decided before the Court held, in Chapman v. California, 386 U.S. 18, 22-23 (1967), that constitutional errors could be subject to harmless-error analysis. Moreover, neither case involved the omission of a sentence-enhancing element from the indictment. Stirone and Russell are thus inapposite here.

Relying on Vasquez v. Hillery, 474 U.S. 254 (1986), petitioner further asserts (Pet. 30-32) that the alleged error is structural because the grand jury has the independent power to reject an indictment even if probable cause is established. In Vasquez, this Court held that purposeful racial discrimination in the selection of a grand jury is structural error. Id. at 263-264. Although Vasquez contains language suggesting that a grand jury need not indict even if probable cause is shown, id. at 263, the Court's reasoning on that point constituted dictum and cannot compel the conclusion, particularly after Cotton, that all grand-jury errors require automatic reversal.

Indeed, this Court held to the contrary in Mechanik, 475 U.S. at 71-72, and Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988), in which it concluded that nonconstitutional errors in the manner in which evidence was presented and handled at the grand jury stage were subject to harmless-error review. In both cases, this Court observed that the racial discrimination at issue in Vasquez was a rare exception to the ordinary rule that harmless-error analysis applies to errors in the grand jury. Mechanik, 475 U.S. at 70 n.1; Bank of Nova Scotia, 487 U.S. at 257. Petitioner argues (Pet. 31-32 & n.31) that, as in Vasquez, there is no way to predict how a grand jury would have responded had the alleged error not occurred. But that is always true in cases involving harmless-error or plain-error analysis. See Cotton, 535 U.S. at 633-634;

Johnson, 520 U.S. at 470. While there may be instances where it is "too speculative" or "difficult[]" to discern what a jury (petit or grand) would have decided about facts not timely presented to it, those circumstances are not present here. See United States v. Salazar-Lopez, 506 F.3d 748, 750, 754 (9th Cir. 2007). Moreover, while a discriminatory selection process can impede the grand jury's entire operations, the failure to present evidence on a specific sentence-enhancement does not impair the integrity of the grand jury's actual findings. Because the court of appeals could evaluate the specific findings by the grand jury, the court also fairly and appropriately considered whether the grand jury would have similarly found the facts that were not presented to it.

d. A defendant's substantial rights are not harmed by the absence of a grand jury's finding of aggravating factors where the defendant had adequate notice that a particular aggravating factor was at issue and where it can be determined beyond a reasonable doubt that the grand jury would have found the omitted facts had it been asked to do so. See United States v. Robinson, 367 F.3d 278, 287 (5th Cir.), cert. denied, 543 U.S. 1005 (2004). The court of appeals held that any failure of the government to explicitly submit statutory aggravating factors to the grand jury was harmless here for two reasons, and its analysis does not warrant further review.

First, as the court of appeals noted, in July 1995, before the Third Superseding Indictment and several months before petitioner's original trial on guilt or innocence, petitioner received the requisite statutory notice of the government's intent to seek the death penalty and notice of the intent elements and statutory aggravating factor that would be relied upon by the government. Pet. App. 50a. In addition, after remand, petitioner received notice of the government's intent to seek the death penalty based on evidence of intent and the statutory aggravating factor of substantial planning and premeditation. Id. at 46a.

Second, in light of the overwhelming evidence in this case, no rational grand jury could have failed to find that petitioner engaged in substantial planning and premeditation for Groves' murder. Petitioner coordinated meetings with co-conspirators who would be responsible for the shooting; he engaged in multiple searches for Groves over the course of a day; and he contacted co-conspirators to coordinate the killing once he found Groves. Pet. App. 6a, 45a. The overt acts in the superseding indictment set forth petitioner's numerous and substantial efforts to orchestrate Groves' murder. Moreover, where, as here, the petit jury unanimously found beyond a reasonable doubt at trial the existence of petitioner's intent and substantial planning and premeditation, a reviewing court can confidently conclude that the grand jury, applying the less rigorous probable-cause standard, would have

found those same factors. See United States v. Lee, 374 F.3d 637, 651 (8th Cir. 2004); cf. Mechanik, 475 U.S. at 67.

e. Although the courts of appeals are divided on the question whether omission of a statutory element of an offense from an indictment is subject to harmless-error review (see Pet. 25-33), this case involves the distinct question whether the failure of the indictment to allege sentencing-enhancement factors necessary for death eligibility can be harmless error. There is no circuit conflict on that narrow issue.

