No. _____

IN THE

Supreme Court of the United States

JULIUS OMAR ROBINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether district courts may validly prohibit death-sentenced inmates from interviewing their trial jurors post-verdict concerning racial bias during deliberations.
2. Whether the omission of aggravating factors from a federal indictment charging a capital offense is structural error.

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MISCELLANEOUS

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

Julius Robinson ("Robinson" or "Petitioner") petitions for a Writ of Certiorari to review the final order of the United States Court of Appeals for the Fifth Circuit in this case denying his appeal, and affirming the judgment of the United States district court denying him relief on his motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6).

OPINIONS BELOW

The district court deemed Robinson's Rule 60(b)(6) motion a second or successive ("SOS") 28 U.S.C. § 2255 motion and transferred it to the Fifth Circuit Court of Appeals. Petitioner's Appendix ("Pet. App.") B at 24-33. That order was a final, appealable order, requiring no certificate of appealability ("COA"). *United States v. Fulton*, 780 F.3d 683, 687-88 (5th Cir. 2015).

Robinson filed a timely notice of appeal. The Fifth Circuit ruled that Robinson's Rule 60(b)(6) motion was an SOS § 2255 motion and that Robinson failed to meet the standard for certification of such a pleading. In a published opinion, the Fifth Circuit denied his motion for authorization and dismissed the appeal for want of jurisdiction. Pet. App. A at 2-22; *United States of America v. Julius Omar Robinson (In re Robinson)*, 917 F.3d 856 (5th Cir. 2019).

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JURISDICTION

The district court had jurisdiction over Robinson's § 2255 motion under 28 U.S.C. §§ 2241 and 2255. The Fifth Circuit entered judgment on Robinson's Rule 60(b)(6) motion on March 8, 2019. Pet. App. A at 1. Robinson moved for one sixty-day extension of time to and including August 5, 2019 to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Miller-El v. Cockrell*, 537 U.S. 322, 329-31 (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

The Fifth Amendment to the United States Constitution provides, in relevant part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

28 U.S.C. § 2244(a)

Title 28 U.S.C. § 2244(a) provides, "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255."

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28 U.S.C. § 2255(h)

"A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain —

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

Federal Rule of Civil Procedure 60(b)(6)

"Grounds *for Relief from a Final Judgment, Order, or Proceeding.* On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason that justifies relief."

PRELIMINARY STATEMENT

This case presents two key questions left unanswered by this Court's jurisprudence.

First, Robinson asks this Court to address an issue left unresolved in the Court's recent decision in *Peña-Rodriguez v. Colorado*, 137 S. Ct 855 (2017): whether lower courts may deny criminal defendants access to their trial jurors such that they are barred from investigating racial bias in deliberations.

Next, Robinson asks this Court to resolve an issue on which the Court previously granted certiorari, but did not decide, over a decade ago in *United States*

v. Resendiz-Ponce, 549 U.S. 102 (2007): whether a constitutionally-defective indictment is structural error. In Robinson's case, his indictment failed to allege the aggravating factors that the government relied upon to charge him with a death-eligible crime. The grand jury never heard the aggravating factors alleged by the government, and as a result, its indictment supported non-capital, rather than capital, charges. For almost 17 years, Robinson has tried to convince the courts that this defect resulted in structural error warranting a new trial. His latest effort, filed in a Rule 60(b)(6) motion, based on this Court's recent decision in *Weaver v. Massachusetts*, 582 U.S. ___, 137 S. Ct. 1899 (2017), was erroneously rejected by the lower courts as an improper attempt at filing an SOS motion.

This Court's decisions in *Peña-Rodriguez* and *Weaver* provide further support for the arguments Robinson has been making for years, and establish once again that prior rulings in this case precluded a full merits determination and resulted in a "defect in the integrity of [his] federal habeas proceeding" such that Rule 60(b) relief was warranted. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).

STATEMENT OF THE CASE

A. Robinson was convicted and sentenced to death based on a defective indictment

The Fifth Amendment to the United States Constitution states that, with the exception of military members in times of war, "[n]o person shall be held to answer for a capital . . . crime, unless on presentment or indictment of a Grand Jury." This Court has held that with respect to federal criminal prosecutions, the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial

guarantees require that any fact, other than a prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 226 (1999). This Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 790 (2000), extended the *Jones* holding, with the exception of the indictment requirement, to state prosecutions under the Fourteenth Amendment.

When Robinson was tried in the Northern District of Texas in 2002, the Federal Death Penalty Act required that the Government present its aggravating factors to the petit jury, but did not require that those factors be charged by a grand jury in an indictment. As a result, the statutory aggravating factors that made Robinson eligible for death were not charged via indictment. Robinson filed a pretrial motion to disqualify the death penalty, arguing that his indictment was constitutionally defective because the aggravating factors that rendered him eligible for death had not been presented to the grand jury. Pet. App. G at 194-205. The district court denied the defense motion, finding that the aggravating factors did not need to be presented to the jury because they "are merely sentencing factors, rather than facts that would enhance his punishment beyond that contemplated by the grand jury." Pet. App. H at 272 (citing *Apprendi*, 530 U.S. at 494 and n.19). As a result, the Government pursued the death penalty and presented statutory aggravating factors to the petit jury that were not subject to the Fifth Amendment's indictment clause.

