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 Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

HILARY POTASHNER
Federal Public Defender
JONATHAN AMINOFF*
CELESTE BACCHI
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5374
Facsimile: (213) 894-0310
Jonathan_Aminoff@fd.org

Attorneys for Petitioner
Julius Omar Robinson
**Counsel of Record*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 8, 2019
Lyle W. Cayce
Clerk

No. 18-70022

D.C. Docket No. 4:05-CV-756

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JULIUS OMAR ROBINSON, also known as Face, also known as Scar, also known as Scarface,

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed for lack of jurisdiction.

Certified as a true copy and issued as the mandate on Mar 08, 2019

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 8, 2019

Lyle W. Cayce
Clerk

No. 18-10732

IN RE: JULIUS OMAR ROBINSON,

Movant.

* * * * *

No. 18-70022

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

JULIUS OMAR ROBINSON, Also Known as Face,
Also Known as Scar, Also Known as Scarface,

Defendant–Appellant.

Appeals from the United States District Court
for the Northern District of Texas

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Julius Robinson was sentenced to death for his role in multiple murders.

After we affirmed his conviction on direct appeal, Robinson filed a federal habeas corpus petition asserting six grounds for relief. The district court denied the petition. Nearly ten years later, Robinson filed a Federal Rule of Civil Procedure 60(b)(6) motion for relief from judgment. The district court determined that Robinson's motion was "in actuality a second or successive petition for habeas relief" and transferred it to this court.

Robinson maintains that the district court erred by construing his Rule 60(b)(6) motion as a second or successive habeas petition. Finding no error, and that Robinson fails to meet the standard for a second or successive petition, we deny his motion for authorization and dismiss for want of jurisdiction.

I.

In 1998, Robinson murdered Johnny Shelton, "a man he mistakenly believed responsible for an armed hijacking that cost him $30,000." *United States v. Robinson*, 367 F.3d 278, 282 (5th Cir.), *cert. denied*, 543 U.S. 1005 (2004). Five months later, Robinson killed Juan Reyes in retaliation for "a fraudulent drug transaction in which [Robinson] paid $17,000 for a block of wood covered in sheetrock." *Id.* Robinson was also involved "in a broad conspiracy that led to the murder of Rudolfo Resendez at the hands of Britt and Hendrick Tunstall." *Id.* at 283.

In 2002, a jury convicted Robinson on sixteen counts, including, *inter alia*,[1] one count of murder while engaging in a continuing criminal enterprise,

[1] The jury also convicted Robinson on one count of conspiracy to distribute more than 100 kilograms of marihuana, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B) (Count 1); one count of conspiracy to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) (Count 2); three counts of possession of a firearm in furtherance of a drug trafficking crime, in violation of § 924(c)(1)(A)(i), (C)(i) (Counts 4, 8, and 17); three counts of carrying or using a firearm during a drug trafficking crime, in violation of § 924(c)(1)(A)(ii) (Counts 5, 9, and 13); and three counts of carrying or using and discharging a firearm during a drug trafficking crime, in violation of § 924(c)(1)(C)(iii) (Counts 6, 10,

in violation of 21 U.S.C. § 848(e) (2012) (Count 3); three counts of murder in the course of carrying or using a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(j) (Counts 7, 11, and 15); and one count of murder while engaged in possession of more than five kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 848(e) (Count 12). The district court sentenced Robinson to death on Counts 3, 7, and 11. The court imposed a life sentence on Counts 12 and 15, to be served concurrently, and 300 months on Count 17, to run consecutively to the sentences on Counts 12 and 15.[2] We affirmed Robinson's conviction and sentence on direct appeal. *Robinson*, 367 F.3d at 293.

In 2005, Robinson initiated federal habeas proceedings via a motion to vacate conviction and sentence and for a new trial under 28 U.S.C. § 2255 and Rule 33 of the Federal Rules of Criminal Procedure. Robinson raised six grounds: (1) ineffective assistance of counsel ("IAC") during the penalty phase, (2) an equal protection (*Batson*) claim related to the prosecuting attorney's alleged use of preemptory challenges in a racially motived manner, (3) a claim that the Federal Death Penalty Act, as applied in Texas, violates the Equal Protection Clause, (4) a claim of IAC on appeal, (5) a due process claim related to the prosecuting attorney's alleged pursuit of fundamentally inconsistent theories at seriatim capital trials, and (6) a due process claim related to the prosecutor's alleged use of false and misleading testimony during the penalty phase. Robinson sought to amend his motion by adding a seventh ground for

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and 14).

[2] The court did not impose a sentence on Counts 1 and 2 because these counts are lesser included offenses of Count 3. Similarly, it declined to impose a sentence on Counts 4, 5, and 6 because each is a lesser included offense of Count 7. Moreover, the court did not impose a sentence on Counts 8, 9, and 10 because those three counts are lesser included offenses of Count 11. Lastly, it declined to impose a sentence on Counts 13 and 14 because they are lesser included offenses of Count 15.

relief—a defective-indictment claim based on the prosecuting attorney's failure to include aggravating factors for the capital charge. The district court granted in part Robinson's motion to amend, allowing him to "add documentary evidence and corresponding argument relating back to his original petition." The court denied Robinson's request to add the defective-indictment claim, finding that we had already addressed the issue on direct appeal.[3]

In 2008, the district court denied Robinson's motion to vacate his conviction and sentence under 28 U.S.C. § 2255, finding that each of his claims was without merit. The court also denied Robinson's motions for a new trial and an evidentiary hearing. With respect to Robinson's request that the court hold an evidentiary hearing on his habeas grounds for relief, the court noted that "the record before [it], including the exhibits submitted by Robinson with his motion, do[es] not create any contested fact issues that must be resolved in order to decide Robinson's claims."[4] Moreover, the court decided Robinson's habeas claims "either by assuming that everything Robinson allege[d] [was] true or based on legal, not factual, bases." Consequently, "because the record before [the district] [c]ourt show[ed] conclusively that Robinson [was] not entitled to relief, his request for an evidentiary hearing [was] denied."

Robinson filed a Federal Rule of Civil Procedure 59(e) motion for recon-

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[3] *See United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986) ("It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 [m]otions."). On direct appeal, we held that "the failure to charge [the death penalty aggravating] factors in an indictment did not contribute to Robinson's conviction or death sentence." *Robinson*, 367 F.3d at 289. The district court also determined that the Supreme Court cases cited by Robinson—*United States v. Gonzalez–Lopez*, 548 U.S. 140 (2006), and *United States v. Resendiz–Ponce*, 549 U.S. 102 (2007)—were inapposite, and, in any event, because these cases considered procedural errors, they were not retroactively applicable to cases on collateral review.

[4] Section 2255 "does not automatically require a hearing to dispose of every motion made under its statutory authority." *Coco v. United States*, 569 F.2d 367, 369 (5th Cir. 1978).

sideration of the order denying the motion to vacate sentencing without an evidentiary hearing. The district court denied that motion[5] and declined to issue a certificate of appealability ("COA"). We affirmed, and the Supreme Court denied Robinson's petition for writ of certiorari.

In February 2018, Robinson filed a Rule 60(b)(6) motion for relief from judgment. He asserted that "the lack of due process in his post-conviction proceedings constituted an extraordinary circumstance that justified re-opening the judgment in his case pursuant to Rule 60(b)." Relying on Supreme Court precedent established after the district court denied his § 2255 motion, Robinson contended that the district court (1) "wrongly denied his ability to appeal" because that court (and the Fifth Circuit) "applied an erroneously high standard for obtaining a [COA]," (2) "erroneously barred [him] from conducting a reasonable investigation," and (3) erroneously denied his "right to amend his [§] 2255 motion to include his [defective-indictment] claim."

The district court determined that the motion was, "in actuality[,] a second or successive petition for habeas relief" and transferred it to this court. On appeal, Robinson asserts that the district court improperly construed his Rule 60(b)(6) motion as a second or successive § 2255 motion. In the event, however, that we find the district court did not err, Robinson asks that we

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[5] The court emphasized that "[b]ona fide contested issues of fact raised in a motion to vacate brought under § 2255 must be resolved on the basis of an evidentiary hearing. . . . But § 2255 does not require a hearing if the motion, files, and record of the case conclusively demonstrate that no relief is appropriate." The court also stressed that "the record before this Court, including the exhibits submitted by Robinson with his motions, do[es] not create any contested fact issues with regard to Robinson's insufficiency-of-counsel claims that must be resolved in order to decide his case." Instead, the court noted, "many of Robinson's claims are based on the record from the trial." Moreover, "with regard to the claims for which Robinson has submitted additional evidence, the Court . . . decided these claims based on uncontested allegations of fact and, where facts are contested, by assuming that what Robinson alleges is true, or based on legal, not factual, bases."

certify a second or successive § 2255 motion so that he may raise his impartial-jury claim in the district court.

II.

"We review a district court's determination as to whether a Rule 60(b) motion constitutes a second-or-successive habeas petition *de novo*." *In re Edwards*, 865 F.3d 197, 202–03 (5th Cir.), *cert. denied*, 137 S. Ct. 909 (2017).

A.

Federal habeas review for a prisoner in federal custody is governed by 28 U.S.C. § 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). "AEDPA limits the circumstances under which a [federal] prisoner may file a successive application for federal habeas review." *Edwards,* 865 F.3d at 203. Under § 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.

28 U.S.C §2255(h). Section 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.

A petition is successive when it 'raises a claim . . . that was or could have been

raised in an earlier petition . . . .'" *Edwards*, 865 F.3d at 203 (quoting *Hardemon v. Quarterman*, 516 F.3d 272, 275 (5th Cir. 2008)).

Federal Rule of Civil Procedure 60(b)(6) authorizes a court to "relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." To prevail on a Rule 60(b)(6) motion in a federal habeas proceeding, a movant must establish that (1) the motion was "made within a reasonable time"[6] and (2) "'extraordinary circumstances' [exist to] justify[] the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)).[7] Extraordinary circumstances "will rarely occur in the habeas context." *Id.*

"Because of the comparative leniency of Rule 60(b) [as compared to AEDPA], petitioners sometimes attempt to file what are in fact second-or-successive habeas petitions under the guise of Rule 60(b) motions." *Edwards*, 865 F.3d at 203. "[T]o bring a proper Rule 60(b) claim, a movant must show 'a *non-merits-based* defect in the district court's earlier decision on the federal habeas petition.'" *Id.* at 204 (quoting *Balentine v. Thaler,* 626 F.3d 842, 847 (5th Cir. 2010) (emphasis added). Thus, we have cautioned that

> it is extraordinarily difficult to bring a claim of procedural defect rather than a successive habeas claim, because '[p]rocedural defects are narrowly construed. They include fraud on the habeas court, as well as erroneous previous rulings which precluded a merits

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[6] Rule 60(c) states, "A motion under Rule 60(b) must be made within a reasonable time—and for reasons [in (b)](1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."

[7] Although *Gonzalez* addressed the application of a Rule 60(b) motion only in the context of a § 2254 habeas proceeding, we have joined "[n]early every circuit [in applying] the *Gonzalez* rationale to federal prisoners seeking habeas relief under § 2255." *Williams v. Thaler*, 602 F.3d 291, 302 & n.4 (5th Cir. 2010) (collecting cases); *see also United States v. Roberts*, 360 F. App'x 584, 585 (5th Cir. 2010).

> determination—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of limitations bar. They generally do not include an attack based on the movant's own conduct, or his habeas counsel's omissions, which do not go to the integrity of the proceedings, but in effect ask for a second chance to have the merits determined favorably.'

Id. at 205 (quoting *In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014)).

Accordingly, "[a] federal court examining a Rule 60(b) motion should determine whether it either: (1) presents a new habeas *claim* (an 'asserted federal basis for relief from a . . . judgment of conviction'), or (2) 'attacks the federal court's previous resolution of a claim *on the merits*.'" *Id.* at 203 (quoting *Gonzales,* 545 U.S. at 530, 532).[8] A "Rule 60(b) motion [that] does either . . . should be treated as a second-or-successive habeas petition and subjected to AEDPA's limitation on such petitions." *Id.* at 204. But a petitioner who "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar," is not asserting one of the aforementioned grounds. *Id.*[9]

B.

Robinson contends that the district court erred when it construed his claim concerning the denial of a COA as a second or successive habeas petition. After the district court denied relief on each of the six grounds he raised in his

[8] A federal court makes a merits determination when it concludes that "there exist or do not exist grounds entitling a petitioner to habeas corpus relief . . . ." *Gonzalez*, 545 U.S. at 532 n.4. So, "[w]hen a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim." *Id.*

[9] If a Rule 60(b) "motion challenges 'not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings,' then a Rule 60(b) motion is proper." *Coleman*, 768 F.3d at 371 (quoting *Gonzalez*, 545 U.S. at 532).

initial § 2255 motion, Robinson moved for a COA on his penalty-phase IAC claim. The court denied the application. Robinson then sought a COA from this court, but we also declined. The Supreme Court denied Robinson's petition for writ of certiorari. *Robinson v. United States*, 565 U.S. 827 (2011).

Robinson cites *Buck v. Davis*, 137 S. Ct. 759, 774 (2017), in which the Court reaffirmed that "[a] 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 348 (2003)). Robinson maintains that both the district court and this circuit erred when each declined to issue a COA to him because both courts "effectively required him to prove he would succeed on appeal before granting the right to appeal." Robinson asserts that both courts should have merely determined whether "it was at least debatable that he was deprived of the effective assistance of counsel at the penalty phase of his trial."

Robinson avers that the district court wrongly decided that "[t]he denial of a COA did not preclude a merits determination," because "merits review by an appellate court is . . . its own independent proceeding that the appellant has a right to access." Because "appellate merits review is a separate entity, . . . an erroneous procedural ruling that precludes appellate merits review is entitled to reconsideration under Rule 60(b)."

The government maintains that Robinson's denial-of-COA claim "is not a proper basis for a Rule 60(b)(6) motion because it does not seek to reopen a ruling that *precluded* a merits determination of his [IAC] claim." Rather, Robinson "seeks to reopen a ruling (the denial of a COA) that *followed* the district court's merits-based ruling on [his] [IAC] claim." The government emphasizes 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" (quoting *Gonzalez*, 545 U.S. at 534).[10] Asserting that Robinson's Rule 60(b) motion attempts to do just that, the government contends that the district court correctly determined the motion was a second or successive § 2255 motion.[11]

The district court correctly concluded that Robinson "badly misreads *Gonzalez*." The denial of a COA on Robinson's IAC claim did not preclude a merits determination. Instead, the court reviewed and denied the claim *on its merits* as part of Robinson's initial § 2255 motion. Because his Rule 60(b) motion attacks the district court's merits-based resolution of his IAC claim, it is best viewed as a second or successive petition.[12] The court did not err in finding that it had "no jurisdiction to consider [the motion]."

C.

Robinson asserts that the district court erred in determining that his request to interview the jurors was a second or successive § 2255 motion. He contends that "he was unreasonably barred from interviewing the trial jurors, thus depriving him of a reasonable post-conviction investigation." Citing *In re Sessions*, 672 F.2d 564, 566 (5th Cir. 1982), Robinson maintains that "it is well-settled law that a denial of discovery is not akin to a denial on the merits of a

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[10] The government highlights that "Robinson points to no authority holding that a ruling that precludes appellate review is the same as a ruling that precludes a merits determination."

[11] The government also avers that *Buck* does not "stand for the proposition that the denial of a COA is a proper basis for a Rule 60(b) motion" because "the denial of the COA was not the basis for Buck's Rule 60(b) motion." Instead, the inverse was true: "Buck sought a COA to appeal the denial of his Rule 60(b) motion . . . ."

[12] *See Gonzalez* 545 U.S. at 532; *Edwards*, 865 F.3d at 203. The district court determined that Robinson's motion was, "'if not in substance a habeas corpus application, at least similar enough that failing to subject it to the same requirements would be inconsistent with the statute' governing successive petitions" (quoting *Gonzalez*, 545 U.S. at 531).

claim for relief."[13] He cites *Mitchell v. Rees*, 261 F. App'x 825, 828–29 (6th Cir. 2008), for the proposition that "if [reopening] a case for the purposes of holding an evidentiary hearing is a valid use of Rule 60(b), then [reopening] to conduct juror interviews must certainly be valid."

Robinson avers that the district court was not correct that his "request . . . seeks to develop evidence in support of an impartial-jury claim under the Sixth Amendment." He contends that as part of his first habeas petition, he sought to interview jurors and that "the reason that [an impartial-jury] claim was not raised to the [d]istrict [c]ourt in Robinson's amended [§] 2255 motion was because the court prevented Robinson from conducting discovery." Consequently, "Robinson's inability to raise an [impartial-jury] claim is a prime example of a defect in the integrity of the habeas proceedings."

In response, the government maintains that Robinson's Rule 60(b) motion seeks to "reopen the [§] 2255 proceedings so that he [can] interview jurors 'to determine what role, if any, racial bias played in his convictions and sentences.'" The government notes, correctly, that "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rather, as we stated in *United States v. Fields*, 761 F.3d 443, 478 (5th Cir. 2014), "[a] petitioner demonstrates 'good cause' [for discovery] under Rule 6(a) [of the Rules Governing § 2255 Proceedings] 'where specific allegations before the court show reason to believe that a petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief'" (quoting *Bracy*, 520 U.S. at 908–09).[14]

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[13] *See also Wellons v. Hall*, 558 U.S. 220, 223 (2010) (per curiam). Robinson concedes, however, that "*Sessions* does not concern Rule 60(b) motions."

[14] Rule 6(a) of the Rules Governing § 2255 Proceedings "does not authorize fishing

The government emphasizes that Robinson's previous request to interview jurors, filed as part of his first § 2255 petition, did not concern a potential impartial-jury claim, but instead related to his *Batson* and IAC claims. The government also highlights that when he made his initial interview request, Robinson expressly acknowledged that he did not have a viable impartial-jury claim. Accordingly, although Robinson "certainly had the ability to bring the claim in his original [§] 2255 motion or to seek leave to amend his motion to add the claim," he "chose not to because . . . there was no evidence to support such a claim."[15]

The best view is that Robinson is attempting to advance a new habeas claim related to jury impartiality (in light of *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017)) under the guise of a Rule 60(b)(6) motion. His "motion seeks to re-open the proceedings for the purpose of adding new claims" and, as such, is "the definition of a successive claim." *Edwards*, 865 F.3d at 204.

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

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expeditions." *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994).

[15] The government also posits that "[g]iven that federal courts disfavor post-verdict interviewing of jurors except where there is some showing of an illegal or prejudicial intrusion into the jury process, *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976), and that by Robinson's own admission, he could not make that requisite showing, Robinson's alleged 'inability' to bring an impartial-jury claim hardly represents a 'defect' in the proceedings." In *Riley*, we strongly cautioned that "Courts simply [must] not denigrate jury trials by afterwards ransacking the jurors in search of some ground, not previously supported by evidence, for a new trial." *Id.*

not to bring this claim in his initial § 2255 motion because, as he acknowledged, such a claim was frivolous.[16]

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).[17] Accordingly, this claim is best viewed as a second or successive § 2255 motion.