As petitioner notes, this Court granted certiorari in United States v. Resendiz-Ponce, 549 U.S. 102, 103-104 (2007), to decide "whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error," but the Court ultimately did not decide the issue. The majority of courts of appeals to consider the issue have held that the omission of an element of an offense is subject to harmless-error review (or plain-error analysis, if not timely raised). See United States v. Dentler, 492 F.3d 306, 310 (5th Cir. 2007); United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); United States v. Prentiss, 256 F.3d 971, 981-985 (10th Cir. 2001) (en banc), overruled in part on other grounds by Cotton, 535 U.S. at 633; United States v. Corporan-Cuevas, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001). The Third and Ninth Circuits, by contrast, have held, in

decisions predating this Court's decision in Cotton, that such omissions constitute structural error and thereby necessitate automatic reversal. See United States v. Du Bo, 186 F.3d 1177, 1179-1181 (9th Cir. 1999); United States v. Spinner, 180 F.3d 514, 515-517 (3d Cir. 1999). The Ninth Circuit has since limited Du Bo, and has not applied its ruling when an indictment challenge was untimely, see United States v. Velasco-Medina, 305 F.3d 839, 846-847 (9th Cir. 2002), or when the indictment fails to allege a sentence-enhancing factor, as compared to an offense element. See Salazar-Lopez, 506 F.3d at 750, 753.

But the courts of appeals uniformly agree that harmless-error review applies to Apprendi/Ring indictment error -- that is, to the omission of a sentencing-enhancement factor from the indictment, including the omission of the FDPA factors that make a defendant eligible for the death penalty. See United States v. Allen, 406 F.3d 940, 945 (8th Cir. 2005) (en banc) (FDPA element), cert. denied, 549 U.S. 1095 (2006); United States v. Barnette, 390 F.3d 775, 784-786 (4th Cir. 2004) (FDPA element); United States v. Cordoba-Murgas, 422 F.3d 65, 69, 72 (2d Cir. 2005);[4] United States

[4] As petitioner notes (Pet. 27-28), the Second Circuit's earlier decision in United States v. Thomas, 274 F.3d 655 (2001) (en banc), stated that the failure in that case to allege drug type or quantity in the indictment was akin to a constructive amendment and "prejudicial per se." Id. at 670-671. But Thomas was decided before this Court's decision in Cotton, and the Second Circuit's post-Cotton decision in Cordoba-Murgas makes clear that harmless-error review applies to Apprendi/Ring indictment errors. At any rate, any intra-circuit tension between Thomas and Cordoba-Murgas does not warrant this Court's review. See Wisniewski v. United

v. Trennell, 290 F.3d 881, 889-890 (7th Cir.) (Apprendi/Ring error on drug quantity), cert. denied, 537 U.S. 1014 (2002); Salazar-Lopez, 506 F.3d at 750, 753 (enhanced sentence under 8 U.S.C. 1326(b)(1)); see also United States v. Brown, 441 F.3d 1330, 1367-1368 & n.16 (11th Cir. 2006).

Petitioner conflates the two issues (omission of a statutory element of an offense and omission of a sentence-enhancing factor) and therefore erroneously asserts that that there is a circuit conflict on the specific issue raised by this case. See Pet. 25-29. While this Court has stated (and the United States has argued) that elements of an offense and statutory enhancements should be analyzed in the same manner, see Recuenco, 548 U.S. at 220, as explained above, the conflict among the courts of appeals is limited to the broader issue (omission of a statutory offense element) that is not presented here. This Court has denied certiorari in two other capital cases presenting the same narrow question as here, notwithstanding the existence of the broader conflict noted above, and there is no reason for a different result here. See United States v. Battle, 549 U.S. 1343 (2007); United States v. Allen, 549 U.S. 1095 (2006).

f. This Court's review also is unwarranted because the type of Apprendi/Ring error alleged here has little prospective significance. After this Court's decision in Ring, the United

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States, 353 U.S. 901, 902 (1957) (per curiam).

States now charges the death-eligibility factors in the indictment, as well as in the separate notice required by statute, in any case in which the death penalty is sought. And as discussed above, the unique procedural circumstances of this case -- involving an omission from a superseding indictment after the defendant received the statutory FDPA notice -- are unlikely to arise in future cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2011