Robinson was sentenced to death on June 5, 2002. Pet. App. I at 275-76. Shortly after Robinson was sentenced to death, the Supreme Court issued *Ring v. Arizona*, 536 U.S. 584 (2002), which extended *Jones* and *Apprendi* and held that where an aggravating factor renders a defendant eligible for capital punishment, it is "the functional equivalent of an element of a greater offense" and therefore must be proven to a jury beyond a reasonable doubt. *Id.* at 609. And as an element of a greater offense, the aggravating factor must be charged in an indictment. *Jones*, 526 U.S. at 243 n.6; *Apprendi*, 530 U.S. at 476.

On appeal, Robinson re-raised the defective indictment issue, arguing that *Ring* established what Robinson had contended all along — that the Fifth Amendment required statutory aggravating factors to be presented to the grand jury and charged in the indictment.

The Government conceded that the indictment was constitutionally defective, and that Robinson's Fifth Amendment rights had been violated. The controversial issue, however, was whether the constitutional violation was a structural error, as Robinson argued,[1] or was subject to harmless error review, as the Government claimed. The Fifth Circuit held that "the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty, and its failure to do so in this case is constitutional error." *United States v. Robinson*, 367 F.3d 278, 284 (5th Cir. 2004).

[1] Robinson has continually maintained that the indictment error that occurred in his case is a structural error. *See, e.g.*, Pet. App. K at 338-53.

Relying on *Neder v. United States*, 527 U.S. 1, 8 (1999), and *United States v. Cotton*, 535 U.S. 625 (2002), the court deemed this "constitutional error" non-structural, and ruled that harmless-error analysis applied. *Id.* at 285. Applying the harmless error standard, the Fifth Circuit found that Robinson received adequate notice of the aggravating factors via the Government's "notice of intent to seek the death penalty," and although the court recognized its limitation in correcting this error on appeal, it found that any rational grand jury would have charged Robinson with the aggravating factors. *Id.* at 287-88.

The Fifth Circuit affirmed Robinson's convictions and sentences, *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004), and this Court denied certiorari. *Robinson v. United States*, 543 U.S. 1005 (2004).

On November 29, 2005, Robinson moved to vacate his convictions and sentences pursuant to § 2255. After timely filing the § 2255 motion, appointed counsel moved to amend the motion to include Robinson's defective indictment claim, arguing that intervening Supreme Court decisions in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), cast doubt on the Fifth Circuit's prior denial of the claim. Pet. App. N. In *Resendiz-Ponce*, this Court originally granted cert to address whether a constitutionally defective indictment is structural error. 549 U.S. at 104, 116. Ultimately, the Court requested additional briefing and ruled on the narrower issue of whether the indictment in question was itself defective. *Id.* at 104. However, in dissent, Justice Scalia opined that he would find the error to be structural. *Id.* at

117. And in *Gonzalez-Lopez*, this Court, in an opinion by Justice Scalia, found that denial of a defendant's retained counsel of choice, "'with consequences that are necessarily unquantifiable and indeterminate,'" was structural error warranting reversal. 548 U.S. at 141 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)).

Based on these two cases, Robinson argued once again that his defective indictment was structural error. Pet. App. N at 392-94. The district court denied Robinson's request to amend. Pet. App. O at 398-99. According to the court, the issue had already been raised and rejected on direct appeal and was therefore frivolous. *Id.* Additionally, because *Gonzalez-Lopez* and *Resendiz-Ponce* did not squarely address the question of defective indictments and were not retroactive, the cases were irrelevant and could not impact Robinson's case, which became final on direct review. *Id.* at 3. The Fifth Circuit affirmed, *United States v. Robinson*, 2010 U.S. App. LEXIS 11675 (5th Cir. 2010), and this Court denied certiorari, *Robinson v. United States*, 565 U.S. 827 (2011).

B. Robinson was unconstitutionally precluded from interviewing the jurors at his trial.

In the course of litigating his section 2255 motion, Robinson sought to interview the jurors from his capital trial pursuant to Northern District of Texas Local Criminal Rule 24.1, which prevents any contact between the parties and a juror absent permission of the presiding court. Pet. App. L. Robinson, a black man, was capitally prosecuted in Texas before a jury of 11 white jurors and 1 black juror.

Additionally, his section 2255 motion raised a *Batson*[2] claim, and Robinson had particular concerns about a black venireperson who was peremptorily challenged by the prosecution. Pet. App. L at 365-67. At the time he filed his motion to interview jurors, Robinson acknowledged that he could not demonstrate an "illegal or prejudicial intrusion into the jury process." Pet. App. L at 360 (quoting *United States v. Riley*, 544 F.2d 237, 241 (5th Cir. 1976)). As Robinson argued, "[w]ithout any opportunity to communicate with the jurors, it would be impossible for Petitioner to identify, much less prove, that an individual juror was biased or that the deliberations were compromised." *Id.* Nevertheless, Robinson asked the court to exercise its discretion and allow him the opportunity to interview jurors given the importance of the constitutional rights at stake and the grave sentence he faced. *Id.* The district court refused, finding that because Robinson could not provide evidence of juror misconduct, he would not be permitted to investigate possible juror misconduct. Pet. App. M.