Ultimately, "[u]sing Rule 60(b) to present new claims for relief from a . . . court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Gonzalez*, 545 U.S. at 531. The district court did not err in determining that Robinson's claim is a second or successive habeas petition.[18]

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[16] The district court echoed this conclusion when it stated that "Robinson conceded he had no evidence of a Sixth Amendment violation."

[17] The cases cited by Robinson are inapposite. The decision in *Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007), stands for the unremarkable proposition that a denial of "relief based on procedural default and failure to exhaust" may properly be reviewed using a Rule 60(b) motion. Likewise, *Balentine v. Thaler*, 626 F.3d 842, 844–49 (5th Cir. 2010), merely affirmed that the denial of relief on the ground that a claim is "unexhausted and procedurally barred" may be challenged using the Rule 60(b) vehicle. Neither situation is presented here. Importantly, the *Ruiz* court emphasized that "a Rule 60(b) motion is a habeas claim when it presents a new claim for relief, or when it presents new evidence in support of a claim already litigated, or when it asserts a change in the substantive law governing the claim, or when it attacks the federal court's previous resolution of a claim on the merits." *Ruiz*, 504 F.3d at 526.

[18] Even if we were to find that Robinson's impartial-jury claim did not constitute a second or successive habeas petition, we would undoubtedly conclude that he fails to show that, as a result of the denial of his discovery request, "'extraordinary circumstances' [exist to] justify[] the reopening of [the] final judgment" under Rule 60(b)(6). *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann*, 340 U.S. at 199); *see also Mitchell*, 261 F. App'x at 828–31.

D.

Robinson raises a third ground for relief in his Rule 60(b) motion. He maintains that the district court erred in finding that his challenge to the denial of his motion to amend his original § 2255 petition to include a defective-indictment claim was substantive in nature. Citing a number of intervening Supreme Court precedents, including *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), and *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), Robinson essentially asserts that our determination in *Robinson*, 367 F.3d at 289—that the government's "failure to charge [the death penalty aggravating] factors in an indictment did not contribute to [his] conviction or death sentence" was harmless error "beyond a reasonable doubt"—was flawed.

Robinson maintains that *Weaver*, in particular, "casts serious doubt on [our] 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[19] 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." 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 contends that *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'" (quoting *Weaver*,

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[19] The *Weaver* Court noted that structural error typically occurs in three instances. First, "an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 137 S. Ct. at 1908. Second, "an error has been deemed structural if the effects of the error are simply too hard to measure." *Id.* And third, "an error has been deemed structural if the error always results in fundamental unfairness." *Id.*

137 S. Ct. at 1908).[20] Ultimately, Robinson avers that "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."

In response, the government asserts that "Robinson's Rule 60(b) motion is a second or successive petition because it attacks the district court's merit-based ruling on his defective-indictment claim." The government notes—as did the district court as part of Robinson's initial habeas proceedings—that "Robinson had 'previously claimed, both at his trial on the merits before [the district court] and on direct appeal before . . . the Fifth Circuit, that the government's failure to submit the death penalty aggravating factors to the grand jury violated the Indictment Clause of the Fifth Amendment.'" Consequently, because we ruled otherwise on direct appeal, *Robinson*, 367 F.3d at 286–89, the government maintains that Robinson "lost his defective-indictment claim on the merits in a legal decision that was binding on the district court."[21]

Importantly, the government highlights that Robinson did not appeal the denial of his motion to amend but instead raises the issue now, several years later, in a Rule 60(b) motion. Nonetheless, the government posits that "[b]ecause Robinson's Rule 60(b) motion attacks the district court's merits-based resolution of his proposed [defective-indictment] claim, it is a second or

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[20] Robinson claims that *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018), "undermines [our] treatment of his [defective-indictment] claim as if it were unpreserved (and therefore subject to harmless error analysis)."

[21] *See also United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986) (emphasizing that we do not consider, on collateral review, issues that were previously raised and decided on direct appeal); *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980) (noting that we are "not required on [§] 2255 motions to reconsider claims of error raised and disposed of on direct appeal").

successive [§] 2255 motion."

At bottom, Robinson challenges 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. Attempting to disguise this claim, which was definitively resolved on direct appeal nearly fifteen years ago,[22] Robinson submits that the district court's refusal to allow, on collateral review, an amendment to his habeas petition to include defective-indictment claim was a procedural defect in the integrity of the habeas proceedings.

The court's refusal, however, was nothing of the sort. Looking to binding circuit precedent, including *Kadish* and *Jones*, the district court concluded that the claim was frivolous because its merits had already been determined on direct appeal. Consequently, the court properly denied amendment in the merits-based decision.

In its transfer order, the district court noted that "Robinson's argument is based solely on a purported change in substantive law regarding the definition of structural error which, he asserts, would alter the outcome of his appellate claim."[23] AEDPA forecloses such a claim here because it potentially cir-

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[22] Notably, Robinson does not assert that the intervening Supreme Court caselaw, including *Weaver* and *Williams*, announced "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). Consequently, because of the strict requirements for second or successive habeas petitions, Robinson attempts to bring this claim before the district court using a Rule 60(b)(6) procedural vehicle. In any event, however, *Weaver* and *Williams* were only changes in decisional law and "did not create an extraordinary circumstance and thus [cannot] create[] a basis for [Robinson] to re-open his proceedings as he now wishes to do." *Edwards*, 865 F.3d at 208. Thus, even if Robinson's second-or-successive claim were somehow construed as properly before us in a Rule 60(b)(6) motion, it would still fail.

[23] The court also noted that "[t]his is the type of end-run around the successive petition rules that *Gonzalez* prohibits."

cumvents § 2255's successive-petition requirements. 28 U.S.C. § 2255(h)(2); *see also id.* § 2244. The district court did not err in determining that the motion was, in actuality, a second or successive habeas petition.

III.

Because we conclude that Robinson's Rule 60(b) motion is a second or successive § 2255 motion, we also address his motion for leave to file a successive petition concerning his impartial-jury claim.

A.

"Before a second or successive [habeas] application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Relevant here, we may authorize such a finding "only if the movant makes a prima facie showing that his claims rely upon 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" *In re Jackson*, 776 F.3d 292, 293 (5th Cir. 2015) (per curiam) (quoting 28 U.S.C. § 2255(h)(2)); *see also* 28 U.S.C. § 2244(b)(3)(C).

"A 'prima facie showing' is 'simply a sufficient showing of possible merit to warrant a fuller exploration by the district court.'" *In re Simpson*, 555 F. App'x 369, 371 (5th Cir. 2014) (per curiam) (quoting *Reyes–Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001)). That standard is satisfied where the movant "put[s] forth minimally sufficient evidence to make a *prima facie* case" such that "there is sufficient, albeit slight, merit in the [petitioner's] motion to warrant further exploration by the district court." *In re Hearn*, 418 F.3d 444, 447–48 (5th Cir. 2005).

B.

Robinson "seeks leave to file a successive § 2255 motion on the ground that . . . [*Pena-Rodriguez*] . . . announced a new rule of constitutional law made retroactively applicable on collateral review." *Simpson*, 555 F. App'x at 370–71. In *Pena-Rodriguez*, 137 S. Ct. at 861, the Court examined "whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." It held,

> [W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 869.

The *Pena-Rodriguez* Court cautioned that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." *Id*. Consequently, "[f]or the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id*. Such a statement must "tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id*. Ultimately, "[w]hether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." *Id*.

C.

The Supreme Court has not expressly stated whether *Pena-Rodriguez*

announced "a new rule of constitutional law, made retroactive to cases on collateral review . . . that was previously unavailable." 28 U.S.C. § 2255(h)(2). Nonetheless, Robinson avers that *Tharpe v. Sellers*, 138 S. Ct. 545, 545–47 (2018) (per curiam), "indicate[s] that *Pena-Rodriguez* is indeed retroactively applicable."

In response, the government notes that the per curiam opinion in *Tharpe* "failed to mention *Pena-Rodriguez* at all." The government also highlights language in a dissenting opinion filed by three Justices in *Tharpe*, 138 S. Ct. at 547–53 (Thomas, J., dissenting). "[N]o reasonable jurist could argue that *Pena–Rodriguez* applies retroactively on collateral review." *Id*. at 551. *Pena-Rodriguez* "established a new rule: The opinion states that it is answering a question 'left open' by this Court's earlier precedents." *Id*. (quoting *Pena-Rodriguez*, 137 S. Ct. at 867). Further, "[a] new rule does not apply retroactively unless it is substantive or a 'watershed rul[e] of criminal procedure.'" *Id*. (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion)). Consequently, "[s]ince *Pena-Rodriguez* permits a trial court 'to consider [certain] evidence,' 137 S. Ct. at 869–70, and does not 'alte[r] the range of conduct or the class of persons that the law punishes,' *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), it cannot be a substantive rule." *Id*.

Although Robinson's contention that *Pena-Rodriguez* (in conjunction with *Tharpe*) announced a new substantive rule that applies retroactively to cases on collateral review is exceedingly doubtful, we need not reach that issue here. Even if the rule announced in *Pena-Rodriguez* did apply retroactively to cases on collateral review, Robinson fails to make the requisite *prima facie* showing of possible merit necessary, under 28 U.S.C. §§ 2244(b)(3)(C) and 2255(h)(2), to warrant the certification of his second or successive habeas motion. Over the past seventeen years, Robinson has proffered absolutely no

evidence of juror misconduct or bias.[24] Accordingly, we decline, as did the district court, Robinson's invitation to join his "improper fishing expedition in support of a hypothetical claim." Because Robinson fails to "put forth minimally sufficient evidence to make a *prima facie* case" and there is not "sufficient . . . merit in [his] motion to warrant further exploration by the district court," we deny the motion for authorization to file a second or successive § 2255 petition. *See Hearn*, 418 F.3d at 447–48.

In sum, the district court correctly construed Robinson's Rule 60(b)(6) motion as a second-or-successive petition for habeas relief. Because Robinson fails to meet the requisite standard for certification of a second or successive § 2255 petition, we DENY the motion for authorization and DISMISS the appeal for want of jurisdiction.

[24] Here, and unlike in *Pena–Rodriguez*, 137 S. Ct. at 869, there is no evidence of "a juror mak[ing] a clear statement that indicates he or she relied on racial stereotypes or animus to convict." Robinson seemingly concedes as much when he claims that he "should be permitted to conduct an investigation . . . to determine what role, *if any*, racial bias played in his convictions and sentences" (emphasis added).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 08, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 18-70022 USA v. Julius Robinson
USDC No. 4:05-CV-756

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

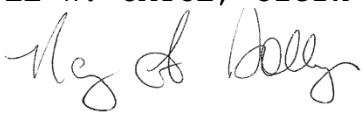
Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Jonathan C. Aminoff
Ms. Celeste Bacchi
Mr. Michael B. Charlton
Ms. Susan Cowger
Mr. Craig Anthony Harbaugh
Ms. Gail A. Hayworth
Mr. James Wesley Hendrix
Mr. Sean Kevin Kennedy
Mr. Frederick M. Schattman

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JULIUS OMAR ROBINSON (02), Petitioner,	§	
	§	Civil No. 4:05-CV-756-Y
V.	§	(Criminal No. 4:00-CR-0260-Y)
	§	
UNITED STATES OF AMERICA Respondent.	§	(death-penalty case)

MEMORANDUM OPINION AND ORDER TRANSFERRING 60(b) MOTION

Before the Court is Julius Omar Robinson's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), filed on February 28, 2018. ("Motion," CV doc. 10).[1] Robinson moves to reopen the Court's judgment in a proceeding under 28 U.S.C. § 2255. The Motion challenges the validity of Robinson's conviction by attacking various procedural rulings with new case law. Because the Motion is in actuality a second or successive petition for habeas relief, the Court **TRANSFERS** the Motion to the United States Court of Appeals for the Fifth Circuit.

Background

This Court sentenced Robinson to death in 2002 after a jury convicted him of murdering Johnny Lee Shelton and Juan Reyes. Robinson was also sentenced to life imprisonment for complicity in a criminal enterprise resulting in the death of Rudolfo Resendez.

[1] When Robinson filed his § 2255 motion, it was the Court's practice to file documents related to § 2255 motions in the criminal case. The practice ended and such documents are now filed in the civil case. Because relevant documents are filed under both cause numbers, "CR doc." refers to the criminal docket number 4:00-CR-260-Y, and "CV doc." refers to the civil docket number 4:05-CV-756-Y.

The Court assessed a second sentence of life imprisonment and a consecutive 300-month sentence on two other counts. (CR doc. 1740.) In 2004, the Fifth Circuit affirmed Robinson's convictions and sentences. *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004), *cert. denied*, 543 U.S. 1005 (2004).

In 2005, Robinson moved to vacate the judgment pursuant to 28 U.S.C. § 2255. (CR doc. 2279.) Following three years of litigation, the Court denied the motion. *Robinson v. United States*, No. 4:05-CV-756-Y, No. 4:00-CR-260-Y(2), 2008 WL 4906272 (N.D. Tex. Nov. 7, 2008) (CR doc. 2453.) Robinson moved for reconsideration, which this Court denied. (CR doc. 2456, 2465.) The Court by separate order denied a certificate of appealability ("COA"). (CR doc. 2473.) In 2010, the Fifth Circuit denied Robinson's request for a COA and denied rehearing. (CR doc. 2477, 2482). The Supreme Court denied Robinson's petition for certiorari. (CV doc. 7.)

Robinson moves to reopen the § 2255 proceedings based on Supreme Court cases that have been decided since this Court denied relief. Respondent contends the Motion fails to meet the standards for relief under Rule 60(b) and, to the extent it raises new claims, it should be transferred to the Court of Appeals as a second or successive petition.

Applicable Law

Federal Rule of Civil Procedure 60(b)(6) allows a district court to grant relief from a final judgment, order, or proceeding

for any reason that justifies relief. *See* Fed. R. Civ. P. 60(b)(6). The purpose of Rule 60(b) is to "balance the principle of finality of a judgment with the interest of the court in seeing that justice is done in light of all the facts." *Hernandez v. Thaler*, 630 F.3d 420, 429-30 (5th Cir. 2011). To succeed under Rule 60(b)(6), the movant must show that extraordinary circumstances exist that justify the reopening of a final judgment. *See Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

District courts have jurisdiction to consider Rule 60(b) motions in 28 U.S.C. § 2254 habeas proceedings so long as the motion attacks not the substance of the court's resolution of the claim on the merits, but some defect in the integrity of the habeas proceedings. *See Gonzalez*, 545 U.S. at 532. Because 28 U.S.C. § 2254 and § 2255 are nearly identical in substance, this Circuit applies *Gonzalez* to Rule 60(b) motions to reopen § 2255 proceedings. *See Williams v. Thaler*, 602 F.3d 291, 302 n.5 (5th Cir. 2010); *Davis v. United States*, 417 U.S. 333, 343 (1974) (section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus"). Examples of Rule 60(b) motions that properly raise a defect in the integrity of the habeas proceedings include a claim of fraud on the court or challenges to a procedural ruling that precluded a merits determination, such as failure to exhaust, procedural default, or time bar. *Gonzalez*, 545 U.S. at 532 nn. 4, 5.

The law limits the defendant to one § 2255 motion unless he obtains certification for a successive motion from the Court of Appeals. *See* 28 U.S.C. §§ 2244, 2255(e), (h); *Gonzalez*, 545 U.S. at 528 (addressing § 2254). Because of the comparative lenience of Rule 60(b), petitioners "sometimes attempt to file what are in fact second-or-successive habeas petitions under the guise of Rule 60(b) motions." *In re Edwards*, 865 F.3d 197, 203 (5th Cir.), *cert. denied sub nom. Edwards v. Davis*, 137 S. Ct. 909 (2017) (citing *Gonzalez*, 545 U.S. at 531–32). A Rule 60(b) motion that (1) presents a new habeas claim, (2) attacks the federal court's previous resolution of a claim on the merits, or (3) presents new evidence or new law in support of a claim already litigated, should be treated as a second or successive habeas petition. *See Gonzalez*, 545 U.S. at 531-32. The rationale is that such motions could circumvent the strict successive-petition requirements in § 2255(h). *See id.* (addressing similarly worded provision in § 2244(b)(2)(A)).

Denial of COA

Robinson first contends that an erroneously high standard was used in denying a COA on his ineffective-assistance-of-counsel claim. He cites *Buck v. Davis*, 137 S. Ct. 759 (2017) as "the Supreme Court's most recent case on the COA standard" and argues that this Court and the Court of Appeals erred under *Buck* by making a COA determination on the merits rather than simply asking whether

the district court ruling was debatable. Motion, p. 5-9. Robinson argues that the COA is a valid subject for Rule 60(b) relief because it is by definition a "non-merits based decision." *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *see* Reply, p. 1.

To the extent Robinson seeks to reopen this Court's order denying a COA, it is not a proper Rule 60(b) motion. *Gonzalez* allows the reopening of procedural decisions that precluded a merits determination. *Gonzalez*, 545 U.S. at 532, n. 4. The denial of COA did not preclude a merits determination; it followed this Court's merits-based ruling on the ineffective-trial-counsel claim. Robinson simply seeks vindication of the claim through a second round of appellate review. It is, "if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute" governing successive petitions. *See id.* at 531; § 2255(h). The Court has no jurisdiction to consider it.

Inability to Question Jurors

Next, Robinson reasserts a request to interview jurors that this Court had denied during the § 2255 litigation. He argues that he should be permitted to "conduct an investigation no more intrusive than necessary to determine what role, if any, racial bias played in his convictions and sentences." Motion, p. 11. This request relies on *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), which held that the "no impeachment" evidence rule for

jurors must yield to the Sixth Amendment when a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict. *See* Fed. R. Evid. 606(b); *see also* L. Cr. R. 24.1 (N.D. Tex.); Motion, p. 9-11.

Robinson made a similar request during the § 2255 litigation "to vindicate his Sixth Amendment right to an impartial jury," but Robinson's § 2255 motion did not contain an impartial-jury claim under the Sixth Amendment. (CR doc. 2279.) Robinson conceded he had no evidence of a Sixth Amendment violation. (CR doc. 2385, p. 1-5.) This Court denied the request as an improper fishing expedition in support of a hypothetical claim. (CR doc. 2388, p. 2-3.)

Robinson's present request again seeks to develop evidence in support of an impartial-jury claim under the Sixth Amendment. Although Robinson argues in his reply that a discovery denial is not a decision on the merits, the case he relies upon is not a Rule 60(b) case. *In re Sessions*, 672 F.2d 564 (5th Cir. 1982). Moreover, discovery in habeas cases must be tied to a showing that, if the facts are more fully developed, the petitioner may be entitled to relief. *Bracy v. Gramley,* 520 U.S. 899, 908-09 (1997). It follows that the only legitimate purpose for which the Court could grant the requested discovery is for Robinson to present a claim for relief. This Court has no jurisdiction to consider it in a Rule 60(b) Motion. *See Gonzalez*, 545 U.S. at 531.

Indictment Error

Robinson's final argument challenges a ruling by the Court of Appeals in the direct appeal. The Court of Appeals held that the government's failure to charge by indictment the aggravating factors used to justify a death sentence constituted harmless error. *See Robinson*, 367 F.3d at 287-88. During the initial § 2255 litigation, Robinson moved to amend the motion to include this indictment-error claim. (CR doc. 2422.) The Court denied the motion because the claim had already been decided on appeal and because the new Supreme Court cases he relied upon were not applicable to the indictment issue and were not retroactive. (CR doc. 2430, p. 2-3). Robinson now argues that the Supreme Court opinions in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) and *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) provide new support for his argument that the indictment error should not have been subjected to a harmless error analysis. Motion, p. 15-19; *see Robinson*, 367 F.3d at 286-89.

Robinson's argument is based solely on a purported change in substantive law regarding the definition of structural error which, he asserts, would alter the outcome of his appellate claim. It is prohibited by *Gonzalez,* 545 U.S. at 531, because it potentially circumvents the successive-petition requirements in § 2255. To avoid this conclusion, Robinson argues that the denial of leave to amend is merely a procedural denial, not a merits-based denial.

But the procedural ruling is inextricably tied to the indictment-error claim offered as a ground for challenging his conviction. Because Robinson seeks vindication of a substantive claim previously denied on appeal, it is a second or successive petition.

Robinson asserts in his reply that, because the *rulings* he challenges are procedural rather than merits-based, they are all subject to being reopened under Rule 60(b), irrespective of his ultimate intent to litigate the underlying substantive claims for relief. This argument, which necessarily characterizes any allegation of procedural error as "extraordinary circumstances" under Rule 60(b)(6), would potentially swallow the general rule. At a minimum, it conflicts with the holding in *Gonzalez* that extraordinary circumstances "will rarely occur in the habeas context." *Id.* at 535. Nevertheless, Robinson cites *Gonzalez* for support, because it held that challenging a timeliness denial was a proper use of Rule 60(b), even as it would have allowed the petitioner to litigate the underlying substantive claims for relief.

Robinson's argument badly misreads *Gonzalez*. The difference between the limitations ruling challenged in *Gonzalez* and the procedural rulings challenged by Robinson is that the limitations ruling *precluded* a merits determination. Here, Robinson challenges a ruling that did not prevent any merits determination (the COA) or leverages "procedural" errors to present new claims challenging his

conviction (the impartial-jury claim and indictment error). Even though couched in terms of procedural error, these issues are, at bottom, merits-based challenges to his conviction.

Gonzalez defines "on the merits" as a determination that there exist or do not exist "grounds" entitling a petitioner to relief. *Id.* at 532 n.4. The Supreme Court clarified that a Rule 60(b) movant is making a habeas-corpus claim when he asserts one of those "grounds" *or* asserts that "a previous ruling regarding one of those grounds" was in error. *Id.* Robinson is doing the latter. He asserts grounds for relief by challenging procedural rulings using new Supreme Court law which may or may not satisfy the requirements in § 2255 that such laws be retroactive rules of constitutional law. This is the type of end-run around the successive petition rules that *Gonzalez* prohibits.

Transfer

Because the Motion raises new claims or seeks to relitigate claims decided on the merits, it is a second or successive petition under 28 U.S.C. § 2255(h). Before this Court may accept a second or successive petition for filing, it must be certified by the court of appeals to contain either newly discovered evidence showing a high probability of actual innocence or a new and retroactive rule of constitutional law. *See* § 2255(h); *see also* § 2244(b)(2); *Gonzalez*, 545 U.S. at 529-30.

This Court may either dismiss the motion for lack of jurisdiction or transfer it to the Court of Appeals for a determination under § 2255(h). *See In re Hartzog*, 444 F. App'x 63, 65 (5th Cir. 2011) (citing *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000)). The Court finds that it is in the interest of justice to transfer the motion to the Court of Appeals rather than dismiss. *See United States v. Fulton*, 780 F.3d 683, 688 (5th Cir. 2015) (stating that a COA requirement, necessitated by dismissal, presents a judicially inefficient procedural mechanism that would have little practical benefit as compared to transfer).

* * * * *

The Clerk of Court is directed to **TRANSFER** Robinson's Motion (CV doc. 10) to the United States Court of Appeals for the Fifth Circuit.

SIGNED June 20, 2018.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

HILARY POTASHNER (Bar No. 167060)
Federal Public Defender
CRAIG A. HARBAUGH (No. 194309)
(E-Mail: Craig_Harbaugh@fd.org)
JONATHAN C. AMINOFF (No. 259290)
(E-Mail: Jonathan_Aminoff@fd.org)
CELESTE BACCHI (No. 307119)
(E-Mail: Celeste_Bacchi@fd.org)
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5374
Facsimile: (213) 894-0310

Attorneys for Defendant/Petitioner
JULIUS OMAR ROBINSON

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

JULIUS OMAR ROBINSON,

Defendant/Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff/Respondent.

Civil No. 4:05-CV-756-Y
(Criminal No. 4:00-CR-00260-2)

DEATH PENALTY CASE

Honorable Terry R. Means
United States District Judge

MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 60(b)(6)

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

JULIUS OMAR ROBINSON, Defendant/Petitioner, v. UNITED STATES OF AMERICA, Plaintiff/Respondent.	Civil No. 4:05-CV-756-Y (Criminal No. 4:00-CR-00260-2) **DEATH PENALTY CASE** Honorable Terry R. Means United States District Judge **MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 60(b)(6)**

Petitioner Julius Robinson moves pursuant to Federal Rule of Civil Procedure, Rule 60(b)(6) for relief from the judgment of this Court due to the extraordinary circumstances of this case. This motion is based on the attached memorandum of points and authorities and all the files and records of this case.

Respectfully submitted,

Dated: February 9, 2018

/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF
CELESTE BACCHI
CRAIG A. HARBAUGH
Deputy Federal Public Defenders

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

This Court sentenced Julius Robinson to death on June 5, 2002. *United States v. Robinson*, CR-260-2, Dkt. No. 1740. The Fifth Circuit affirmed Robinson's convictions and sentences, *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004), and the Supreme Court denied certiorari. *Robinson v. United States*, 543 U.S. 1005 (2004).

Robinson then moved, pursuant to 28 U.S.C. Section 2255, to vacate his convictions and sentences in this Court on November 29, 2005. CR-260-2, Dkt. No. 2279. In the course of litigating his Section 2255 motion, Robinson sought to interview the jurors from his capital trial, but the Court denied this request. Dkt. No. 2388. Robinson then sought to amend his Section 2255 motion to include a claim raised on direct appeal regarding the adequacy of the indictment, but the Court denied this request. Dkt. No. 2430. Notwithstanding the government's concession that Robinson was entitled to an evidentiary hearing on his penalty-phase ineffective assistance of counsel claim (dkt. nos. 2365 at 90, 2439 at 10), the Court summarily denied Robinson's Section 2255 motion and denied his request for a certificate of appealability. Dkt. Nos. 2453, 2473. The Fifth Circuit affirmed, *United States v. Robinson*, 2010 U.S. App. LEXIS 11675 (5th Cir. 2010), and the Supreme Court denied certiorari, *Robinson v. United States*, 565 U.S. 827 (2011).

For over 12 years, Robinson has fought the unconstitutional denial of his due process rights to full and fair litigation of his Section 2255 claims. In the past year, the Supreme Court has issued three decisions which provide further support for the arguments Robinson has been making and establish once again that prior rulings in this case which precluded a full merits determination resulted in a "defect in the integrity of [his] federal habeas proceeding." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Specifically, the Supreme Court's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), confirms that Robinson was erroneously denied a COA, which deprived him of a merits review of his appeal. The Supreme Court's decision in *Peña-Rodriguez v. Colorado*,

137 S. Ct 855 (2017), confirms that Robinson was erroneously denied the opportunity to interview the jurors in his case which prevented Robinson from presenting a fully investigated Section 2255 motion to this Court, and prevented the Court from reviewing the merits of this case in its entirety. Finally, the Supreme Court's decision in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), confirms that this Court erroneously denied Robinson's request to amend his Section 2255 motion. Robinson moves to re-open the Section 2255 litigation to correct the defects in the integrity of the post-conviction proceedings that deprived him of a resolution of his claims on their merits.

II. ARGUMENT

The central concern of Federal Rule of Civil Procedure 60(b)(6) is that justice is done. *Klapprott v. United States*, 335 U.S. 601, 615 (1949). Accordingly, Rule 60(b)(6) "vests power in courts . . . to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Id*. at 615. Pursuant to Rule 60(b)(6), a party can seek relief "from a final judgment, order, or proceeding" and request reopening of his case, for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Rule 60(b)(6) "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995) (quoting *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

The Fifth Circuit has long identified Rule 60(b)(6) "as 'a grand reservoir of equitable power to do justice in a particular case. . . .'" *Williams v. Thaler*, 602 F.3d 291, 311 (5th Cir. 2010) (quoting *Harrell v. DCS Equip. Leasing Corp.,* 951 F.2d 1453, 1458 (5th Cir. 1992)); *see also Steverson v. GlobalSantaFe Corp*., 508 F.3d 300, 303 (5th Cir. 2007) (Rule 60(b)(6) "is a means for accomplishing justice in exceptional circumstances.") (internal citations omitted). Specifically,

> [t]he purpose of Rule 60(b) is to delineate the circumstances under which relief may be obtained from the operation of final judgments, whether they are entered by default, [] or otherwise. By its very nature, the rule seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the court's conscience that justice be done in light of *all* the facts.

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981) (internal citations and quotations omitted) (emphasis added). While finality is important, "the justice-function of the courts demands that [finality] 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." *Id.* Thus, Rule 60(b) is "liberally construed in order to achieve substantial justice." *Id*. at 402.

Rule 60(b), "like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings" and "has an unquestionably valid role to play in habeas cases." *Gonzalez*, 545 U.S. at 534; *see, e.g., United States v. Fernandez*, 797 F.3d 315 (5th Cir. 2015) (applying Rule 60(b) in the context of an action initiated under Section 2255). District courts have jurisdiction to consider Rule 60(b) motions in habeas proceedings when such motions "attack[ ] not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceeding." *Gonzalez*, 545 U.S. at 532. Thus, a district court can consider a Rule 60(b) motion when a petitioner "asserts that a previous ruling which precluded a merits determination was in error — for example, a denial for such reasons as failure to exhaust, procedural default or statute-of-limitations bar." *Id*. at 532 n.4.

Rule 60(b) is particularly important where federal review of the merits of a petitioner's claims has been limited. Accordingly, the Fifth Circuit has held that the "'main application'" of Rule 60(b) "is to those cases in which the true merits of a case

might never be considered" and it has "reversed where denial of relief precludes examination of the full merits of the cause," because in such instances "even a slight abuse may justify reversal." *Ruiz v. Quarterman*, 504 F.3d 523, 532 (5th Cir. 2007) (internal citations and quotations omitted); *see also Phelps v. Alameida*, 569 F.3d 1120, 1140 (9th Cir. 2009) ("a central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard.").

To avail himself of relief under Rule 60(b), a petitioner must "demonstrate both the motion's timeliness and … that 'extraordinary circumstances justif[y] the reopening of a final judgment.'" *Christeson v. Roper*, 135 S. Ct. 891, 895-96 (2015) (quoting *Gonzalez*, 545 U.S. at 535).

A. The Lack of Due Process Afforded to Robinson Constitutes Extraordinary Circumstances Justifying Relief

In the course of litigating his Section 2255 motion, Robinson has been denied: the ability to interview the jurors in his case; discovery and an evidentiary hearing; the right to amend his Section 2255 motion; and a certificate of appealability. Intervening Supreme Court caselaw reaffirms that these denials, which precluded a full and fair merits determination, were erroneous.

1. Robinson Was Wrongly Denied His Ability to Appeal Because This Court and the Fifth Circuit Applied an Erroneously High Standard for Obtaining a Certificate of Appealability

To obtain a certificate of appealability ("COA"), a petitioner is required to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to meet that burden, the only issue is whether an applicant can show that "jurists of reason could disagree with the district court's resolution of his constitutional claims, or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). As the Supreme Court has repeatedly held, the "established rule" for granting a COA

requires a court of appeals to "limit its examination to a threshold inquiry into the underlying merit of the claims,' and ask 'only if the District Court's decision was debatable.'" *Buck v. Davis*, 137 S. Ct. at 774 (citing *Miller-El*, 537 U.S. at 348). Section 2253(c)(2) sets forth a clear, "two-step process: an initial determination whether a claim is reasonably debatable, and then — if it is — an appeal in the normal course." *Id.* Obtaining a COA "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller–El*, 537 U.S. at 337. Moreover, in death penalty cases, "any doubt as to whether a COA should issue . . . must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005).

In *Buck v. Davis*, the Supreme Court's most recent case on the COA standard, the petitioner requested a COA following the denial of a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). *Buck*, 137 S. Ct. at 773. However, rather than asking "only if the District Court's decision was debatable," *Miller-El*, 537 U.S. at 348, the Fifth Circuit "essentially decided the case on the merits" by finding that Buck had not shown the "extraordinary circumstances that would permit relief" under Rule 60(b)(6). *Id.* at 773-74. The Supreme Court found that the Fifth Circuit's COA denial in *Buck* was based upon "ultimate merits determinations [that] the panel should not have reached." *Id.* The Court explained that the Fifth Circuit's approach, which determined the merits of the appeal before and as part of its ultimate COA judgment, was an improper application of COA procedure:

> [T]he question for the Fifth Circuit was not whether Buck had "shown extraordinary circumstances" or "shown why [the State's actions] would justify relief from the judgment." Those are ultimately merits determinations the panel should not have reached.
>
> [. . .]

> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean that he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage. Miller-El*, 537 U.S. at 336-37. *Miller-El* flatly prohibits such a departure from the procedure described by § 2253.

Id. (italics in original).

As Robinson argued to this court, the Fifth Circuit, and the United States Supreme Court, these standards were not followed in Robinson's case. After summarily denying Robinson's Section 2255 motion (dkt. no. 2453), this Court, and later the Fifth Circuit, denied Robinson's request for a COA on his penalty-phase ineffective assistance of counsel claim. *See* Dkt. No. 2473; *United States v. Robinson*, No. 09-70020 (5th Cir. June 8, 2010). In response, Robinson argued that the District Court and the Fifth Circuit had effectively required Robinson to prove he would succeed on appeal before granting him the right to appeal — an approach which imposed an erroneously high standard on Robinson's COA requests, and failed to abide by the COA guidelines set forth by the Supreme Court. *Robinson v. United States*, Supreme Court Case No. 10-8146, Cert Petition filed December 22, 2010. The COA denials issued by this Court and by the Fifth Circuit in this case were improper because they were contrary to the requirements of Section 2253 and "placed too heavy a burden

on [Robinson] *at the COA stage*." *Buck*, 137 S. Ct. at 774 (italics in original) (internal citations omitted).

In order to be entitled to a COA, Robinson had to establish that it was at least debatable that he was deprived of the effective assistance of counsel at the penalty phase of his trial. This Court denied Robinson's request for a COA, finding that Robinson had failed to establish either *Strickland* prong. Dkt. No. 2473. Much of the Court's Order was a defense of the Court's merits denial. *Id*. at 3-4. The Court concluded that because "Robinson has not produced independent indicia of the likely merit of either prong… it does not appear that reasonable jurists would disagree with the denial of this claim." *Id*. at 4. The "independent indicia" standard is a Fifth Circuit construct that holds that a Section 2255 movant is entitled to an evidentiary hearing only if he "produces independent indicia of the likely merit of her allegations, typically in the form of one or more affidavits from reliable third parties." *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998). In support of his Section 2255 motion, Robinson filed over 40 declarations from third parties, but the Court found that some of Robinson's declarants were not reliable. *See, e.g.*, Dkt. No. 2453 at 26 (finding witness's "credibility is questionable"). By definition, questionable credibility is at least debatable, and thus a COA should have issued. *Miller-El*, 537 U.S. at 336-37.

On review of Robinson's request for a COA, the Fifth Circuit skipped an analysis of the deficient performance prong, and instead decided that even if Robinson could establish deficient performance, he could not establish prejudice. *United States v. Robinson*, 2010 U.S. App. LEXIS 11675 (5th Cir. 2010). Yet in so doing, the Fifth Circuit engaged in the same improper pattern that the Supreme Court has repeatedly condemned. For example, the Fifth Circuit decided that despite Robinson's specifically named deficiencies in the trial attorneys' representation, "no reasonable jurist would find that Robinson was prejudiced by the [] alleged deficiencies." *Id*. at *11. Similarly, the Fifth Circuit found that trial counsel was not ineffective for failing to

challenge the future dangerousness evidence because "no jurist of reason would believe that a dent in that evidence, which Robinson alleges, would have created a reasonable probability of a different verdict." *Id* at *11-12. And these are not isolated examples. *See id.* at *14 ("Robinson's case for a difficult childhood's mitigating his culpability is far less compelling than the showing in recent cases in which the Supreme Court found the omission of mitigation evidence prejudicial. … No reasonable jurist would find [the mitigation evidence's] omission prejudicial.").

Thus, the Fifth Circuit's sole reason for denying a COA is its belief that Robinson failed to establish prejudice — i.e., that he failed to win his *Strickland* claim on the merits. Yet as the *Buck* Court makes clear, it was error for the Fifth Circuit to make such merits determinations and *then* deny Robinson a COA. Whether a reasonable jurist would find prejudice is the ultimate issue to be decided. At the COA stage, the only relevant inquiry is whether reasonable jurists would debate whether Robinson could establish prejudice. "Indeed, a claim can be debated even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that the petitioner will not prevail." *Miller-El*, 537 U.S. at 338.

The improper standard applied by the Fifth Circuit in *Buck* and in this case has been repeated in other cases. Since the Fifth Circuit's erroneous denial of Robinson's COA motion, the Supreme Court has continued to overturn Fifth Circuit COA denials, and recently referenced the Fifth Circuit's "troubling" pattern of misapplying Supreme Court precedent in denying COA's. *See, e.g., Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., dissenting from the denial of certiorari). The Fifth Circuit's practice has been to conduct "a detailed evaluation of the merits and then conclude[] that because [the petitioner] had "fail[ed] to prove" his constitutional claim, a COA was not warranted." *Fisher*, 135 S. Ct. at 2652 (Sotomayor, J., dissenting); *see e.g. Miller-El*, 537 U.S. 322. The Supreme Court in *Buck v. Davis* once again noted this pattern. *See* 137 S. Ct. at 773 ("The court below phrased its determination in proper terms — that jurists of reason would not debate that Buck should be denied relief, but it reached

that conclusion only after essentially deciding the case on the merits.") (citation to Fifth Circuit opinion omitted).

However, since *Buck v. Davis*, the Fifth Circuit appears to be making efforts to correct its approach. *See, e.g., Washington v. Davis*, 2017 U.S. App. LEXIS 25832, at *6-7 (5th Cir. 2017). In *Washington*, the panel granted a COA on several procedurally defaulted claims of ineffective assistance of counsel. *Id.* at *8-10. The panel acknowledged that the recent *Buck* decision made clear that "[w]hen a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication on the actual merits, it is . . . deciding an appeal without jurisdiction." *Id.* at *6 (citing *Buck*, 137 S. Ct. at 773). The panel also found that even though "[t]he State argues — with persuasive force — that the foregoing claims are unlikely to succeed on the merits," such disagreement between the State and defense "proves that Washington's claims are 'debatable' and thus warrant a COA." *Id.* at *11.