C. Rule 60(b) proceedings

On February 28, 2018, Robinson filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) in the United States District Court for the Northern District of Texas. Pet. App. C (motion); Pet. App. E (reply in support). Robinson argued that the lack of due process in his post-conviction proceedings, coupled with changes in decisional law, constituted an extraordinary

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986) (a prosecutor's use of a peremptory challenge in a criminal case may not be used to exclude jurors based solely on their race).

circumstance that justified re-opening the judgment in his case. Specifically, Robinson asserted that new Supreme Court case law established that, *inter alia*, he was unreasonably barred from interviewing the trial jurors, thus depriving him of a reasonable post-conviction investigation, *see Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); and he was unreasonably denied the right to amend his section 2255 motion to include his indictment claim, *see Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). Pet. App. C at 41-42, 49-58. Robinson acknowledged that changes in decisional law did not typically qualify as "extraordinary circumstances" supporting relief in a Rule 60(b)(6) motion. Pet. App. E at 95. However, he argued, *Gonzalez v. Crosby* did not absolutely preclude reliance on new decisional law when analyzing a case for extraordinary circumstances, and the Fifth Circuit had explicitly kept open the possibility that a change in law, in the appropriate case, can constitute an extraordinary circumstance. Pet. App. E at 95 (*citing Batts v. Tow Motor Forklift*, 66 F.3d 743, 748 n.6 (1995)).

In his Rule 60(b) Motion, Robinson explained how recent Supreme Court case law establishes yet again that the Fifth Circuit's denial of Robinson's defective indictment claim was wrong. Pet. App. C at 52-58. For example, in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), the Supreme Court provided its most expansive definition to date for what constitutes structural error, holding that it typically arises in three circumstances: If "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other

interest"; "if the effects of the error are simply too hard to measure"; and "if the error always results in fundamental unfairness." *Id.* at 1908. The Court cautioned that these categories are not rigid and explained, "[O]ne point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* In addition to clarifying the categories of structural error, *Weaver* also held that when a structural error is not objected to at trial, and instead is raised via an ineffective assistance of counsel claim, a defendant must show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) in order to be granted relief. In contrast, a preserved (or non-waived) claim of structural error carries no such prejudice (or harmless error) requirement. *Id.* at 1911-12.

Robinson argued that *Weaver* casts serious doubt on the Fifth Circuit's denial of Robinson's defective indictment claim in two significant ways. First, the *Weaver* Court's description of the three general categories of structural error make clear that this Court's requirement that Robinson's defective indictment claim affect the "fundamental fairness" of his trial in order to be structural was misguided. *Compare, Robinson*, 367 F.3d at 286 (no structural error because the error did not deprive Robinson "of basic protections without which . . . no criminal punishment may be regarded as fundamentally fair") and *Weaver*, 137 S. Ct. at 1907 ("[O]ne point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case."). Second, *Weaver* left no doubt that this Court's application of the harmless error standard to Robinson's *preserved* defective indictment claim—a claim of structural error—was improper. Robinson filed a

pretrial motion seeking to dismiss the indictment and objected to the denial of that motion at trial, thereby preserving the claim for direct appeal. Yet contrary to the approach in *Weaver*, the district court's decision in *Robinson* equated waived claims with non-waived claims. 367 F.3d 285-86. That court improperly relied on *Cotton*, 535 U.S. 625, which applied plain error review to a waived indictment claim. By expanding that logic to Robinson's non-waived indictment error claim, the court treated Robinson's claim as if it were *not* preserved for appeal, and *Weaver* affirms that this was erroneous. There is no logical basis for treating Robinson as if his claim was waived; Robinson gave the court the opportunity to correct the Government's error, and the Government had the ability to supersede its indictment. Yet, this did not occur, and the result should not affect Robinson's ability to defend his rights.

In addition to *Weaver*, Robinson argued, the Supreme Court's decisions in *Williams* and *McCoy* further support Robinson's claim for relief under Rule 60(b). In *Williams*, this Court ruled that in an analysis of whether an error is structural, "it is neither possible nor productive" to inquire into the interworkings of proceedings that are confidential. *Williams*, 136 S. Ct. at 1905. Thus, the Fifth Circuit's inquiry on appeal into the confidential grand jury proceedings to determine how the jurors might have voted had a statutory aggravating factor been presented to them runs afoul of the *Williams* principle. Moreover, the Court's analysis in *Williams* establishes that the indictment error at issue in Robinson is structural because it falls under *Weaver*'s rubric of an error whose effects are "simply too hard

to measure." *Weaver*, 137 S. Ct. at 1908. And in *McCoy*, the Court elaborated once again on the need to distinguish between preserved and unpreserved errors in the structural error analysis. *McCoy*, 138 S. Ct. at 1509 (holding that an objected-to concession of guilt is structural error). Because Robinson preserved his defective indictment claim, the *McCoy* ruling further undermines the appellate court's treatment of his claim as if it were unpreserved (and therefore subject to harmless error analysis). *See Robinson*, 367 F.3d at 285-86.