The analysis applied by the Fifth Circuit in *Washington* is in accordance with the standards set forth in *Buck*, and is the standard that the Court should have applied in Robinson's case. The Supreme Court's rejection of the Fifth Circuit's long-standing pattern of misapplying the COA standards is an "extraordinary circumstance" justifying re-opening this case under Rule 60(b)(6) and allowing Robinson to move for a COA.

2. This Court Erroneously Barred Robinson From Conducting a Reasonable Investigation

After filing his initial Section 2255 motion, Robinson moved for permission to interview the jurors. Dkt. No. 2385. This Court denied Robinson's request, finding that Robinson had not provided any evidence that merited allowing Robinson to investigate possible juror misconduct. Dkt. No. 2388 at 2.

However, the Supreme Court's recent decision in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), supports Robinson's case for interviewing the jurors and demonstrates the error of this Court's decision. In that case, Peña-Rodriguez's counsel

was permitted to speak with the jurors, and two jurors informed counsel that another juror had expressed anti-Hispanic bias toward the defendant and his alibi witnesses. *Id*. at 861. Defense counsel ultimately submitted signed affidavits from those jurors, which memorialized the racist comments made by another juror. *Id.* at 862. Despite this evidence of juror misconduct the trial court denied the defense motion for a new trial, finding that the affidavits were not admissible to impeach the verdict under Colorado's equivalent to Federal Rule of Evidence 606(b), which renders inadmissible virtually any post-verdict juror statement concerning the contents of the jury's deliberations. *Id.* at 862. The Colorado Supreme Court affirmed, and the Supreme Court granted certiorari to decide if racial bias should be an exception to the general, firmly rooted provisions behind Rule 606(b). *Id.* at 862-63. The Supreme Court reversed, finding that the Sixth Amendment requires that the no-impeachment rule give way in order to permit a trial court to consider evidence that a juror relied on racial stereotypes or animus to convict a criminal defendant. *Id*. at 869. 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 evidence rules must be modified to root out racism in the criminal justice system. *Id.* at 871.

It is uncontroverted that the death penalty has a long history of racial injustice. Indeed, just last term the Supreme Court reversed a Texas capital conviction in which a man's death sentence may have been based on his race. *Buck*, 137 S. Ct. at 778. Similarly, Julius Robinson is a black man who was capitally prosecuted in Texas — a state which leads the nation in federal capital convictions. Of the 13 federal capital convictions from the state of Texas, 9 defendants are black, 2 are white, and 2 are Latino.[1] Robinson was tried before a jury of 11 white people and 1 black man, whom

[1] These numbers were taken from the Death Penalty Information Center's website. Available at: https://deathpenaltyinfo.org/federal-death-row-prisoners#list. These numbers include Louis Jones and Juan Garza, both of whom have been executed.

the defense had unsuccessfully moved to strike for cause. Additionally, the Government was permitted to strike 7 of the 8 black jurors questioned during voir dire. Given the severity of Robinson's sentence, and the racial undertones of this capital prosecution, Robinson should be permitted to conduct an investigation no more intrusive than necessary to determine what role, if any, racial bias played in his convictions and sentences.

The Supreme Court noted in *Peña-Rodriguez* that the "practical mechanics of acquiring and presenting [evidence of juror bias] 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." *Id*. at 869. In Texas, however, Local Criminal Rule 24.1 prevents any contact between the parties and a juror absent permission of the court. This leaves Robinson entirely at the whim of the jurors and without a mechanism, practical or otherwise, for even investigating the type of misconduct at issue in *Peña-Rodriguez.*

Ultimately the *Peña-Rodriguez* case emphasizes that the specter of racial bias is an issue so repulsive that exceptions should be made to general rules to ensure that racism has not influenced criminal convictions or sentences. The Supreme Court has also emphasized the importance of investigation in the post-conviction context. *See, e.g., Martinez v. Ryan*, 566 U.S. 1, 13 (2012) (explaining that post-conviction ineffective assistance of counsel claims can require extensive investigation such that an inmate's ability to file such a claim is significantly diminished absent the assistance of post-conviction counsel). On balance, *Peña-Rodriguez* establishes that rules such as Local Criminal Rule 24.1 must allow criminal defendants an ability to investigate issues such as racial bias, and Robinson was deprived of this right. Robinson's inability to adequately investigate his case prevented a full and fair merits determination, which warrants re-opening the proceedings under Rule 60(b) and permitting Robinson to move the Court for an order growing Robinson access to the jurors from his trial.

3. This Court's Denial of Robinson's Right to Amend his Section 2255 Motion to Include His Indictment Claim was Erroneous

a. Procedural History of Robinson's Request to Amend

Prior to Robinson's trial, the Supreme Court held in *Jones v. United States*, 526 U.S. 226 (1999), 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. The Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) extended the *Jones* holding, with the exception of the indictment requirement, to state prosecutions under the Fourteenth Amendment.

When Robinson was tried, the Federal Death Penalty Act required that the Government present its aggravating factors to the petit jury, but did not require that they 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, and the grand jury returned an indictment charging only non-capital offenses. Regardless, 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 filed a pretrial motion to disqualify the death penalty because the aggravating factors had not been presented to the Grand Jury. Dkt. No. 1443. This 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." Dkt. No. 1575 at 2 (citing *Apprendi*, 530 U.S. at 494 and n. 19).

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 death, 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 this 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 Robinson's Fifth Amendment rights had been violated. The controversial issue, however, was whether the constitutional violation was a structural error, as Robinson argued[2], or was subject to harmless error review, as the Government claimed. The Fifth Circuit agreed with Robinson's argument 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). Nevertheless, the court deemed this "constitutional error" non-structural, and ruled that the harmless-error analysis applied. *Id.* at 285.

In finding that the Government's failure to include statutory aggravating factors in the indictment was not structural error, the Fifth Circuit relied on *Neder v. United States*, 527 U.S. 1, 8 (1999), wherein the Supreme Court explained that structural errors tend to involve a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Robinson*, 367 U.S. at 285 (quoting *Neder*, 527 U.S. at 8). The court then examined *United States v. Cotton*, 535 U.S. 625 (2002), where the Supreme Court applied the plain error test to a forfeited claim that the government had failed to allege a fact that increased the statutory maximum

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[2] Robinson has continually maintained that the indictment error that occurred in his case is a structural error. *See, e.g., United States v. Robinson*, Fifth Circuit Case No. 02-10717, Reply Brief filed 12/11/2003.

sentence in the indictment and found that the error did not affect the "fairness, integrity, or public reputation" of the proceedings. *Robinson*, 367 F.3d at 286 (quoting *Cotton*, 535 U.S. at 632-33). Reconciling the two cases, the Fifth Circuit held that if Cotton's indictment claim did not affect the fairness of the proceedings, then it could not be the type of structural error that the *Neder* Court described as "one that necessarily 'deprive[s] defendants of basic protections without which … no criminal punishment may be regarded as fundamentally fair.'" *Robinson*, 367 F.3d at 286 (quoting *Neder*, 527 U.S. at 8-9) (alterations in original). 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.

After his conviction became final, Robinson moved to vacate his convictions and sentences under 28 U.S.C. Section 2255. Undersigned appointed counsel, however, had only four months to investigate the case and file the motion before the one-year statute of limitations would expire. After timely filing the Section 2255 motion, appointed counsel moved to amend the motion to include Robinson's indictment claim, arguing that intervening Supreme Court case law cast doubt over the Fifth Circuit's prior denial of the claim. Robinson's argument was that the Supreme Court's decisions in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), and *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), further clarified what constitutes a structural error, and they demonstrate that the Fifth Circuit's decision was erroneous. Dkt. No. 2422. The Court denied Robinson's request to amend, finding that because the new case law did not squarely address the issue, the cases were irrelevant. Additionally, the Court held that because the cases were not retroactive, they could not impact Robinson's case, which became final on direct review. *Id.* at 3. The Court subsequently denied Robinson's Section 2255 motion. Dkt. Nos. 2453, 2454.

b. The Impact of *Weaver v. Massachusetts*

On June 22, 2017, the Supreme Court issued *Weaver v. Massachusetts*, 582 U.S. ___, 137 S. Ct. 1899 (2017), in which the defendant claimed his trial attorney had been ineffective for failing to object when the trial court barred the public from portions of the jury selection process, in violation of his right to a public trial under *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam). There was no dispute that Weaver's right to a public trial had been violated and that such error is structural. At issue, however, was whether in the context of trial counsel's failure to object to the closure of the courtroom, Weaver needed to show prejudice to establish his ineffective assistance of counsel claim, or if prejudice would simply be presumed because the error that counsel failed to object to was structural. *Id*. at 1907.

The Court began with its most expansive definition of structural errors to date, explaining that structural errors tend to arise in three circumstances. "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id*. at 1908. The Court provided a defendant's right to self-representation as an example of this type of structural error. "Second, an error has been deemed structural if the effects of the error are simply too hard to measure." *Id*. The denial of a defendant's right to select her own attorney is an example of this type of structural error. *Id*. And "[t]hird, an error has been deemed structural if the error always results in fundamental unfairness." *Id*. The denial of an indigent defendant's right to counsel is one such example. *Id*. Notwithstanding these three rationales, the Court cautioned that these categories are not rigid and explained: "one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id*. After reaffirming that the error there was structural, and the reasons therefore, the Court set out to decide the remedy for a structural error not objected to at trial and raised on appeal via an ineffective assistance of counsel claim. The Court ultimately held that this error, when raised via an ineffective assistance claim, required a showing of

prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984). 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.

Weaver casts serious doubt on the Fifth Circuit's decision in this case in two significant ways. First, *Weaver* reiterated yet again the value of not waiving a valid claim for appeal. Had Weaver's counsel simply preserved a claim challenging the structural error present in his case, Weaver would have been entitled to a new trial. Yet contrary to the approach in *Weaver*, the Fifth Circuit's decision in *Robinson* equated waived claims with non-waived claims. In relying on *Cotton*, a case about a defective indictment claim which was not preserved for appeal, the Supreme Court applied plain error review. The Fifth Circuit expanded that logic to Robinson's non-waived indictment error claim, overlooking the significance of Robinson's preservation of his claim. In essence, the Fifth Circuit 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. Second, *Weaver* establishes that structural errors do not always implicate fairness. But the Fifth Circuit's analysis of whether Robinson's claim was structural depended almost entirely on "fundamental fairness."

In addition to *Weaver*, the Supreme Court's recent decision in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), reinforces the veracity of Robinson's argument. In *Williams*, the issue was whether a claim of judicial bias qualified as a structural

error. There, Williams had won post-conviction relief on a *Brady*[3] claim in the state trial court. The state appealed to the Pennsylvania Supreme Court, whose chief justice had previously been the District Attorney at the time of Williams' trial and authorized seeking capital punishment against Williams. *Id*. at 1903-05. Williams responded to the state's pleadings in the state supreme court and filed a motion asking the chief judge to recuse himself, or if he declined to have the full court consider the recusal motion. The chief judge denied the motion and the full court, including the chief judge, reversed the lower court's grant of post-conviction relief and reinstated the death penalty against Williams. *Id*. at 1905. On review to the Supreme Court, the Court held that the chief justice's failure to recuse himself violated Williams' Fourteenth Amendment due process rights. The Court held that because the judge had a significant, personal involvement as a prosecutor in the defendant's case, there was an impermissible risk of actual bias. *Id*. at 1905. The Court then had to decide if this due process violation amounted to structural error. The novel issue in this case was the fact that the Court was looking at one possibly biased jurist on a multi-judge panel and the biased jurist's vote was not outcome determinative. *Id*. at 1909. While it might seem obvious that a prejudice analysis could simply examine whether the biased judge's vote was outcome determinative, the Court rejected this explaining that the deliberations of an appellate panel are generally confidential and thus "it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision making process." *Id*. The Court continued that even if the disqualified judge's vote was totally unnecessary to the outcome of the case, "[t]hat outcome does not lessen the unfairness to the affected party" of having a biased jurist decide his case. *Id*.

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

The Supreme Court's ruling that it is neither possible nor productive to inquire into the interworkings of proceedings that are confidential runs contrary to the Fifth Circuit's inquiry into the confidential grand jury proceedings in Robinson's case and how they might have voted had a statutory aggravating factor been presented to them. *See Robinson*, 367 F.3d at 288 ("any rational grand jury would find probable cause to charge Robinson with at least one of the statutory aggravating factors omitted from his indictment."); *see also Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (finding racial discrimination in the selection of grand jurors to be a structural error because "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come."). Indeed, 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.

c. *Weaver* Represents an Intervening Change of Law by the United States Supreme Court Which Permits Consideration of This Claim Despite the Fifth Circuit's Law of the Case Doctrine

The Fifth Circuit has created a rule that bars Section 2255 litigants from raising claims that were previously denied on appeal. *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980); *United States v. Kalish*, 780 F.2d 506 (5th Cir. 1986). This Court cited that rule, which is akin to the law of the case doctrine, in response to Robinson's motion to amend, and that rule will surely be in play when considering this motion. 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). *Weaver* satisfies the second exception and establishes that the earlier decision is clearly erroneous, and would manifest injustice especially considering that this is a death-penalty case. As such, the denial of amendment should be reconsidered in light of these recent cases.

B. This Motion is Timely

Robinson has diligently pursued his rights. He timely appealed his convictions and sentences in this Court and timely filed his Section 2255 motion and related appeals. When those actions were all denied, Robinson timely filed a petition in the Inter-American Commission on Human Rights. *Robinson v. United States*, P-561-12.

Robinson has filed this motion under Federal Rule of Civil Procedure, Rule 60(b)(6). A motion brought pursuant to Rule 60(b)(6) must be filed within a reasonable time to be considered timely. Rule 60(c)(1). "The timeliness of the motion is measured as of the point in time when the moving party has grounds to make such a motion, regardless of the time that has elapsed since the entry of judgment." *First Republic Bank Fort Worth v. Norglass, Inc.,* 958 F.2d 117, 120 (5th Cir. 1992). Once a party has grounds to make a Rule 60(b) motion, however, they must bring the motion reasonably promptly, though "the determination of reasonableness is less than a scientific exercise." *Id.*at 121.

The Fifth Circuit has held that "[a] district court is provided wide discretion in determining whether a Rule 60(b) motion is filed within a reasonable time." *McKay v. Novartis Pharmaceutical Corp.,* 751 F.3d 694, 701 n. 5 (5th Cir. 2014) (citations omitted). In this inquiry, the "particular facts of the case in question" determine whether a motion has been timely filed. *Id*. Further, in determining whether a motion has been filed within a reasonable time, the Fifth Circuit instructs that district courts should consider: (1) "the interest in finality;" (2) "the reason for delay;" (3) "the practical ability of the litigant to learn earlier of the grounds relied upon;" and (4) "prejudice to other parties." *Travelers Ins. Co. v. Liljeberg Enters., Inc.,* 38 F.3d 1404, 1410 (5th Cir. 1994) (internal citations and quotation marks omitted).

The interest in finality has been minimized by the Supreme Court in the context of a Rule 60(b) motion because the purpose of Rule 60(b) is to create an exception to finality. *Gonzalez*, 545 U.S. at 520 ("[Finality], standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality."). Setting aside the first factor, Robinson has good reason for any delay, as this motion is largely based upon three recent Supreme Court decisions —*Buck*, *Peña-Rodriguez, Weaver* — which were issued less than a year from the date of filing this motion. The third factor also weighs in Robinson's favor because he obviously could not have known how these decisions would impact his case before the Supreme Court issued their opinions. Indeed, the Fifth Circuit has legitimized waiting for subsequent decisions to be issued before filing a Rule 60(b) motion. *See First Republic Bank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 120-21 (5th Cir. 1992) (citing, with approval, *Clarke v. Burke*, 570 F.2d 824, 831-32 (8th Cir. 1978) (where the "movants acted reasonably in waiting for the district court's decision in a later, but related, case before filing the Rule 60(b) motion because it was the unfavorable ruling in the later case that precipitated the need for the Rule 60(b) motion."). Finally, the government will not suffer prejudice if the Court grants this motion. While the Supreme Court opinions upon which this motion is based are new, the underlying issues have been previously argued in this case. As a result, the government should be familiar with these issues and not prejudiced by the timing of this motion.

Returning to *Buck v Davis,* the Supreme Court overturned the Fifth Circuit's denial of a COA and found that Buck had demonstrated entitlement to relief under Rule 60(b)(6). 137 S. Ct. 759 (2017). The Supreme Court reached this decision notwithstanding that Buck's motion primarily relied on the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), but was filed almost two years after *Martinez* was decided and 8 months after *Trevino* was decided. *Id*. at 767, 771. Robinson's motion is being filed less than one year after *Buck* was decided and approximately seven months after *Weaver* was decided. *Buck*

establishes that Robinson has filed his motion within a reasonable time, and the Court should exercise its discretion and find Robinson's motion timely.

III. CONCLUSION

For all of the foregoing reasons, Robinson respectfully requests that the Court grant this motion.

Respectfully submitted,

Dated: February 9, 2018

/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF
CELESTE BACCHI
CRAIG A. HARBAUGH
Deputy Federal Public Defenders

CERTIFICATE OF CONFERENCE

Counsel for Julius Robinson, Celeste Bacchi and Jonathan Aminoff, and counsel for the government, Alex Lewis, conferred on February 9, 2018. Counsel for Robinson had e-mailed counsel for the government a brief summary of the contents of this motion on February 8 such that the parties could more meaningfully discuss the issues. An agreement could not be reached, however, due to disagreement over the issues in question and the government opposes this motion.

Dated: February 9, 2018

/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JULIUS OMAR ROBINSON, Movant, v. UNITED STATES OF AMERICA, Respondent.	No. 4:05-CV-756-Y (4:00-CR-260-Y-2)

GOVERNMENT'S RESPONSE TO RULE 60 MOTION

Respectfully submitted,

Erin Nealy Cox
United States Attorney

s/ Timothy W. Funnell
Timothy W. Funnell
Assistant United States Attorney
Wisconsin State Bar No. 1022716
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102-6897
Phone 817-252-5252
tim.funnell@usdoj.gov

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GOVERNMENT'S RESPONSE TO RULE 60 MOTION

Robinson's motion should be denied because it fails to meet the restrictive standards for relief under Rule 60(b)(6). To the extent that it raises new claims, it should be transferred to the Fifth Circuit as a second or successive motion under Section 2255.

STATEMENT OF THE CASE

In March 2002, a jury found Robinson guilty of the murders of Johnny Lee Shelton and Juan Reyes and of complicity in a criminal enterprise resulting in the death of Rudolfo Resendez. (CR No. 1641.)[1] In June 2002, the Court accepted the jury's recommendation and sentenced Robinson to death for the murders of Shelton and Reyes and life in prison for the death of Resendez. (CR No. 1740.) In 2004, the Fifth Circuit affirmed the judgment and the Supreme Court denied review. *See United States v. Robinson*, 367 F.3d 278 (5th Cir.), *cert. denied*, 543 U.S. 1005 (2004).

In November 2005, Robinson filed his first motion for post-conviction relief under Section 2255. (CR No. 2279.) He claimed that he received ineffective assistance of trial counsel, was denied equal protection and due process, and was entitled to a new trial. (CR Nos. 2279; 2422; 2432.) Over the ensuing months and years, he supplemented his post-conviction claims with additional arguments and evidence, and ultimately, the Section 2255 filings before the Court included his initial motion, the government's response, his reply, his amendment to the motion, his supplemental pleading, the

[1] "CR No. __" refers to the docket of the criminal proceeding and "CV No. __" refers to the docket of this Section 2255 action.

government's response to the supplemental pleading, and his reply in support of his supplemental pleading. (CR Nos. 2279; 2365; 2380; 2422; 2432; 2439; 2443.)

In January 2008, the Court denied Robinson's request to amend his Section 2255 motion by adding a defective-indictment claim. (CR No. 2430.) The Court determined that the issue was barred because it was decided adversely on direct appeal; the recent Supreme Court cases that Robinson cited were inapplicable; and even if the cases did apply, they demonstrated procedural error that was not retroactively applicable on collateral review to a final judgment like Robinson's. (*Id.* at 2-4.)

In November 2008, the Court issued a 46-page memorandum opinion and written order denying Robinson's Section 2255 motion. (CR No. 2453.) It concluded that an evidentiary hearing was unnecessary because "the record . . . , including the exhibits submitted by Robinson with his motion, [did] not create any contested fact issues that [were required to] be resolved in order to decide Robinson's claims." (*Id.* at 45.) It further explained that an evidentiary hearing was not required for the following reasons:

> With regard to the claims for which Robinson has submitted additional evidence, the Court has decided these claims either by assuming that everything Robinson alleges is true or based on legal, not factual, bases. Accordingly, because the record before this Court shows conclusively that Robinson is not entitled to relief, his request for an evidentiary hearing is denied.

(*Id.* at 45-46.) Having assumed the truth of Robinson's factual allegations, the Court concluded that each of his claims lacked merit. (*See generally id.* at 14-45.)

Robinson moved for reconsideration, claiming that the Court's denial of an evidentiary hearing was a "manifest error of law." (CR No. 2456 at 3.) The government

opposed the motion, (CR No. 2464), and on February 17, 2009, the Court issued an order denying reconsideration, (CR No. 2465). First, it observed that because the cases cited by Robinson were inapplicable, its decision to deny relief was not manifestly wrong. (*Id.* at 2-4.) Next, it rejected each of Robinson's points of error, repeating its earlier determination that an evidentiary hearing was unnecessary because the claims were conclusively resolved based on (i) legal questions and (ii) facts that were undisputed or assumed be true as Robinson had alleged. (*Id.* at 4-7.) The Court made clear that an evidentiary hearing was pointless because its analysis did not suffer from factual gaps or disputes:

> As the Court held in its memorandum opinion and order denying Robinson's motion to vacate (Doc. #2453), the record before this Court, including the exhibits submitted by Robinson with his motions, do not create any contested fact issues with regard to Robinson's insufficiency-of-counsel claims that must be resolved in order to decide his case. To the contrary, many of Robinson's claims are based on the record from the trial. And, with regard to the claims for which Robinson has submitted additional evidence, the Court has decided these claims based on uncontested allegations of fact and, where facts are contested, by assuming that what Robinson alleges is true, or based on legal, not factual, bases. Accordingly, because the record before this Court shows conclusively that Robinson is not entitled to relief, his motion to reconsider the Court's denial of his request for an evidentiary hearing on his remaining claims for relief is DENIED.

(*Id.* at 7.)

In conjunction with Robinson's Section 2255 motion—and of relevance here—he moved for permission to interview jurors during the post-conviction proceedings. (CR No. 2385.) The government opposed the motion, (CR No. 2387), and in a written order,

the Court denied the request without a hearing, (CR No. 2388). It explained that Robinson did "not state that he ha[d] any reason to suspect that his jury was actually partial, but merely point[ed] to the importance of his right to an impartial jury under the Sixth Amendment and argue[d] that he ha[d] no other way of discovering whether this right has been violated than to interview his trial jurors." (*Id.* at 1.) It also rejected his alternative request to interview a prospective-but-excused juror regarding a potential *Batson* violation. (*Id.* at 1, 4.) It determined that Robinson's hypothetical *Batson* challenge was unrelated to the prosecutor's state of mind in exercising the peremptory strike, and thus, "the requested permission for a post-trial interview of this prospective juror would appear neither useful to a *Batson* analysis nor necessary to protect any of [Robinson]'s rights." (*Id.* at 4.)

In April 2009, Robinson moved for a certificate of appealability ("COA") from the denial of Section 2255 relief. (CR No. 2467.) The Court issued a written order denying Robinson's request for a COA. (CR No. 2473.) In it, the Court applied Supreme Court and Fifth Circuit precedent governing the COA determination, including *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Haynes v. Quarterman*, 526 F.3d 189 (5th Cir. 2008). (*See generally id.*)

Having been denied post-conviction relief and a COA by this Court, Robinson moved the Fifth Circuit for authorization to appeal. In June 2010, the Fifth Circuit denied Robinson's request for a COA, and in August 2010, it denied his petition for panel rehearing and rehearing en banc. (*See* CV Nos. 5-6.) Robinson then sought relief before the Supreme Court, which denied certiorari review on October 3, 2011. (*See* CV No. 7.)

On February 9, 2018, more than six years and four months after the denial of certiorari, Robinson filed the Rule 60(b)(6) motion at issue here. (CV No. 10.)

STATEMENT OF THE ISSUES

Rule 60(b)(6) authorizes relief from final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Robinson contends that this provision permits him to raise the following challenges to the denial of Section 2255 relief:

- First, that this Court and the Fifth Circuit applied an "erroneously high standard" in denying his "request for a COA on his penalty-phase ineffective assistance of counsel claim." (CV No. 10 at 4-9.)
- Second, that this Court "erroneously barred [him] from conducting a reasonable investigation" when it denied his motion to interview jurors. (*Id.* at 9-11.)
- Third, that the indictment suffered from "structural error" because it did not include "aggravating factors," so this Court's "denial of [his] right to amend his Section 2255 motion to include his [defective] indictment claim was erroneous." (*Id.* at 12-19.)

ARGUMENT AND AUTHORITIES

Standard of Review

Robinson's instant motion relies exclusively on Rule 60(b)(6), which "is a catchall provision that allows a court to grant relief 'from a final judgment, order, or proceeding' for 'any other reason that justifies relief.'" *In re Edwards*, 865 F.3d 197, 203 (5th Cir. 2017) (quoting Fed. R. Civ. P. 60(b)(6)). To succeed, movants under Rule 60(b)(6) "must show: (1) that the motion [was] made within a reasonable time; and (2) extraordinary circumstances exist that justify the reopening of a final judgment." *Id.* (citing *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)).

In addition, "[b]ecause of the comparative leniency of Rule 60(b), petitioners sometimes attempt to file what are in fact second-or-successive habeas petitions under the guise of Rule 60(b) motions." *Id.* (citing as exemplary *Gonzalez*, 545 U.S. at 531-32). In that regard, the determinative inquiry is whether "the Rule 60(b) motion seeks to advance new claims or seeks instead to show a non-merits-based defect in the district court's earlier decision on the federal habeas petition." *Id.* Thus, a district court "examining a Rule 60(b) motion should determine whether [the motion] either: (1) presents a new habeas *claim* . . . , or (2) 'attacks the federal court's previous resolution of a claim *on the merits*.'" *Id.* (quoting *Gonzalez*, 545 U.S. at 530) (emphasis in original). A purported Rule 60(b) motion that does either of these "should be treated as a successive habeas petition and subjected to AEDPA's limitation on such petitions." *Id.*; *see also* 28 U.S.C. §§ 2244 & 2255(h).[2]

"A federal court resolves a [habeas] claim on the merits when it determines that there are or are not 'grounds entitling a petitioner to habeas corpus relief . . . ,' as opposed to when a petitioner alleges 'that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'" *Id.* at 204 (quoting *Gonzalez*, 545 U.S. at 3). Again, "to bring a proper Rule 60(b) claim, a movant must show 'a non-merits-

[2] In particular, "[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 factfinder 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." 28 U.S.C. § 2255(h).

based defect in the district court's earlier decision on the federal habeas petition.'" *Id.* (quoting *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010)). "Accordingly, if the Rule 60(b) motion attacks 'some defect in the integrity of the federal habeas proceedings,' rather than the resolution on the merits, then the motion is not treated as a second-or-successive petition." *Id.* (quoting *Gonzalez*, 545 U.S. at 532).

The Fifth Circuit has emphasized that "it is extraordinarily difficult to bring a claim of procedural defect rather than a successive habeas claim." *Id.* at 205. Indeed, in evaluating the nature of a motion brought under Rule 60,

> [p]rocedural defects are narrowly construed. They include fraud on the habeas court, as well as erroneous previous rulings which precluded a merits determination—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of limitations bar. They generally do not include an attack based on the movant's own conduct, or his habeas counsel's omissions, which do not go to the integrity of the proceedings, but in effect ask for a second chance to have the merits determined favorably.

Id. (quoting *In re Coleman*, 768 F.3d 367, 371-72 (5th Cir. 2014) (holding that arguments regarding counsel's neglect of specific arguments sounded in substance, not in procedure)).

Discussion

1. Robinson's resort to Rule 60(b)(6) is unavailing.

Robinson's motion challenges three "erroneous" post-conviction rulings by this Court and the Fifth Circuit under Section 2255. (*See generally* CV No. 10.) He contends that each ruling evinces a "defect in the integrity" of the Section 2255 proceedings that satisfies Rule 60(b)(6)'s standard of "any other reason that justifies relief." (CV No. 10 at 1-2, 4.) To that end, Robinson tethers his motion to three Supreme Court decisions: *Buck v. Davis*, 137 S. Ct. 759 (2017); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); and *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). He posits that these decisions "provide further support for the arguments [he] has been making and establish once again that prior rulings in this case . . . precluded a full merits determination[.]" (*See id.*)

Robinson fails to demonstrate that he is entitled to relief under Rule 60(b)(6). The rule is limited to correcting procedural errors that occurred during the post-conviction proceedings, which explains Robinson's repeated reference to procedural-defect allegations throughout his current motion. His arguments, however, reveal that he is seeking a second chance to have the same issues determined in his favor. But absent extraordinary circumstances, which Robinson cannot demonstrate, Rule 60(b) does not serve that purpose. Procedural defects are "narrowly construed" under Rule 60(b) and reviewing courts are cautioned to be wary of second or successive Section 2255 motions brought under the "guise" of the rule. *See Edwards*, 865 F.3d at 203, 205. Robinson's motion does not satisfy these narrow standards, and to the extent that it asserts new

claims, he must obtain circuit-court authorization to file it as a second or successive motion under Section 2255(h).

A. Robinson's circumstances are not remotely similar to those that the Supreme Court in *Buck* found extraordinary under Rule 60(b)(6).

Robinson contends that this Court and the Fifth Circuit applied an "erroneously high standard" in denying his "request for a COA on his penalty-phase ineffective assistance of counsel claim." (CV No. 10 at 4-9.) In support, he cites *Buck v. Davis*, 137 S. Ct. 759 (2017), as "the Supreme Court's most recent case on the COA standard[.]" (CV No. 10 at 5.) Because *Buck*'s holding is inapposite to Robinson's circumstances, its recency is likewise immaterial.

Buck involved a death-penalty defendant whose ineffective-assistance-of-counsel ("IAC") claim had "never been heard on the merits in any court[.]" 137 S. Ct. at 767. The IAC claim arose from sentencing-phase testimony by the defense's expert, who opined that Buck's race was relevant to future dangerousness and rendered him "statistically more likely to act violently because he is black." *Id*. The prosecutor cited the expert's testimony during closing argument, and after two days of deliberations, the jury returned a sentence of death. *Id.* at 769. Buck's post-conviction counsel failed to raise the IAC claim in state court, and on federal habeas review, the district and circuit courts determined under then-existing law that the claim was unreviewable on the merits based on procedural default. *Id.* at 767, 770-73.

Buck then moved for relief from judgment under Rule 60(b)(6). He argued that several factors amounted to extraordinary circumstances under the rule, including: two

recent Supreme Court cases that "changed the law in a way that provided an excuse for his procedural default"; his trial attorney's introduction of expert testimony linking his race to increased propensity for violence; the prosecutor's questioning and arguments on the topic; and the state's confession of error in other cases involving the same expert but no concession of error in Buck's case. *Id.* at 767, 772. The district court denied relief, concluding that Buck failed to demonstrate extraordinary circumstances and that "even if the circumstances *were* extraordinary," the IAC claim "would fail on the merits." *Id.* at 772 (emphasis in original). In denying Buck's request for a COA, the circuit court agreed with the district court that the circumstances were "not extraordinary at all in the habeas context." *Id.* at 773. The panel reasoned that two factors—the changes in procedural-default law and the state's inconsistent positions regarding confessed error—were not significant, and that "most of the other factors" were "variations on the merits" of Buck's IAC claim. *Id.*

On certiorari review, the Supreme Court repeated without modification the well-established COA standards from its prior decision in *Miller-El*, which permitted a threshold inquiry into the merits of the district court's decision and required only that the decision was debatable among jurists of reason. *Id.* at 773-74, 777-78 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).[3] The issue, therefore, was whether it was debatable

[3] *See also United States v. Fleming*, Case No. H-07-513-01, 2017 WL 3411920, *1 (S.D. Tex. June 21, 2017) (unpublished) ("According to Defendant, *Buck* sets forth new standards for granting a certificate of appealability that, had this Court utilized them, would have resulted in the granting of habeas relief or a COA. Defendant is incorrect. *Buck* did not set forth new standards regarding a COA; to the contrary, the Supreme Court in *Buck* confirmed and enforced existing Supreme Court standards which this Court followed in denying Defendant a COA.")

that Buck failed to show extraordinary circumstances under Rule 60(b)(6). *Id.* at 777-78. "In determining whether extraordinary circumstances are present, a court may consider a wide range of factors[, which] may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Id.* at 778 (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988)). Considering those factors, the Court had no difficulty concluding that reversal was required by the strong evidence of racial bias offered at Buck's sentencing that may have impacted the jury's recommendation to impose a death sentence. *Id.* at 777-78. In fact, the "extraordinary nature of [Buck's case was] confirmed by what the State [of Texas] itself did in response to [the defense expert's] testimony"—taking the "remarkable steps" of confessing error in other cases where the same expert testified but not confessing error in Buck's case. *Id.* at 778-79.

Buck's limited holding is unavailing to Robinson. As the Supreme Court emphasized, Rule 60(b)(6) relief was justified in *Buck* based on extraordinary evidence of racial bias that was unduly minimized on federal habeas review and never considered on the merits by any reviewing court. In contrast, Robinson's trial and sentencing involved no evidence of racial bias or other circumstances remotely equivalent to those in *Buck*, and Robinson's post-hoc request to interview jurors was—as this Court correctly observed—wholly unsupported by evidence of bias. (*See* CR No. 2388.) Circuit courts have rejected similar attempts by death-row inmates under Rule 60(b)(6) to ignore and distort *Buck*'s central holding. *See Miller v. Mays*, 879 F.3d 691, 702 (6th Cir. 2018) (emphasizing that *Buck* did not turn on changes in the law regarding ineffective

representation but instead "focused on" the extraordinary circumstances presented by "the injection of race into the sentencing determination, the state's actions [of confessing error] in similar cases, and notions of finality"); *Davis v. Kelley*, 855 F.3d 833, 836 (8th Cir. 2017) (holding that Davis "failed to present extraordinary circumstances mirroring those presented in *Buck*"; "*Buck* focused on the race-based nature of the case and its far reaching impact on the community by the prospect of a defendant having been sentenced to death because of his race"; the "extraordinary facts [presented in *Buck*] have no application to the present case"); *Lambrix v. Sec'y Dep't of Corr.*, 851 F.3d 1158, 1172-73 (11th Cir. 2017) ("Lambrix's underlying ineffective-trial-counsel claims do not present allegations that his trial counsel presented race-based evidence of future dangerousness, the underlying issue that the Supreme Court found so 'odious' and poisonous in *Buck*.").

In addition, unlike in *Buck* where the ineffective-assistance claim had never been decided on the merits by any court, Robinson had the benefit of an on-the-merits ruling from this Court. Although no evidentiary hearing was held, Robinson had ample opportunity to advance his claims and develop the record during three-plus years of Section 2255 litigation. Indeed, the voluminous post-conviction filings considered by the Court included Robinson's initial motion, the government's response, his reply, his amendment to the motion, his supplemental pleading, the government's response to the supplemental pleading, and his reply in support of his supplemental pleading. (CR Nos. 2279; 2365; 2380; 2422; 2432; 2439; 2443.) The Court's written orders made clear that it was able to conclusively resolve the claims by assuming the truth of Robinson's

allegations and making legal determinations—thereby obviating the need for a hearing. (CR Nos. 2453 at 45-46; 2465 at 7.)

In sum, the circumstances presented here are not the least bit similar to those that the Supreme Court found extraordinary in *Buck*. Unable to rely on *Buck*'s reasoning and holding, Robinson can only cite it as the high court's most recent COA-related decision. But again, *Buck* is not remarkable in that regard.[4] It reaffirmed settled law governing COAs from its prior decision in *Miller-El*, and even Robinson acknowledges that he already "argued to this [C]ourt, the Fifth Circuit, and the United States Supreme Court [that] these standards were not followed in [his] case." (CV No. 10 at 6.) Thus, Robinson implicitly concedes that the COA argument he makes here under the pretense of Rule 60(b)(6) is the same one that he exhausted in the normal course of post-conviction litigation where each reviewing court—including the Supreme Court—considered the issue and universally denied relief.

Against this unbroken history of COA denials based on the application of settled law, Robinson's extraordinary-circumstances argument falls flat. Again, (i) *Buck* did not change the Supreme Court's COA jurisprudence in *Miller-El*; (ii) Robinson is reprising the same argument here that he previously made before this Court, the Fifth Circuit, and the Supreme Court; and (iii) his current argument, therefore, is functionally equivalent to "ask[ing] for a second chance to have the merits determined favorably" and would

[4] *Cf. Ruiz v. Davis*, 850 F.3d 225, 230 (5th Cir. 2017) (denying death-penalty defendant's request for a COA based on a cruel-and-unusual-punishment claim, observing: "We are keenly aware of the admonitions of *Buck v. Davis*. Properly applied, they do not reset the balance of federalism struck by Congress and the settled constitutional commands attending capital punishment.").

require this Court to disregard the narrow construction afforded to Rule 60(b) motions. *See Edwards*, 865 F.3d at 205; *Coleman*, 768 F.3d at 371-72. This Court should reject Robinson's unsanctioned resort to Rule 60(b)(6).

Moreover, this Court and the Fifth Circuit correctly applied the controlling standards in denying Robinson's request for a COA. (*See* CR No. 2473 at 2; CV No. 5 at 5.) Both courts followed *Miller-El*'s holding—and therefore *Buck*'s holding as well—by conducting a threshold inquiry into the merits of Robinson's claims. This Court denied a COA after it determined that the Section 2255 motion lacked merit, but its written order supports that the COA denial was not pre-ordained by its denial on the merits; instead, its COA analysis was properly framed under the objective standards of *Miller-El*, *Haynes*, and other cases. (*See* CR No. 2473 at 2-3.)[5] Likewise, the Fifth Circuit's denial of a COA correctly applied the *Miller-El* standards by limiting its consideration of the merits to a "threshold inquiry." (*See* CV No. 5 at 4-5.) Robinson's ongoing dissatisfaction with the COA denials does not permit their relitigation—under Rule 60(b)(6) or otherwise—simply because the Supreme Court has issued a new decision applying the same unchanged standards. Put simply, *Buck*'s reiteration of well-established principles governing COAs does not show extraordinary circumstances that support a procedural-defect argument under Rule 60(b)(6).