The Government opposed the Rule 60(b)(6) motion, arguing that Robinson was not entitled to relief because the motion was actually a second or successive 2255 motion. Pet. App. D. The district court agreed with the Government's position and transferred the motion to the Fifth Circuit Court of Appeal. Pet. App. B.

In the Fifth Circuit, Robinson argued once again that his request to vacate his conviction was properly raised as a Rule 60(b) motion, and that the district court erred in holding otherwise. The Fifth Circuit found no error, determined that Robinson failed to meet the standard for a second or successive motion, and dismissed his appeal for want of jurisdiction. Pet. App. A; *In re Robinson*, 917 F.3d 856.

With regard to Robinson's challenge to his defective indictment, the Fifth Circuit held that Robinson attacked "not 'some defect in the integrity of his habeas proceedings,' *Gonzalez*, 545 U.S. at 532, but rather our previous resolution, on the merits, of his defective-indictment claim. . . . AEDPA forecloses such a claim here because it potentially circumvents § 2255's requirements [by relying on *Weaver*]."

Pet. App. A at 17-18. In a footnote, the court also found that "even if Robinson's second-or-successive claim were somehow properly before us in a Rule 60(b)(6) motion, it would still fail" because "*Weaver* and *Williams* were only changes in decisional law and 'did not create an extraordinary circumstance'" to support a re-opening of his proceedings. Pet. App. A at 17, n.22 (quoting *In re Edwards*, 865 F.3d 197, 208 (5th Cir.), *cert. denied*, 137 S. Ct. 909 (2017)).

With regard to the lower court's denial of Robinson's request to interview jurors, the Fifth Circuit found:

> The best view is that Robinson is attempting to advance a new habeas claim related to jury impartiality (in light of *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017)) under the guise of a Rule 60(b)(6) motion. . . . The denial of Robinson's discovery request during his initial habeas proceedings—a request that was then related to his *Batson* and IAC claims—did not prevent a merits determination on those issues. Moreover, Robinson was not prevented from litigating his impartial-jury claim because of "a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *See Gonzalez*, 545 U.S. at 532 n.4. Instead, Robinson chose not to bring this claim in his initial § 2255 motion because, as he acknowledged, such a claim was frivolous.
>
> To the extent that Robinson now attempts to bring such a claim, the government rightly posits that "[b]ecause the merits of Robinson's discovery request to interview jurors [are] wrapped up with, and dependent on, his ability to bring a new claim for relief from the judgment of his conviction," his request is "a paradigmatic habeas claim." *Rodwell v.* Pepe, 324 F.3d 66, 72 (1st Cir. 2003).

Pet. App. A at 13-14.

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REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to establish that barring criminal defendants from access to their trial jurors, particularly in death penalty cases, contradicts this court's decision in *Peña-Rodriguez v. Colorado*.

In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), this Court created an exception to evidentiary rules barring post-trial verdict-impeaching statements of jurors where those statements documented that racial bias may have affected the verdict. The Court reasoned that racial bias is such a stain on American history and notions of fair justice, and such a clear denial of the jury trial guarantee, that general evidentiary rules must be modified to root out racism in the criminal justice system. *Id*. at 871.

The *Peña-Rodriguez* Court deferred to the lower courts to resolve whether and when a criminal defendant may pursue evidence of a juror's racial bias. *Peña-Rodriguez*, 137 S. Ct. at 869 ("The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. These limits seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord.") (internal citations omitted). If a juror does not come forward of her own accord, as in *Peña-Rodriguez,* the defendant's ability to investigate juror bias is limited by local court rules.

There are 94 federal districts courts in the United States, including in Guam, the Virgin Islands, the Northern Mariana Islands, and Puerto Rico.[3] Of those, 55 districts prohibit a party, or representative thereof, from speaking with a juror post-trial absent court approval. The remaining 39 districts do not restrict a party's access to jurors post-trial.

Robinson, a black man, was tried in the Northern District of Texas in front of a jury composed of 11 white people and 1 black person. The relevant local rule states: "A party, attorney, or representative of a party or attorney, shall not, before or after trial, contact any juror, prospective juror, or the relatives, friends, or associates of a juror or prospective juror, unless explicitly permitted to do so by the presiding judge." ND TX LR 24.1. When Robinson moved to interview the jurors in his case, the district court refused to grant him access based on a Catch-22: the court required that he provide some evidence that racial bias infected his jury's deliberations; but the court would not allow Robinson to interview the jurors who were the only witnesses to those deliberations. Opinion 18-20.[4] And therefore Robinson has been deprived of any ability to investigate racial prejudice amongst

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[3] https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links

[4] The district court and the Fifth Circuit ultimately found that because Robinson's request to interview jurors would lead to new claims, his motion was a SOS § 2255 motion. This ruling is clearly erroneous. Because Rule 60 motions are geared towards procedural issues, once granted they frequently create the possibility of raising new claims. *See, e.g., Gonzalez*, 545 U.S. 524 (finding a motion challenging a district court's timeliness finding was validly raised under Rule 60 which, if ultimately granted, could open the door to an amended petition raising new claims).

his jury comprised of 11-white people and one black person. Had he been tried a short distance away in the Western District of Texas, he would not have been required to seek approval before speaking with his trial jurors.