[5] It is axiomatic that this Court acted in full accord with its obligations under Section 2255 when it addressed the COA issue *after* it ruled on the merits of Robinson's motion. *See* Rule 11(a) Governing Section 2255 Proceedings ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). Thus, the Court's issuance of an on-the-merits decision does not suggest that it pre-judged the COA determination.

Even assuming for the sake of argument that this Court and the Fifth Circuit misapplied the COA standards, Rule 60(b)(6) affords Robinson no relief in this Court. In that scenario, this Court's COA denial became moot when the Fifth Circuit affirmed the ruling, thereby making the circuit court's determination the law of the case. *See Dillingham v. Jenkins*, No. 17-3813, 2017 WL 5438882, *1 (6th Cir. 2017) (unpublished) (affirming denial of Rule 60 motion because "[r]easonable jurists would also not find debatable or wrong the district court's assessment that this Court's denial of a [COA] became the law of the case, binding in subsequent stages of the litigation"). As to the Fifth Circuit's ruling, this Court cannot overturn it absent intervening authority that changed the law or a determination that it was clearly erroneous and would work a manifest injustice. *See United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). *Buck* provides no such authority because it produced no such change, and there is no indication that the Fifth Circuit's decision was clearly wrong considering its adherence to *Miller-El*'s standards and the fact that the Supreme Court left it undisturbed on certiorari review.

For these reasons, *Buck* fails to provide Robinson with extraordinary circumstances that present "any other reason that justifies relief" under Rule 60(b)(6).

B. Because the exception recognized in *Peña-Rodriguez* does not apply here, it cannot support Robinson's claim under Rule 60(b)(6).

Robinson's Rule 60(b) motion also claims that during the Section 2255 proceedings, this Court "erroneously barred [him] from conducting a reasonable investigation" into the possibility of a racially biased jury because "Criminal Local Rule

24.1 prevents any contact between the parties and a juror absent permission of the court." (CV No. 10 at 9-11.) Robinson relies on a recent Supreme Court case—*Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017)—to contend that "[o]n balance, *Penã-Rodriguez* establishes that rules such as Local Criminal Rule 24.1 must allow criminal defendants an ability to investigate issues such as racial bias, and [he] was deprived of this right." (*Id.* at 11.) According to Robinson, this alleged deprivation constitutes a procedural defect under Rule 60(b)(6) because it "prevented a full and fair merits determination" of the prospect of juror bias. (*Id.*)

Penã-Rodriguez's narrow holding, however, does not require or authorize a suspicionless investigation into the possibility of racial bias. In fact, it preserves rules that prohibit post-verdict contact with jurors, including "no-impeachment" rules that forbid using jurors' post-trial statements to undermine the verdict. Although the Court in *Penã-Rodriguez* crafted a limited constitutional exception to such rules, the exception has no applicability here because Robinson has not produced clear and admissible evidence of juror bias.

After Pena-Rodriguez was found guilty of unlawful sexual contact and harassment, the trial court instructed the jurors—as mandated by Colorado law—that it was "entirely [their] own decision" to "discuss this case with the lawyers, defendant, or other persons" and they should notify the court "[i]f any person persists in discussing the case over [their] objection[.]" 137 S. Ct. at 861. Following the jury's discharge, defense counsel entered the jury room to discuss the trial with jurors and two of them privately told counsel that "another juror had expressed anti-Hispanic bias toward [Pena-

Rodriguez] and [his] alibi witnesses." *Id.* Counsel reported this to the court, and with the court's supervision, obtained sworn affidavits from the two jurors that "described a number of biased statements made by . . . Juror H.C." *Id.* at 861-62. Based on the affidavits, the court "acknowledged H.C.'s apparent bias" but denied a motion for a new trial because the deliberations could not be impeached under Colorado Rule of Evidence 606(b). *Id.* at 862.

On review, the Supreme Court framed the question as "whether there is an exception to the no-impeachment rule when, after the jury is discharged, *a juror comes forward with compelling evidence* that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." *Id.* at 861 (emphasis added). It recognized the respective governmental roles involved, observing: "The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Id.* at 867. Ultimately, it determined that the Constitution required a narrow exception to no-impeachment rules, reasoning: "This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system. The two lines of precedent, however, need not conflict." *Id.* Having expressed its intention to reconcile rather than void no-impeachment rules, the Court held:

> [W]here a juror *makes a clear statement* that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-

> impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 869 (emphasis added).

In addition to requiring "a clear statement" of a juror's racial bias rather than an "offhand comment," the Court addressed the permissible manner of obtaining such evidence. *Id.* In that regard, the *Peña-Rodriguez* Court reaffirmed the viability of no-contact and no-impeachment rules, stating: "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." *Id.* It recognized that "[t]hese 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. That is what happened here*." *Id.* (emphasis added).

Unlike in *Peña-Rodriguez*, Robinson's post-conviction allegations of juror bias were—and still are—purely hypothetical. Jurors in Robinson's trial did not "come forward of their own accord" with a "clear statement" of bias; indeed, they did not allege racial bias at all. Nor did Robinson discover evidence of racial bias in another fashion. Accordingly, in denying Robinson's post-conviction motion to interview jurors, this Court's written order highlighted that Robinson's motion did "not state that he ha[d] any reason to suspect that his jury was actually partial, but merely point[ed] to the importance of his right to an impartial jury under the Sixth Amendment and argue[d] that he ha[d] no

other way of discovering whether this right has been violated than to interview his trial jurors." (CR No. 2388 at 1.) It also determined that because his theoretical *Batson* challenge was unrelated to the prosecutor's state of mind in striking a particular juror, "the requested permission for a post-trial interview of this prospective juror would appear neither useful to a *Batson* analysis nor necessary to protect any of [Robinson]'s rights." (*Id.* at 4.) Even now, Robinson's circumstances are not remotely similar to those in *Peña-Rodriguez* because he does not support his suppositions of bias with evidence. Instead, he resorts to alleging "the specter of racial bias" and superficially cites 13 federal death-penalty cases from Texas without providing necessary context and analysis to prove their relevance here. (CV No. 10 at 10.)

In sum, Robinson cannot avoid the undeniable reality that his post-conviction motion to interview jurors was a fishing expedition into the possibility of juror bias. This Court's denial of that request in no way violated *Peña-Rodriguez*'s limited holding, and therefore, its ruling evinces no procedural defect and no extraordinary circumstances justifying relief under Rule 60(b)(6). In fact, to adopt Robinson's juror-bias argument and grant post-conviction relief would require this Court to extend *Peña-Rodriguez* in a manner that the Supreme Court did not sanction and carefully avoided—judicially voiding no-contact and no-impeachment rules rather than harmonizing them with the Constitution. For these reasons, Robinson's claim of jury bias lacks a jurisdictional basis under Rule 60(b)(6) and must be dismissed. To the extent that he argues for the extension of *Peña-Rodriguez* to conduct post-conviction discovery into the possibility of

a racially biased jury, the claim must be transferred to the Fifth Circuit for authorization to proceed under Section 2255(h).

C. Robinson cannot demonstrate extraordinary circumstances arising from *Weaver* to justify relief under Rule 60(b)(6).

Lastly, Robinson's Rule 60(b) motion asserts that the indictment's failure to include "aggravating factors" violated the Fifth Amendment and therefore, this Court's "denial of [his] right to amend his Section 2255 motion to include his [defective] indictment claim was erroneous." (CV No. 10 at 12-19.) In support, he cites *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), which, according to Robinson, "represents an intervening change of law" on the issue of "structural error." (*Id.*) He further contends that "[i]in addition to *Weaver*, the Supreme Court's recent decision [regarding judicial bias] in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), reinforces the veracity of [his] argument." (*Id.* at 16-17.) Once again, Robinson fails to demonstrate extraordinary circumstances under Rule 60(b)(6).

On January 7, 2008, this Court entered its written order denying Robinson's request to add the defective-indictment claim to his Section 2255 motion. (CR No. 2430 at 2-4.) At the time, Robinson asserted that "two recent United Supreme Court decisions cast serious doubt" on the Fifth Circuit's direct-appeal ruling, which held Robinson was not harmed by the error. (*See id.* (citing CR No. 2422).)[6] This Court denied the proposed amendment because the issue was already decided on direct appeal; the cases cited by

[6] Robinson cited *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

Robinson were inapplicable; and even if the cases did apply, they demonstrated procedural error that was not retroactively applicable on collateral review to a final judgment like Robinson's. (*Id.*) The Fifth Circuit affirmed this Court's ruling when it denied his request for a COA and his request for rehearing. (*See* CV Nos. 5-6.) Now, for the second time, Robinson cites two recent Supreme Court cases—*Weaver* and *Williams*—as "cast[ing] serious doubt" over the Fifth Circuit's decision. (CV No. 10 at 15-17.)

Robinson's contention that *Weaver* marks a change in the Supreme Court's structural-error jurisprudence may be construed as a new habeas claim that must be transferred to the circuit court under Section 2255(h). *See Edwards*, 865 F.3d at 203. Alternatively, if Robinson alleges that the prior rulings of this Court and the Fifth Circuit were procedurally wrong based on *Weaver*, it is clear that "a change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment under Rule 60(b)(6)." *Diaz v. Stephens*, 731 F.3d 370, 375-76 (5th Cir. 2013) (citations and quotation marks omitted). That principle applies with full force here because *Weaver*, and for that matter *Williams*, have no direct applicability to Robinson's defective-indictment claim and extending them beyond their holdings is not authorized under Rule 60(b)(6).

In *Weaver*, the issue was whether—in the context of collateral review—courtroom closure was structural error that obviated the need to demonstrate prejudice or "if the prejudice inquiry is altered when structural error is raised in the context of an ineffective-assistance-of-counsel claim." 137 S. Ct. at 1905. The Supreme Court ultimately

determined that the public-trial right was structural and "generally" requires "automatic reversal" on direct appeal, but the right was "subject to exceptions" and therefore Weaver must demonstrate prejudice under *Strickland*. *Id.* at 1908-10. In reaching this somewhat-meandering result, the Court was required to engage in a comprehensive review of structural error, the public-trial right, and the right to effective counsel. *See generally id.* Illustrative of the complexity of the Court's analysis, it recognized that classifying errors as structural "varies in a significant way from error to error"; "[t]here appear to be at least three broad rationales" to address the issue; the three "categories are not rigid"; and "although the public-trial right is structural, it is subject to exceptions." *Id.* at 1907-08.

Like *Weaver*, *Williams* was unrelated to a defective-indictment claim. In that case, the Court held that where a state supreme court justice—while previously serving as a district attorney—officially approved seeking the death penalty against Williams, due process required the judge to recuse himself from post-conviction review of the death sentence. 136 S. Ct. at 1903.

Thus distilled, *Weaver* and *Williams* cannot support Robinson's request for relief under Rule 60(b)(6). *Weaver* focused on the right to a public trial vis-à-vis an ineffective-assistance claim, which required a searching analysis by the Supreme Court into the hard-to-define topic of structural error. *Williams* dealt exclusively with the issue of judicial bias under the rubric of due process. Both cases were completely silent on the unrelated issue of the Fifth Amendment's indictment clause. Their holdings, therefore, provide Robinson no basis to assert that the prior rulings of this Court and the Fifth Circuit on the defective-indictment claim were "clearly erroneous." (CV No. 10 at 18.)

Nothing in *Weaver* or *Williams* would change this Court's prior determination that the issue was already decided on direct appeal; the cases cited by Robinson were inapplicable; and even if the cases did apply, they demonstrated procedural error that was not retroactively applicable on collateral review to a final judgment like Robinson's. (*See* CR No. 2430.) Likewise, neither case would undermine the Fifth Circuit's denial of a COA on the defective-indictment claim, (*see* CV No. 5), which represents the law of the case that this Court cannot overturn. *See Matthews*, 312 F.3d at 657. Because Robinson's cavalier conclusions to the contrary are unsupportable, he fails to demonstrate extraordinary circumstances under Rule 60(b)(6).

D. Robinson's motion is untimely.

Motions under Rule 60(b)(6) must be made within a reasonable time unless good cause can be shown for the delay. *Edwards*, 865 F.3d at 203 (citations omitted). Good cause is "evaluated on a case-by-case basis" and timeliness "is measured as of the point in time when the moving party has grounds to make such a motion, regardless of the time that has elapsed since the entry of judgment." *Id.* (citations omitted). A party with grounds to make a Rule 60(b) motion must bring it "reasonably promptly, though the determination of reasonableness is less than a scientific exercise," and the rule "may not be used as an end run to effect an appeal outside the specified time limits, otherwise those limits become essentially meaningless." *Id.* (citations omitted).

By these standards, Robinson's motion should be dismissed as untimely. His reference to diligently pursuing his rights by the timely pursuit of his prior appeals is irrelevant to his instant motion, which was filed on February 9, 2018—more than six

years and four months after the Supreme Court denied review of his Section 2255 judgment. (*Compare* CV No. 10, *with* CV No. 7.) His instant motion asserts no newly discovered evidence, claiming instead that he "has good reason for any delay, as [the] motion is largely based upon three Supreme Court decisions—*Buck*, *Peña-Rodriguez*, *Weaver*—which were issued less than a year from the date of filing this motion." (CV No. 10 at 20.) But for reasons previously discussed, none of those cases assists Robinson in meeting his burden of showing extraordinary circumstances under Rule 60(b)(6). Accordingly, they are equally meaningless as a basis for timeliness.

CONCLUSION

Robinson's motion should be dismissed.

Respectfully submitted,

Erin Nealy Cox
United States Attorney

s/ Timothy W. Funnell
Timothy W. Funnell
Assistant United States Attorney
Wisconsin State Bar No. 1022716
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102-6897
Phone 817-252-5252
tim.funnell@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on April 30, 2018, I filed this response with the clerk of court for the U.S. District Court, Northern District of Texas through the electronic filing system which will generate service to Robinson's counsel, Jonathan Charles Aminoff.

s/ Timothy W. Funnell
Timothy W. Funnell
Assistant United States Attorney

HILARY POTASHNER (No. 167060)
Federal Public Defender
CRAIG A. HARBAUGH (No. 194309)
(E-Mail: Craig_Harbaugh@fd.org)
JONATHAN C. AMINOFF (No. 259290)
(E-Mail: Jonathan_Aminoff@fd.org)
CELESTE BACCHI (No. 307119)
(E-Mail: Celeste_Bacchi@fd.org)
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5374
Facsimile: (213) 894-0310

Attorneys for Petitioner
JULIUS OMAR ROBINSON

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

JULIUS OMAR ROBINSON,

Defendant/Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff/Respondent.

Civil No. 4:05-CV-756-Y
(Criminal No. 4:00-CR-00260-2)

DEATH PENALTY CASE

Honorable Terry R. Means
United States District Judge

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

I. ARGUMENT

A. Robinson's Motion is Appropriately Considered Under Rule 60(b)

1. Robinson's Rule 60 Motion is not a Second or Successive Habeas Petition

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court held that Federal Rule of Civil Procedure 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.

Here, Robinson's motion raises three issues. First, Robinson challenges the denial of a certificate of appealability ("COA"). A COA denial is, by definition, a non-merits based decision. *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (explaining that until a COA is granted, a reviewing appellate court may not rule on the merits of the case). Second, Robinson challenges a discovery denial, specifically the Court's rejection of his request to interview his trial jurors. The denial of discovery is not a decision on the merits of a claim. *See, e.g., In re Sessions*, 672 F.2d 564, 566 (5th Cir. 1982) (differentiating orders denying discovery from final orders dispensing of cases on the merits). And third, Robinson challenges the Court's denial of his request for leave to amend his section 2255 motion which, again, is a procedural denial, not a denial of a claim on its merits. *Flores v. Stephens*, 794 F.3d 494, 502 (5th Cir. 2015). Each of these issues address "erroneous previous rulings

which precluded a merits determination," and thus are appropriate for review under Rule 60(b). *In re Edwards*, 865 F.3d 197, 205 (5th Cir. 2017).

The Government's assertion that Robinson is actually "seeking a second chance to have the same issues determined in his favor" is flawed. Dkt. No. 14 ("Opposition") at 8. The Government cannot honestly claim that the rulings Robinson challenges are anything but procedural. Moreover, whether granting Robinson's Rule 60(b) motion ultimately leads to an opportunity for Robinson to litigate his substantive claims for relief is not part of the analysis at this stage. Indeed, in the habeas context, any time a court grants a Rule 60(b) motion in the 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 this Court must follow.

2. Robinson has Established Extraordinary Circumstances

Relief under Rule 60(b)(6) is available only in "extraordinary circumstances." *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).

The Fifth Circuit has described "a lack of fundamental fairness essential to due process" as an extraordinary circumstance, albeit not in the Rule 60(b) context. *Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir. 1972). Robinson has been sentenced to death without the procedural due process afforded to most death-sentenced inmates that has deprived him of a full and fair merits determination of his case in post-conviction review. The lack of due process is inconsistent with the Supreme Court's

Eighth Amendment jurisprudence that requires "heightened reliability" in the context of death-penalty proceedings. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Generally a change in decisional law, standing alone, is not enough to amount to an extraordinary circumstance. *Diaz v. Stephens*, 731 F.3d 370, 375-76 (5th Cir. 2013); *but see Adams v. Merill 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 Fifth Circuit has 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."). 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). 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."). Moreover, in a case where the decisional law in question affects issues of fundamental fairness and due process, this Court should follow the approach taken in *Diaz*, 731 F.3d at 376-77, and 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 in his motion and *supra*, he is not using his motion as a substitute for 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, brief the availability of a COA, and 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).

B. The Supreme Court's Prior Denials of Robinson's Petitions for Writ of Certiorari Have No Bearing on the Issues Before the Court

In its Opposition, the Government continually makes reference to the fact that the United States Supreme Court has twice denied certiorari in this case: once on direct review and once following the Fifth Circuit's denial of a COA after this Court denied Robinson's section 2255 motion. The Government argues that because the Supreme Court left the Fifth Circuit's decision "undisturbed," this Court may assume that the Fifth Circuit's decision was not "clearly wrong." Opposition at 15. The Government's argument has been rejected by both the Supreme Court and the Fifth Circuit, and it should be absolutely clear that: "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 404 (1931) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)); *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) ("Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner"); *Eastburn v. Ford Motor Co.*, 438 F.2d 125, 126 (5th Cir. 1971) (same).

C. *Buck* Establishes a "Troubling" Pattern of Holding Petitioners to an Erroneously High Standard for Obtaining Certificates of Appealability

Robinson relies on the Supreme Court's recent decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), to establish that this Court and the Fifth Circuit erroneously denied him a COA, thus depriving him of the right to a merits-based determination of his case on appeal. In its Opposition, the Government resorts to a lengthy summation of the *Buck* case and explains how Buck's substantive claims for relief differ from Robinson's claims. This is, however, a red herring and the Government's Opposition misses the point. Robinson does not argue that *Buck* is a similar factual case to his. Instead,

Robinson relies on *Buck* to establish the Fifth Circuit's "troubling" "pattern" of denying COAs "after engaging in extensive review of the merits of a habeas petitioner's claims." *Jordan v. Fisher*, 135 S. Ct 2647, 2652 n.2 (2015) (Sotomayor, J., dissenting from the denial of certiorari and collecting cases). And to establish that his case fits into this troubling pattern, Robinson cites to multiple instances in both this Court's and the Fifth Circuit's denials wherein the Courts conducted a merits-based analysis to deny Robinson's COA application. *See* Motion at 7-8. The Government, however, fails to respond to the specifics of Robinson's argument, instead opting to make blanket statements that because this Court and the Fifth Circuit cited to cases articulating the appropriate COA standard, the Court must have denied Robinson's COA request based on a correct application of those standards. Not surprisingly, the Fifth Circuit also cited to the appropriate COA standard in *Buck*, but nevertheless applied those standards incorrectly. *Buck v. Stephens*, 623 Fed. Appx. 668, 671-72 (5th Cir. 2015) *overruled by Buck v. Davis*, 137 S. Ct. 759 (2017).

D. Robinson was Barred from Conducting a Reasonable Investigation Which Prevented a Full and Fair Post-Conviction Review Process

This Court's procedural rulings have placed Robinson in a catch-22: to establish racial bias, he must investigate; to be permitted to investigate, he must establish racial bias. The Government endorses this catch-22, arguing that Robinson "has not produced clear and admissible evidence of juror bias" while also arguing that Robinson has been correctly denied the right to interview the jurors that recommended a death judgment in his case. Opposition at 16.

Both Robinson and the Government cite to the Supreme Court's language in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), where the Court states "[t]he 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." 137 S. Ct. at 859-60. As Robinson argued in his Motion, however, Local Criminal Rule 24.1 does not set forth "practical

mechanics" guiding counsel's post-trial contact with jurors; rather, it constitutes an all-out ban on counsel's ability to investigate the possibility of juror misconduct. Motion at 11:7-14. The Government's only response is that because the jurors did not approach Robinson's counsel of their own accord and Robinson could not otherwise find evidence of juror misconduct, Opposition at 18, Robinson is simply out of luck.

The Government's arguments do not comport with *Pena-Rodriguez*. Federal Rule of Evidence 606(b) prohibits jurors from testifying about the substance of their deliberations. In *Pena-Rodriguez*, however, the Supreme Court held that the Sixth Amendment required that Rule 606(b), and its state equivalent, cannot bar evidence of racial animus. 137 S. Ct. 855 (2017). Allowing a petitioner to advance evidence of a juror's racial bias is inconsistent with barring a petitioner from investigating racial bias amongst jurors. Indeed, the Supreme Court discusses at length rules that "limit" attorneys contact with jurors and provide the jurors "some protection" when their juror obligations are complete. *Id*. at 869. Rules like Rule 24.1, that go beyond *limiting* contact and instead create total bans on juror interviews, render the rights articulated in *Pena-Rodriguez* meaningless.

Constitutional rights implicitly protect those closely related acts necessary to their exercise. *Luis v. United States*, 136 S.Ct. 1083, 1097 (2016) (Thomas, J. dissenting). Inevitably, "[t]here comes a point ... at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting). The Supreme Court has applied this principle in a number of cases. For example, because criminal defendants have a right to an initial appeal, the Court has determined that defendants must also have the right to counsel for that appeal, or else the appellate right is diminished. *Douglas v. California*, 372 U.S. 353 (1963). And later, continuing this trend, the Court held that if defendants on appeal have a right to counsel, then that right must encompass the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). The same logic applies here: If criminal defendants have the

constitutional right to present evidence of juror bias, then they must be given the tools to investigate that evidence, and Local Rule 24.1 bars the ability to do so.

This past term, the Supreme Court emphasized that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Buck*, 137 S. Ct. at 778 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)); *Pena-Rodriguez*, 137 S. Ct. at 868 (same). The *Buck* court continued that:

> Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015). It thus injures not just the defendant, but "the law as an institution, … the community at large, and ... the democratic ideal reflected in the processes of our courts." *Rose*, 443 U.S. at 556 (internal quotation marks omitted). Such concerns are precisely among those we have identified as supporting relief under Rule 60(b)(6).

137 S. Ct. at 778.

Those same concerns are at issue here. Robinson has already highlighted the racial issues at play in his case and in death-penalty prosecutions at large. These issues warrant relief under Rule 60(b).

E. Robinson's Defective Indictment Claim

Robinson's Fifth Amendment rights were violated when the Government failed to present the statutory aggravating factors that made Robinson eligible for the death penalty to the grand jury. *United States v. Robinson*, 367 F.3d 278, 284 (5th Cir. 2004). However, the Fifth Circuit found that Robinson's defective indictment claim was subject to harmless error review and concluded that because Robinson was ultimately convicted beyond a reasonable doubt, a grand jury would have found the statutory aggravating factors present. *Id*. at 285.

In his Motion, Robinson has explained how *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), justifies re-opening this case under Rule 60(b). Motion at 12-19. One of

the issues *Weaver* helps to clarify is the significance of a non-waived versus a waived claim, and how the Fifth Circuit equated the two in affirming Robinson's convictions and sentences. Motion at 16:7-21. Since Robinson filed his Rule 60(b) motion, the Supreme Court issued *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), which further supports Robinson's argument. In *McCoy*, the Supreme Court found that the defendant's Sixth Amendment rights were violated when his trial counsel conceded the defendant's guilt of the capital crimes over his client's in-court objection, and the Court found that this violation was structural. The Court reconciled *McCoy* with *Florida v. Nixon*, 543 U.S. 175 (2004), where the Court found that an attorney's concession of the defendant's guilt was subject to the ineffective-assistance-of-counsel analysis, including its prejudice requirement, where the defendant fails to object to the attorney's concessions. *McCoy*, 138 S. Ct at 1509. The Supreme Court's continuing emphasis on preserved errors, and their significance in the structural error analysis, further undermines the Fifth Circuit's ruling in *Robinson*, 367 F.3d 278 (5th Cir. 2004).

As Robinson predicted, Motion at 18-19, the Government raises a law-of-the-case argument to assert that the Court may not re-visit the defective indictment issue. The Government, however, does not respond to Robinson's explanation of how the law of the case doctrine does not bar this Court from reconsidering the denial of amendment. Indeed, the law of the case doctrine does not bar relief because of an intervening change of law by the Supreme Court and because the earlier decision was clearly erroneous and would work a manifest injustice. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002).

II. CONCLUSION

For the foregoing reasons, Robinson respectfully requests that the Court grant his motion and allow him to: (1) brief his entitlement to a COA; (2) move to interview his trial jurors; and, (3) move to amend his section 2255 motion to include his defective indictment claim.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: June 13, 2018

By */s/ Jonathan C. Aminoff*
JONATHAN C. AMINOFF
Deputy Federal Public Defender

CERTIFICATE OF SERVICE

I certify that, on June 13, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court, Northern District of Texas using the Court's electronic case filing system which will generate service to Assistant United States Attorney Timothy Funnel, counsel for the United States of America.

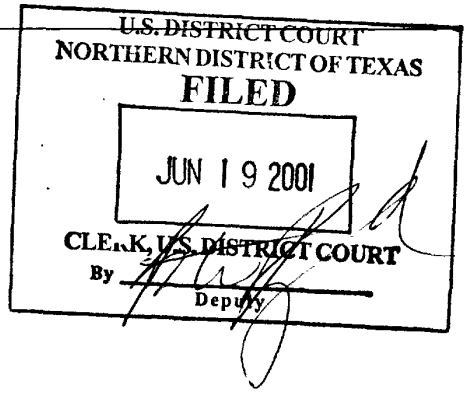
/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF
Deputy Federal Public Defender

ORIGINAL

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION



UNITED STATES OF AMERICA		§	
		§	
vs.		§	
		§	
NATHAN DESHAWN HENDERSON		§	
a.k.a. "Cash", a.k.a. "Nate"	(01)	§	
JULIUS OMAR ROBINSON		§	
a.k.a. "Scarface, a.k.a. "Scar",		§	
a.k.a. "Face"	(02)	§	
JASON GEHRING	(03)	§	
VICTOR JIMENEZ, a.k.a. "Vic"	(05)	§	
JAVIER GUADALUPE AGUILAR	(06)	§	
MARCUS JWAIN ROBINSON	(07)	§	
JOHN TURNER	(08)	§	
FANISHA HILL	(10)	§	CRIMINAL NO.4:00-CR-0260-Y
JEWELL EWING, a.k.a. "Duke"	(12)	§	[Supersedes Indictments Returned Nov. 2, 2000 and
CANTRAL HUGGINS,		§	April 19, 2001 as to the named defendants]
a.k.a. "Crumb"	(13)	§	
TERRENCE HOLIMON,		§	
a.k.a "Bone"	(14)	§	
L.J. BRITT, a.k.a. "Capone"	(15)	§	
RICHARD SMART, a.k.a "Black"	(16)	§	
TRAVIS DIXON	(21)	§	
STEVEN TOSTON	(22)	§	
ANGELO HARRIS, a.k.a. "Step"	(23)	§	
KIMBERLY JOHNSON	(24)	§	
TAMIEKA SIBLEY	(26)	§	
HENDRICK EZELL TUNSTALL	(38)	§	
TYRONE BRYANT	(39)	§	
CHRISTHIAN MORALES	(40)	§	
EDY SONIA ZAMUDIO	(41)	§	
DAKARI WARNER		§	
a.k.a. "Dakari Sells"		§	
a.k.a. "DK"	(43)	§	
LEON JENKINS	(44)	§	

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THE GRAND JURY CHARGES:

Count One

Commencing on or about January 1, 1997, the exact date being unknown, and continuing thereafter until at least November 8, 2000, in the Fort Worth Division of the Northern District of Texas, and elsewhere, including diverse locations in the states of Texas, Louisiana, Oklahoma, Arkansas, Missouri, Florida, and Kentucky, **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"; Julius Omar Robinson, a.k.a. "Scarface, a.k.a. "Scar", a.k.a. "Face"; Jason Gehring; Victor Jimenez, a.k.a. "Vic"; Javier Guadalupe Aguilar; Marcus Jwain Robinson; John Turner; Fanisha Hill; Jewell Ewing, a.k.a. "Duke"; Cantral Huggins, a.k.a. "Crumb"; Terrence Holimon, a.k.a "Bone"; L.J. Britt, a.k.a. "Capone"; Richard Smart, a.k.a "Black"; Travis Dixon; Steven Toston; Angelo Harris, a.k.a. "Step"; Kimberly Johnson; Tamieka Sibley,** defendants, and others both known and unknown to the Grand Jury, did intentionally and knowingly combine, conspire, confederate, and agree to engage in conduct in violation of Title 21, United States Code, §841(a)(1), namely to distribute more than 100 kilograms of a mixture and substance containing a detectable amount of marijuana, a Schedule I, controlled substance.

Manner and Means

To promote, facilitate, carry on, and perpetrate the aforesaid conspiracy, the following manner and means were, from time to time, employed by one or more of the conspirators:

1. It was a part of the conspiracy that **Victor Jimenez, a.k.a. "Vic"**, defendant, and **Javier Guadalupe Aguilar**, defendant, would each provide bulk quantities - amounts in excess of 10 kilograms - of marijuana to defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar"**

a.k.a. "Face" and **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"** for distribution to others.

2. It was a part of the conspiracy that **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"** and **John Turner,** defendants, would transport and cause to be transported bulk quantities of marijuana to others in the states of Texas, Louisiana, Oklahoma, Arkansas, Missouri, Florida, and Kentucky for further distribution to others.

3. It was a part of the conspiracy that **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"** and **Jason Gehring,"** and **John Turner,** defendants would ship by commercial interstate carrier and the United States Mail, quantities of marijuana to others in the states of Arkansas, Missouri, and Kentucky.

4. It was a part of the conspiracy that **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendants, utilized communication facilities in interstate commerce including cellular telephones and the Internet to monitor the progress of shipments of marijuana.

5. It was a part of the conspiracy that **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"** and **John Turner,** defendants, would establish and operate businesses in order to disguise and conceal their income from the unlawful sale and distribution of controlled substances.

6. Throughout the course of the conspiracy and despite changes in the membership of the conspiracy from time to time, it was a part of the conspiracy that defendants **Julius Omar Robinson,**

a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face" and **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"** would obtain bulk quantities of marijuana which they would distribute to others for further distribution; such distributors included **Jason Gehring; Marcus Jwain Robinson; John Turner; Jewell Ewing, a.k.a. "Duke"; Cantral Huggins, a.k.a. "Crumb"; Terrence Holimon, a.k.a "Bone"; Travis Dixon; Steven Toston; Tamieka Sibley; L.J. Britt, a.k.a. "Capone"; and Richard Smart, a.k.a "Black";** defendants, and other persons known to the Grand Jury, including Jamila Marie Camp; Leteshia Lenore Barnett; Angela Leach; Edward Jenkins, a.k.a. "Bear"; Santana Minor; Timothy Dewayne Caldwell, a.k.a "Timmy"; Troy Lee Simpson; Cody Elliott; Misty Grounds; Jeanne Denice Wilkins, Howard Edward Ringer, Stephen Williams, Dorothy Hodges, and Reginald Kinchen;

7. It was a part of the conspiracy that Jamila Marie Camp and Leteshia Lenore Barnett, aided and abetted by defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate",** and **John Turner,** would open and maintain places for the storage, processing, and distribution of bulk quantities of marijuana.

8. It was a part of the conspiracy that Jamila Marie Camp, Leteshia Lenore Barnett and defendant **Marcus Jwain Robinson** would transport quantities of marijuana, to the facilities of interstate commercial carriers, including United Parcel Service, for shipment to others in the states of Arkansas and Oklahoma.

9. It was a part of the conspiracy that the conspirators, when using the services of interstate common carriers, would employ false and fictitious names and/or addresses on shipping or mailing labels purporting to show the identity of the person(s) sending the package.

10. It was a part of the conspiracy that the conspirators would purchase shipping boxes and

materials from commercial establishments to utilize in sending quantities of marijuana to other conspirators by interstate commercial carriers.

11. It was a part of the conspiracy that money derived from the sale and distribution of marijuana would be used to purchase additional quantities of marijuana.

12. It was a part of the conspiracy that **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"** would from time to time use counterfeit United States currency to pay for quantities of marijuana.

13. It was a part of the conspiracy that **Fanisha Hill,** defendant, would from time to time act as a lookout for **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate",** defendant, when **Henderson** was conducting marijuana transactions.

14. It was a part of the conspiracy that **Richard Smart, a.k.a. "Black",** defendant, would assist **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, in taking delivery of quantities of marijuana and in transporting quantities of money obtained from the sale and distribution of marijuana.

15. It was a part of the conspiracy that **Kimberly Johnson**, defendant, would assist **Jason Gehring**, defendant, in delivering monies to **Victor Jimenez, a.k.a. "Vic",** defendant.

16. It was a part of the conspiracy that **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, and **L.J. Britt, a.k.a. "Capone",** defendants, in conjunction with others whose full identities are unknown, would contrive to obtain monies to finance their drug acquisition and distribution by robbing and/or burglarizing third persons of money and other things of value including controlled substances..

17. It was a part of the conspiracy that defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face";** would recruit defendant **L.J. Britt, a.k.a. "Capone"** to assist **Robinson** in the commission of acts of force and violence against others.

18. It was a part of the conspiracy that defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face",** would, by means of force and violence, seek retribution against others whom the defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face"** believed had cheated him in drug transactions, had failed to pay him for marijuana, or had become informers for law enforcement.

19. It was a part of the conspiracy that the conspirators would possess, carry, use, brandish, and discharge firearms.

Overt Acts

In furtherance of the conspiracy and to effect and accomplish the objects thereof, one or more of the conspirators committed diverse overt acts within the Northern District of Texas, and elsewhere, among which were the following:

a. In or about March 1997, **Terrence Holimon, a.k.a. "Bone"**, defendant, possessed approximately 17 pounds of marijuana in the Eastern District of Arkansas.

b. On or about September 17, 1998, approximately $14,615 in United States Currency was sent by United States Mail from Saint Louis in the Eastern District of Missouri addressed to "Platinum Sounds", 3201 East Pioneer Parkway, Arlington, Texas.

c. On or about September 18, 1998, **John Turner,** defendant, as the owner of "Platinum Sounds" disclaimed any knowledge of, or claim to, the $14,615 in United States Currency

which had been mailed to his business.

d. On or about December 3, 1998, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, and **L.J. Britt, a.k.a. "Capone"**, defendant, did possess, carry, and use firearms.

e. On or about December 3, 1998, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, and **L.J. Britt, a.k.a. "Capone"**, defendant, did intentionally cause the death of Johnny Lee Shelton, by shooting him with firearms.

f. On or about January 13, 1999, **Travis Dixon**, defendant, utilizing the services of United Parcel Service, sent $3,500.00 in U.S. currency from Conway in the Eastern District of Arkansas to "That Sounds Good, 916 East Arkansas Lane, Arlington, Texas 76014", in the Northern District of Texas.

g. On or about January 19, 1999, **Steven Toston**, defendant, utilizing the services of United Parcel Service, sent $27,400.00 in U.S. currency from Fayetteville in the Western District of Arkansas to "That Sounds Good, 916 East Arkansas Lane, Arlington, Texas 76014", in the Northern District of Texas.

h. On or about January 21, 1999, **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, utilized the name of "James Stevens" and attempted to send approximately 38 pounds of marijuana from Arlington in the Northern District of Texas to "D&D Detail" 1126 Harkrider, Conway, Arkansas in the Eastern District of Arkansas utilizing the services of United Parcel Service.

i. On or about March 2, 1999, a package containing approximately 20 pounds of marijuana was transported from the Northern District of Texas to the Eastern District of Arkansas,

addressed to "Mrs. Freeman, 2840 Dave Ward Dr., Conway, Arkansas".

j. On or about September 24, 1999, a person known to the Grand Jury utilized the name of "Teshia Barnett" and sent a 2 pound parcel from Arlington in the Northern District of Texas to Little Rock in the Eastern District of Arkansas utilizing the services of United Parcel Service.

k. On or about December 29, 1999, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face",** defendant, obtained cellular telephone service from Southwestern Bell Wireless, Dallas, Texas, for telephone number, 817-454-8015 bearing Electronic Serial Number 23514252463.

l. On or about January 25, 2000, a parcel containing approximately $5,500 in United States Currency was sent by Express Mail to "Platinum Sounds, 2540 East Arkansas Lane, Suite #106, Arlington, TX. 76014" in the Northern District of Texas, which parcel bore a fictitious address in Berkeley in the Eastern District of Missouri.

m. On or about February 14, 2000, **Marcus Jwain Robinson**, defendant, utilized the name of "James Lewis" and attempted to send a parcel containing approximately one pound of marijuana from the Northern District of Texas to the residence of **Terrence Holimon, a.k.a "Bone"**, defendant, at 707 North Drew in Dermott in the Eastern District of Arkansas by means of United Parcel Service, a commercial interstate carrier.