This is a split amongst the districts that will result in only one side being represented by negative court opinions. For those inmates fortunate enough to be prosecuted in one of the 39 districts where they can freely investigate racial bias amongst their jurors, they will never be petitioning this Court for review regarding their inability to investigate juror bias. But for those from the other 55 districts, they are arbitrarily barred from conducting a reasonable investigation. *See, e.g., United States v. Mitchell*, 2018 WL 4467897 (D. Ariz. September 18, 2018) (denying Mitchell's request to interview jurors because he could not offer evidence of racial bias prior to undertaking an investigation.). This inequity flies in the face of core death penalty principles regarding "arbitrariness," in that a defendant's ability to investigate is based on where he happens to be tried, and "heightened reliability," in that no one knows whether Robinson's convictions and death sentences were impacted by racial bias. *Furman v. Georgia*, 408 U.S. 238 (1972); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Notwithstanding *Peña-Rodriguez*'s recognition that racial bias is "a familiar and recurring evil," 137 S. Ct. at 868, the Court's deferral to the lower courts has left *Peña-Rodriguez* without any force. If "[t]he work of "purg[ing] racial prejudice from the administration of justice" is far from done, *Tharpe v. Ford*, 139 S. Ct. 911, 913 (2019) (quoting *Peña-Rodriguez,* 137 S. Ct. at 867) (Sotomayor J., respecting the

Denial of Cert), then it is incumbent on the Court to establish that *Peña-Rodriguez* is not just an exception to the rules of evidence, but also to the rules barring post-conviction interviews with jurors.

II. Certiorari should be granted to resolve a circuit split and determine whether an indictment that omits an element of an offense or an aggravating factor rendering the defendant eligible for a death verdict amounts to structural error warranting reversal.

As discussed above, the Court's holdings in *Ring*, *Jones*, and *Apprendi* all stand for the proposition that an aggravating factor which renders a defendant eligible for capital punishment is "the functional equivalent of an element of a greater offense" and therefore must be charged in an indictment. *Ring*, 536 U.S. at 609; *Jones*, 526 U.S. at 243 n. 6; *Apprendi*, 530 U.S. at 476. And as this Court stated over a century ago, the omission of a necessary element of an offense is a "matter of substance, and not a defect or imperfection in the matter of form only." *United States v. Carll*, 105 U.S. 611, 613 (1881) (internal quotation marks omitted).

Yet lower courts, as the district court and Fifth Circuit did here, continue to struggle with whether the omission of an element of an offense (including aggravating factors) from an indictment is subject to automatic reversal as structural error, or instead subject to harmless error review. This Court recognized the need to address this issue in *Resendiz-Ponce*, where it granted certiorari to decide whether an indictment's omission of an element of an offense is structural error. Ultimately, the Court chose not to answer that important constitutional question when further review determined that the indictment in that case

contained no such omission. *Resendiz-Ponce*, 549 U.S. at 104. However, this case presents an ideal vehicle to finally resolve this recurring circuit conflict.

A. There is a split in the courts over whether a constitutionally-defective indictment is structural error.

There is a clear and well-established circuit conflict concerning whether the omission of an element of a charged offense is structural error or should be subject to harmless error analysis.

Seven circuits which have analyzed this issue, including the Fifth Circuit in Robinson's appeal, *United States v. Robinson*, 367 F.3d at 285-86, have all concluded that such an omission is to be reviewed for harmlessness. *See United States v. Stevenson*, 832 F.3d 412, 426-28 (3d Cir. 2016); *United States v. Sinks*, 473 F.3d 1315, 1321 (10th Cir. 2007); *United States v. Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (en banc), *cert. denied*, 549 U.S. 1095 (2006); *United States v. Trennell*, 290 F.3d 881, 889-90 (7th Cir. 2002), cert. denied, 537 U.S. 1014 (2002); *United States v. Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004); *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-81 (6th Cir. 2002), cert. denied, 537 U.S. 880 (2002); *United States v. Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir. 2001), *cert. denied*, 534 U.S. 880 (2001).

The Ninth Circuit, taking a hybrid approach, is the lone circuit which has explicitly held that a defective indictment is a structural error.[5] *See United States*

[5] The District of Columbia (D.C.) Circuit has routinely dismissed indictments for failing to include an element of the offense, but has thus far declined to address whether structural error analysis or harmless error analysis should apply. *See, e.g.*, *United States v. Pickett*, 353 F.3d 62, 68-69 (D.C. Cir. 2004).

v. Du Bo, 186 F.3d 1177, 1179-81 (9th Cir. 1999); *United States v. Velasco-Medina*, 305 F.3d 839, 846-47 (9th Cir. 2002). However, because that Circuit's reasoning closely tracks that taken by this Court in *Weaver*, its stance is significant. In *Du Bo*, the Ninth Circuit held that if an indictment failed to recite an element of the charged offense, and that failure was challenged prior to trial, such error "is not a minor nor technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment." 186 F.3d at 1179. However, this holding "is limited to cases where a defendant's challenge is timely. . . . Untimely challenges to the sufficiency of an indictment are reviewed under a more liberal standard," namely plain error. *Id.* at 1180 n.3; *see also Velasco-Medina*, 305 F.3d at 846-47 (when the validity of an indictment is challenged for the first time on appeal without an objection prior to trial, "we liberally construe the indictment in favor of validity" (internal quotations and citations omitted)).

Similarly, in *Weaver*, this Court reiterated the longstanding view that where a structural error is objected to at trial, the defendant generally is entitled to automatic reversal regardless of the error's actual effect on the outcome. *Weaver*, 137 S. Ct. at 1910 (citing *Neder*, 527 U.S. at 7). However, where the error is not objected to at trial, and is later raised in the context of an ineffective-assistance-of-counsel claim, a defendant must show prejudice under *Strickland*. Part of the Court's reasoning was based on the value of preserving a claim and raising it on direct review versus forfeiting the claim and raising it in a collateral proceeding. The Court explained that the former allows the trial court to correct its error or

explain its reasoning, while the latter deprives the trial court of any ability to cure the error and generally comes to light years after the fact. *Id.* at 1912.

Judges and commentators have recognized the existence of this conflict. *See, e.g., United States v. Omer*, 429 F.3d 835 (9th Cir. 2005) (Graber, J., dissenting from denial of rehearing en banc); *United States v. Prentiss*, 256 F.3d 921, 992-93 (10th Cir. 2001) (en banc) (Henry, J., dissenting in part); 4 Wayne R. LaFave et al., Criminal Procedure § 19.3(a), at 155, 161 n.39.51 (2d ed. Supp. 2006).

B. Failure to allege an essential element of a criminal charge, including aggravating factors in support of a capital prosecution, is structural error warranting reversal.

The Constitution authorizes a single means of initiating a federal prosecution: through an indictment by a grand jury. U.S. Const. art. V. And unlike most other constitutional errors, the Fifth Amendment provides an explicit remedy, namely, that a person "shall not be held to answer." *Id.* This Court has explained that the phrase "no person shall be held to answer" confers a right not to be tried. *See United States v. MacDonald*, 435 U.S. 850, 860 n.7 ("Dismissal of the indictment is the proper sanction . . . when [the] indictment is defective."); *Midland Asphalt v. United States*, 489 U.S. 794, 802 (1989) ("[A] defect so fundamental that it causes the grand jury no longer to be a grand jury, *or the indictment no longer to be an indictment*, gives rise to the constitutional right not to be tried.").

This explicit provision in the Fifth Amendment supports the argument that an indictment which fails utterly to allege aggravating factors in support of a capital prosecution should not be susceptible to mere harmless error review, but instead deemed structural and reversible error. As this Court explained in

Gonzales-Lopez, and reiterated in *Weaver*, an error is considered structural if "the harmless error inquiry is irrelevant to remedying the constitutional error." 524 U.S. at ** (*2546 n.4). At its heart, the Fifth Amendment guarantees criminal defendants the right not to be held to answer if the indictment is constitutionally deficient. It is specifically designed to protect the individual against the government. "Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone v. United States*, 361 U.S. 212, 274 (1960).

In this case, the Government has conceded, and the Fifth Circuit agreed, that the indictment violated the Fifth Amendment. *Robinson*, 367 F.3d at 284. Yet on appeal, the Fifth Circuit found that the petit jury's acceptance of the aggravating factors which were not charged in the indictment was sufficient to show that the failure to present the aggravating factors to the grand jury was harmless. *Id.* at 284-89. However, the strength of the Government's case at jury trial (i.e., the fact that the petit jury found aggravating factors and sentenced Robinson to death) cannot satisfy fundamental fairness principles and therefore validate an invalid indictment which was found to be constitutionally defective on appeal. And even if the error in this case did not lead to fundamental unfairness, *Weaver* makes clear that a defective indictment does not have to affect the fundamental fairness of the trial in order to be structural error. *Weaver*, 137 S. Ct. at 1907.

Guessing what, if anything, the grand jury might have found with a proper indictment "def[ies] analysis by harmless error standards." *Arizona v. Fulminante*,

499 U.S. 279, 309-310 (1991). And like the denial of a defendant's right to select his own attorney, the error that arises from an indictment which fails to allege elements of the offense or aggravating factors in support of the death penalty is structural error where "the effects of the error are simply too hard to measure." *Id.* at 1908; *see also Gonzalez-Lopez*, 548 U.S. at 141. Because the grand jury never heard the aggravating factors alleged by the Government, Robinson was essentially indicted on non-capital, rather than capital, charges. Yet nearly every aspect of a non-capital case and a capital case are different: arraignment, motions practice, jury qualification and selection, jury instructions, and trial strategies. It is impossible to quantify the harm that accrued to Robinson when he was deprived of his Fifth Amendment guarantee to have a grand jury decide whether they accepted the aggravating factors charged by the Government.

The actions that would have been taken by the grand jury with regard to the aggravating factors are "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 141. In addition to being speculative, such an approach improperly denies a defendant of the guaranteed protections explicitly stated in the Fifth Amendment. The indictment clause assures the public that the "trouble, expense, and anxiety of a public trial" will not occur before probable cause is established. *Ex Parte Bain*, 121 U.S. 1, 12 (1886). It would be contrary to the Fifth Amendment if the government were free to arrest and detain citizens solely on the possibility that future investigation would uncover incriminating evidence for use at a merits trial months or even years later.

III. The Fifth Circuit's decision denying Robinson's Rule 60(b)(6) motion as a second or successive section 2255 motion is in conflict with this Court's opinion in *Gonzalez v. Crosby*.

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Court held that Rule 60 is applicable to habeas corpus proceedings, but cautioned that courts should be wary of second or successive habeas petitions disguised as Rule 60 motions. The Court explained that a Rule 60(b) motion "that seeks to revisit the federal court's denial on the merits of a claim for relief should be treated as a successive habeas petition." *Id.* at 534 (emphasis added). But where the motion "confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas proceeding," that motion is not a second or successive petition, but rather is a valid exercise of Rule 60(b). *Id.* Indeed, a motion that "challenges only the District Court's failure to reach the merits does not warrant such treatment, and can therefore be ruled upon by the District Court without precertification by the Court of Appeals pursuant to § 2244(b)(3)." *Id.* at 538.

The rulings Robinson challenged in his Rule 60(b)(6) motion are strictly procedural, and he adhered to the rule set forth in *Gonzalez* that only those procedural decisions that preclude a merits determination are properly raised in a Rule 60(b) motion. In his motion, Robinson explained how recent Supreme Court case law establishes yet again that the Fifth Circuit's procedural denial of Robinson's defective indictment claim was wrong. Pet. App. B at 52-59 (discussing *Weaver*, *Williams*, and *McCoy*). Ultimately, the Fifth Circuit was not persuaded by Robinson's argument, opining that Robinson's Rule 60(b) motion challenged "not 'some defect in the integrity of the habeas proceedings,' *Gonzalez*, 545 U.S. at 532,

but rather our previous resolution, on the merits, of his defective-indictment claim, *Robinson*, 367 F.3d at 286-89." Pet. App. A at 16. This finding is erroneous and not supported by the record.

The lower courts did not cite, and Robinson is not aware, of any authority for the proposition that the denial of a motion for leave to amend is anything but a procedural ruling. *Cf. Flores v. Stephens*, 794 F.3d 494, 502 (5th Cir. 2015) (finding that the district court's denial of leave to amend the habeas petition is a procedural denial, and applying the procedural COA standard to the petitioner's request for a COA). Motions for leave to amend are rooted in procedural questions and governed by procedural rules. *See, e.g., Mayle v. Felix*, 545 U.S. 644, 655 (2005); Fed. R. Civ. Pro. 15; Fed. R. Civ. Pro. 81(a)(2); Habeas Corpus Rule 12. When a section 2255 movant is denied leave to amend his petition with a new claim, that claim does not receive merits review by the federal courts. As a result, the denial of a motion to amend necessarily "precludes a merits determination" of the substantive claim. *Gonzalez,* 545 U.S. at 532 n.4. There is no basis for treating a motion for leave to amend any differently from other procedural rulings, like "failure to exhaust, procedural default, or statute-of-limitations bar," *id.*, which may be challenged in the Rule 60(b) context.

The Fifth Circuit's reliance on the "binding circuit precedent" of *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980), and *United States v. Kalish*, 780 F.2d 506 (5th Cir. 1986), is unavailing. *Jones* and *Kalish* stand for the proposition that district courts are not required to consider post-conviction claims that were

previously raised and decided on direct appeal. In light of those cases, the Fifth Circuit held that the district court properly concluded that the defective-indictment was frivolous because its merits had already been determined on direct appeal, and "[c]onsequently, the court properly denied amendment in the merits-based decision." *In re Robinson*, 917 F.3d at 867-68.

As Robinson argued below, the rule against including claims in habeas petitions that were previously raised and rejected on direct appeal is akin to the law of the case doctrine, which holds that "an issue of law or fact decided on appeal may not be reexamined either by the District Court on remand or by the appellate court on a subsequent appeal." *United States v. Becerra*, 155 F.3d 740, 752 (5th Cir. 1998). However, the law of the case doctrine is subject to three exceptions: (1) the evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). The issuance of the opinions in*Weaver*, *Williams*, and *McCoy* satisfies the second and third exceptions described in *Matthews*. As discussed above, these opinions demonstrate that the earlier denial of Robinson's motion to amend is clearly erroneous; and the courts' continued denial of Robinson's right to litigate the impact of the structural error inherent in his defective-indictment claim would work a manifest injustice, especially since this is a death-penalty case.

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What's more, these changes in decisional law help to satisfy the extraordinary circumstances requirement of Rule 60(b)(6). *Gonzalez*, 545 U.S. at 535. Determining whether such circumstances are present may include consideration of a wide range of factors, including "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 (1988). Generally a change in decisional law, standing alone, is not enough to amount to an extraordinary circumstance. *Agostini v. Felton*, 521 U.S. 203, 239 (1997); *Diaz v. Stephens*, 731 F.3d 370, 375-76 (5th Cir. 2013). *But see Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989) ("In this circuit, a change in relevant case law by the United States Supreme Court warrants relief under [Rule] 60(b)(6)."). But the courts have kept open the possibility that a change in law, in the appropriate case, can constitute an extraordinary circumstance. *Batts v. Tow Motor Forklift*, 66 F.3d 743, 748 n.6 (1995) ("We do not hold that a change in decisional law can never be an extraordinary circumstance."); *Cox v. Horn*, 757 F.3d 113, 115, 124-26 (3d Cir. 2014) (rejecting government's argument for a "*per se* rule that a change in decisional law, even in the habeas context, is inadequate, either standing alone or in tandem with other factors, to invoke relief from a final judgment under 60(b)(6)"). Courts have noted that Rule 60(b)(6) relief is especially appropriate in cases where the interest in finality is somehow abrogated. *Blue Diamond Coal Co. v. Trustees of UMWA Combined Ben. Fund.*, 249 F.3d 519, 528 (6th Cir. 2001) (collecting cases). And the Fifth Circuit has recognized that habeas

cases fit the bill of cases with a diminished interest in finality. *Batts*, 66 F.3d at 748 n.6 ("Courts may find a special circumstance warranting [Rule 60(b)(6)] relief where a change in the law affects a petition for habeas corpus, where notions of finality have no place.").

In a case where the decisional law in question affects issues of fundamental fairness and due process, the Fifth Circuit erred in not following the approach taken in *Diaz,* 731 F.3d at 376-77, to consider additional equitable factors when deciding whether extraordinary circumstances exist to warrant Rule 60(b)(6) relief. In *Diaz*, the Fifth Circuit evaluated a number of equitable factors which apply to Rule 60(b) motions generally, including:

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether[,] if the judgment was a default or a dismissal in which there was no consideration of the merits[,] the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether[,] if the judgment was rendered after a trial on the merits[,] the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Id. at 377. An evaluation of these equitable considerations weighs heavily in Robinson's favor. As described above, his motion was not a substitute for an appeal. While habeas courts have some interest in finality, that interest may not outweigh a petitioner's right to a full and fair consideration of the merits of his claims,

especially in a case like this one, where procedural rules foreclosed merits consideration of his Rule 60(b) issues in their entirety. There are no intervening equities that would make it inequitable to grant relief, as the Government has not alleged that they will be prejudiced in any way by re-opening this case and allowing Robinson to interview the trial jurors and/or amend his section 2255 motion to include his indictment error claim which, the parties and the Fifth Circuit agree, resulted in a deprivation of Robinson's constitutional rights. Finally, as the Supreme Court and this Circuit have ruled time and again, the Rule should be liberally construed in cases like this one, where the denial of the motion would result in a fundamental injustice. *See, e.g.*, *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) ("[Rule 60] should be liberally construed in order to do substantial justice. What is meant by this general statement is that, although the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause.") (internal citations omitted).

Moreover, whether granting Robinson's Rule 60(b) motion on either the *Peña-Rodriguez* issue or the defective-indictment issue ultimately leads to an opportunity for Robinson to litigate his substantive claims for relief is not part of the analysis. Indeed, in the habeas context, any time a court grants a Rule 60(b) motion in a habeas petitioner's favor, the substance of the habeas petition will ultimately be litigated. In fact, in *Gonzalez*, 545 U.S. 524 (2005), the Supreme Court found that

challenging a timeliness denial via a Rule 60(b) motion was a proper function of a Rule 60(b) motion, which, if granted, would obviously allow the habeas petitioner to litigate his underlying substantive claims for relief. Thus, whether Robinson is ultimately trying to reach the merits of claims that were never decided on their merits is irrelevant to the Rule 60(b) standards that courts must follow.

Robinson's Rule 60(b)(6) motion was a legitimate attempt to seek relief via a procedure which "has an unquestionably valid role to play in habeas cases." *Gonzalez*, 545 U.S. at 534. "When a prisoner has shown reasonable diligence in seeking relief based on a change in procedural law, and when that prisoner can show that there is probable merit to his underlying claims, it would be well in keeping with a district court's discretion under Rule 60(b)(6) for that court to reopen the habeas judgment and give the prisoner the one fair shot at habeas review that Congress intended that he have." *Id.* at 542 (Stevens, J., dissenting). In light of the procedural rulings challenged in the motion and the extraordinary circumstances of this case, it was error for the lower courts to dismiss Robinson's Rule 60(b)(6) motion as an improper SOS petition.

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CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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