n. On or about March 7, 2000, **Marcus Jwain Robinson**, defendant, utilized the name of "James Lewis" and attempted to send parcels containing approximately six pounds of marijuana from the Northern District of Texas to addresses in the Eastern District of Arkansas by means of United Parcel Service, a commercial interstate carrier.

o. On or about March 9, 2000, **Jason Gehring**, defendant, utilized the name of James Johnson, and attempted to send a parcel containing approximately 35 pounds of marijuana to the residence of **Jewell Ewing,** defendant, at 3114 Alameda Drive in Little Rock in the Eastern District of Arkansas by means of United Parcel Service, a commercial interstate carrier.

p. On or about May 30, 2000, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face" and Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendants, sent a parcel containing approximately 19 pounds of marijuana to an address in Louisville in the Western District of Kentucky by means of United Parcel Service, a commercial interstate carrier.

q. On or about May 31, 2000, **Jason Gehring** and **Kimberly Johnson,** defendants, met with **Victor Jimenez, a.k.a. "Vic",** defendant, at a residence located at 823 Winston, Dallas, Texas.

r. On or about June 2, 2000, **Victor Jimenez, a.k.a. "Vic"**, defendant, engaged in a telephone conversation with **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, concerning the purchase price for a quantity of marijuana.

s. On or about June 2, 2000, **Victor Jimenez**, defendant, delivered approximately 104 pounds of marijuana to **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face" and Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendants, for delivery to others.

t. On or about June 2, 2000, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar"**

a.k.a. "Face" and Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate", defendants, delivered approximately 104 pounds of marijuana to a person known to the Grand Jury, for delivery to others in the state of Arkansas.

u. On or about June 3, 2000 **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, engaged in a telephone conversation with **Richard Smart, a.k.a. "Black"** defendant, concerning the carrying on of the business of the sale and distribution of controlled substances and the commission of acts of force and violence to obtain money to carry on such business.

v. On or about June 11, 2000, **Terrence Holimon, a.k.a. "Bone"**, defendant, possessed approximately 4 pounds of marijuana.

w. On or about June 22, 2000, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, and **Richard Smart, a.k.a. "Black"** defendants met with **Javier Guadalupe Aguilar**, defendant, at a residence in Dallas, Texas.

x. On or about June 28, 2000, **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, and **Victor Jimenez**, defendants met in Arlington, Texas.

y. On or about June 30, 2000, **Jason Gehring**, defendant, engaged in a coded telephone conversation with **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, concerning the distribution of approximately 20 pounds of marijuana.

z. On or about June 30, 2000, **John Turner**, defendant, engaged in a coded telephone conversation with **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, concerning the distribution of approximately 10 pounds of marijuana.

aa. On or about July 2, 2000, **Jason Gehring**, defendant, engaged in a coded telephone conversation with **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, concerning the distribution of approximately 10 pounds of marijuana.

bb. On or about July 8, 2000, **Fanisha Hill**, defendant, acted as a lookout for delivery of approximately 20 pounds of marijuana by **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, to **others**.

cc. On or about July 12, 2000, **Javier Guadalupe Aguilar** and **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendants, met at the premises of "That Sounds Good", 2540 East Arkansas Lane, Suite 106, Arlington, Texas.

dd. On or about July 12, 2000, **Javier Guadalupe Aguilar**, defendant, transported away from the premises of "That Sounds Good", 2540 East Arkansas Lane, Suite 106, Arlington, Texas approximately $22,546 in United States Currency.

ee. On or about July 13, 2000, in the Eastern District of Arkansas, **Jewell Ewing**, defendant, possessed $4,880 in United States Currency, one Rossi .38 caliber Revolver, serial number 805205, marijuana, and drug paraphernalia at his residence located at 3114 Alameda Drive, Little Rock, Arkansas.

ff. On or about November 8, 2000, **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, possessed with intent to distribute 4.316 kilograms (approximately 9 pounds) of marijuana, a Schedule I controlled substance.

gg. On or about November 8, 2000, **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, possessed two firearms, to wit: one BFI .223 caliber semi-automatic

assault rifle, serial number P05130; and one 45 caliber UZI pistol, serial number UP52637.

hh. On or about November 8, 2000, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, possessed three firearms, to wit: one 9mm UZI pistol, serial number 18740; one Smith & Wesson .357 caliber pistol, serial number 5224575; and one SKS 7.62x39 semi-automatic assault rifle, serial number 1510198P.

ii. On or about November 8, 2000, **John Turner,** defendant, possessed a ballistic vest at his residence located at 1010 Judy Lynn Drive, Arlington, Texas.

Criminal Forfeiture

I. Pursuant to the provisions of Title 21, United States Code, §853, **Javier Guadalupe Aguilar**, defendant, from his engagement in the aforesaid offense, shall forfeit to the United States any and all property constituting or derived from, any proceeds the defendant obtained directly or indirectly as a result of the aforesaid offense; as well as any of the property of **Javier Guadalupe Aguilar**, defendant, used or intended to be used, in any manner or part, to commit, or facilitate the commission of the offense alleged in Count 1 of this Indictment; such property including, but not limited to the following:

1. $22,546 in United States Currency seized on July 12, 2000 from Javier Guadalupe Aguilar.

II. Pursuant to the provisions of Title 21, United States Code, §853, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, from his engagement in the aforesaid offense, shall forfeit to the United States any and all property constituting or derived from, any proceeds the defendant obtained directly or indirectly as a result of the aforesaid offense; as well

as any of the property of **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, used or intended to be used, in any manner or part, to commit, or facilitate the commission of the offense alleged in Count 1 of this Indictment; such property including, but not limited to the following:

1. One 1991 Nissan Infiniti sedan, VIN: JNKCP01P1MT206841, bearing Texas License MYN20B, assigned Texas Certificate of Title 22025936201103735.

2. Cash and Money Market and Mutual Funds held under the name of **Julius Robinson**, and designated as assets of Edward Jones Account Number 491-07869-1-4

All in violation of Title 21, United States Code, §846, the penalty for which is found at Title 21, United States Code, §841(b)(1)(B).

Count Two

Commencing on or about January 1, 1997 and continuing thereafter until November 8, 2000, in the Fort Worth Division of the Northern District of Texas, and elsewhere, including diverse locations in the states of Texas, Louisiana, and Oklahoma, **Julius Omar Robinson, a.k.a. "Scarface, a.k.a. "Scar", a.k.a. "Face"; Victor Jimenez, a.k.a. "Vic"; John Turner; L.J. Britt, a.k.a. "Capone"; Angelo Harris, a.k.a. "Step"; Hendrick Ezell Tunstall; Tyrone Bryant; Christhian Morales; Edy Sonia Zamudio; Dakari Warner, a.k.a. "Dakari Sells, a.k.a. "DK"; Leon Jenkins,** defendants, and others both known and unknown to the Grand Jury, did intentionally and knowingly combine, conspire, confederate, and agree to engage in conduct in violation of Title 21, United States Code, §841(a)(1), namely to distribute more than 5 kilograms of a mixture and substance containing a detectable amount of cocaine, a Schedule II, controlled substance.

Manner and Means

To promote, facilitate, carry on, and perpetrate the aforesaid conspiracy, the following manner and means were, from time to time, employed by one or more of the conspirators:

1. Throughout the course of the conspiracy and despite changes in the membership of the conspiracy from time to time, it was a part of the conspiracy that defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** would obtain quantities of cocaine from suppliers, including **Victor Jimenez, a.k.a. "Vic", Dakari Warner, a.k.a. "Dakari Sells, a.k.a. "DK", Christhian Morales; and Edy Sonia Zamudio**, defendants, which would be distributed to others for further distribution.

2. It was a part of the conspiracy that defendant **Julius Omar Robinson, a.k.a. "Scarface",**

a.k.a. "Scar" a.k.a. "Face" would distribute quantities of cocaine to defendants **Jason Gehring; John Turner; Angelo Harris, a.k.a. "Step"; and Leon Jenkins,** and others for further distribution to others.

3. It was a part of the conspiracy that **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** defendant, would establish and operate businesses in order to disguise and conceal his income from the unlawful sale and distribution of cocaine.

4. It was a part of the conspiracy that **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face";** and **L.J. Britt, a.k.a. "Capone"** and **Hendrick Ezell Tunstall;** and **Tyrone Bryant;** and **Christhian Morales;** and **Edy Sonia Zamudio;** defendants, in conjunction with others whose full identities are unknown, would obtain quantities of cocaine, a Schedule II controlled substance by means of force and violence against others.

5. It was a part of the conspiracy that defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face";** would recruit defendant **L.J. Britt, a.k.a. "Capone"** to assist **Robinson** in the commission of acts of force and violence against others.

6. It was a part of the conspiracy that defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face",** would, by means of force and violence, seek retribution against others whom the defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face"** believed had cheated him in drug transactions, had failed to pay him for cocaine, or had become informers for law enforcement.

7. It was a part of the conspiracy that the conspirators would possess, carry, use, brandish, and discharge firearms.

8. It was a part of the conspiracy that defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face",** would recruit others to transport quantities of cocaine in interstate commerce from the state of Texas to the state of Arkansas.

9. It was a part of the conspiracy that the defendants would utilize common carriers to transport cocaine from one state to another.

Overt Acts

In furtherance of the conspiracy and to effect and accomplish the objects thereof, one or more of the conspirators committed diverse overt acts within the Northern District of Texas, and elsewhere, among which were the following:

a. On or about March 16, 1999, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, met with **Carmen Nicole Byrd**, defendant, and a person known to the Grand Jury at Robinson's residence in the Northern District of Texas.

b. On or about March 16, 1999, **Carmen Nicole Byrd,** defendant, possessed with intent to distribute approximately one kilogram of a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance.

c. On or about May 8, 1999, defendant **Angelo Harris, a.k.a. "Step"** traveled in interstate commerce from the state of Oklahoma to the Northern District of Texas and met with defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Dakari Warner, a.k.a. "Dakari Sells, a.k.a. "DK"**, for the purpose of obtaining cocaine.

d. On or about May 8, 1999, defendant **Angelo Harris, a.k.a. "Step"** and defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face",** obtained what they

believed to be one kilogram of cocaine from **Dakari Warner, a.k.a. "Dakari Sells, a.k.a. "DK"**, and another.

e. On or about May 8, 1999, defendant **Angelo Harris, a.k.a. "Step"** caused what he believed to be a kilogram of cocaine to be transported from the Northern District of Texas to Oklahoma City, Oklahoma.

f. On or about May 9, 1999, defendant **Angelo Harris, a.k.a. "Step"** traveled in interstate commerce from the state of Oklahoma to the Northern District of Texas and met with defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, for the purpose of seeking retribution against suppliers of cocaine.

g. On or about May 9, 1999, defendants **Angelo Harris, a.k.a. "Step"** and **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** did possess, carry, and use firearms.

h. On or about May 9, 1999, defendants **Angelo Harris, a.k.a. "Step"** and **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** did intentionally cause the death of Juan Reyes, by shooting him with firearms.

i. On or about July 12, 1999, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face";** and **L.J. Britt, a.k.a. "Capone";** and **Hendrick Ezell Tunstall;** and **Tyrone Bryant;** and **Christhian Morales;** met in Arlington, Texas and thereafter did, by force and violence, obtain twenty kilograms of cocaine from Rudolfo Resendez.

j. On or about July 12, 1999, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar", a.k.a. "Face";** and **L.J. Britt, a.k.a. "Capone"** and **Hendrick Ezell Tunstall;** and

Tyrone Bryant; and **Christhian Morales;** acting in concert and at the behest of **Edy Sonia Zamudio**, defendant, did intentionally cause the death of Rudolfo Resendez by shooting him with firearms.

k. On or about July 21, 1999, **Angelo Harris,** defendant, and **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face",** defendant, delivered approximately one kilogram of a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance, to a person known to the Grand Jury for delivery to others in the Western District of Oklahoma.

l. On or about September 29, 1999, **Angelo Harris, also known as "Step"** and **Brandi Scales**, defendants, transported approximately $8,000 in United States Currency from the Northern District of Texas to the Western District of Oklahoma.

m. On or about November 3, 1999, defendants **Leon Jenkins, Angelo Harris, a.k.a. "Step", and Brandi Scales** were present in Arlington, Texas.

n. On or about June 2, 2000, **L.J. Britt, a.k.a. "Capone"**, defendant, engaged in a telephone conversation with **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant.

o. On or about June 14, 2000, **John Turner**, defendant, engaged in a coded telephone conversation with **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, concerning the distribution of approximately 500 grams of cocaine.

p. On or about June 15, 2000, **L.J. Britt, a.k.a. "Capone"**, defendant, engaged in a series of telephone conversations with **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar"**

a.k.a. "Face", defendant concerning the payment of monies by **Robinson** to **Britt**.

q. On or about November 8, 2000, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, possessed three firearms, to wit: one 9mm UZI pistol, serial number 18740; one Smith & Wesson .357 caliber pistol, serial number 5224575; and one SKS 7.62x39 semi-automatic assault rifle, serial number 1510198P.

r. On or about November 8, 2000, **John Turner,** defendant, possessed a ballistic vest at his residence located at 1010 Judy Lynn Drive, Arlington, Texas.

A violation of Title 21, United States Code, §846, the penalty for which is found at Title 21, United States Code, §841(b)(1)(A)

Count Three

1. From on or about January 1, 1997 and continuing thereafter until the date of the return of this Indictment, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, did engage in a continuing criminal enterprise, that is to say that **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, in concert with more than five other persons with respect to whom the defendant occupied a position of organizer and a supervisory position and a position of management, did, as part of a continuing series of felonious violations of subchapter I of Chapter 13 of Title 21, United States Code, intentionally and knowingly violate the provisions of such subchapter and from such continuing series of violations, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, obtained substantial income and resources.

2. The persons with respect to whom **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, occupied a position of organizer and a supervisory position and a position of management included, among others, the following:

Jason Gehring,	John Turner,
Misty Grounds,	Leteshia Lenore Barnett,
Angelo Harris, a.k.a. "Step"	Reginald Kinchen,
Jewell Ewing, a.k.a., "Duke",	Cantral Huggins, a.k.a. "Crumb",
Jeanne Denise Wilkins,	Steven Toston,
Carmen Byrd,	Brandi Scales,
Edward G. Jenkins, a.k.a. "Bear",	Jamila Marie Camp,
Santana Minor,	Dorothy Hodges, a.k.a. "Dorry",
Marcus Jwain Robinson,	L.J. Britt, a.k.a. "Capone",

Richard Smart, a.k.a. "Black", Hendrick Ezell Tunstall,

Tyrone Bryant, Christhian Morales,

Dakari Warner, a.k.a. "Dakari Sells, a.k.a. "DK", and

Leon Jenkins,.

3. The continuing series of felonious violations of subchapter I of Title 21, United States Code, included the following:

i. Aiding, abetting, counseling, commanding, inducing, procuring, and causing the attempted distribution of approximately 38 pounds of marijuana on or about January 21, 1999;

ii. Aiding, abetting, counseling, commanding, inducing, procuring, and causing the attempted distribution of approximately 25 pounds of marijuana on or about March 2, 1999;

iii. Aiding, abetting, counseling, commanding, inducing, procuring, and causing the attempted distribution of approximately one kilogram of cocaine on or about March 16, 1999;

iv. Aiding, abetting, counseling, commanding, inducing, procuring, and causing the distribution of a quantity of cocaine on or about May 8, 1999

v. Aiding, abetting, counseling, commanding, inducing, procuring, and causing the distribution of approximately twenty kilogram of cocaine on or about July 12, 1999 in Fort Worth, Texas.

vi. Aiding, abetting, counseling, commanding, inducing, procuring, and causing the attempted distribution of approximately five kilograms of cocaine on or about July 22, 1999 in Little Rock, Arkansas;

vii. Aiding, abetting, counseling, commanding, inducing, procuring, and causing the attempted distribution of approximately 10 pounds of marijuana on or about March 20, 2000;

viii. Aiding, abetting, counseling, commanding, inducing, procuring, and causing the attempted distribution of approximately 19 pounds of marijuana on or about May 30, 2000;

ix. Aiding, abetting, counseling, commanding, inducing, procuring, and causing the attempted distribution of approximately 104 pounds of marijuana on or about June 2, 2000;

x. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about May 30, 2000;

xi. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 1, 2000;

xii. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21,

United States Code, namely the distribution of approximately 104 pounds of marijuana on or about June 2, 2000;

xiii. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 2 pounds of marijuana on or about June 2, 2000;

xiv. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 4, 2000;

xv. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 5, 2000;

xvi. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 6, 2000;

xvii. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 8, 2000;

xviii. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 4 pounds of marijuana on or about June 10, 2000;

xix. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 12, 2000;

xx. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 13, 2000;

xxi. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts

constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 25 pounds of marijuana on or about June 13, 2000;

xxii. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 14, 2000;

xxiii. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 15, 2000;

xxiv. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 16, 2000;

xxv. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 2 pounds of marijuana

on or about June 16, 2000;

xxvi. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 1 pound of marijuana on or about June 20, 2000;

xxvii. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 25 pounds of marijuana on or about June 27, 2000.

4. While engaging in, and working in furtherance of the aforesaid Continuing Criminal Enterprise, on or about December 3, 1998, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **L.J. Britt, a.k.a. "Capone** did intentionally kill Johnny Lee Shelton, by shooting him with firearms.

5. While engaging in, and working in furtherance of the aforesaid Continuing Criminal Enterprise, on or about May 9, 1999, defendants **Angelo Harris, a.k.a. "Step"** and **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** did intentionally kill, and counsel, command, induce, procure, and cause the intentional killing of Juan Reyes, by shooting him with firearms, and such killing resulted.

6. While engaging in, and working in furtherance of the aforesaid Continuing Criminal Enterprise, on or about July 12, 1999, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a.**

"Scar", a.k.a. "Face"; and **L.J. Britt, a.k.a. "Capone"** and **Hendrick Ezell Tunstall;** and **Tyrone Bryant;** and **Christhian Morales** and **Edy Sonia Zamudio;** acting in concert, did intentionally kill, and counsel, command, induce, procure, and cause the intentional killing of, Rudolfo Resendez by shooting him with firearms, and such killing resulted.

A violation of Title 21, United States Code, §848.

Count Four

On or about December 3, 1998, in the Northern District of Texas, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **L.J. Britt, a.k.a. "Capone** did intentionally and knowingly possess firearms in furtherance of a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 1 and Count 3 of this Indictment.

A violation of Title 18, United States Code, §924(c)(1)(A)(i).

Count Five

On or about December 3, 1998, in the Northern District of Texas, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **L.J. Britt, a.k.a. "Capone** did intentionally and knowingly carry and use firearms, and did brandish such firearms, during and in relation to a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 1 and Count 3 of this Indictment.

A violation of Title 18, United States Code, §924(c)(1)(A)(ii).

Count Six

On or about December 3, 1998, in the Northern District of Texas, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **L.J. Britt, a.k.a. "Capone** did intentionally and knowingly carry and use firearms, and did discharge such firearms, during and in relation to a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 1 and Count 3 of this Indictment.

A violation of Title 18, United States Code, §924(c)(1)(A)(iii).

Count Seven

On or about December 3, 1998, in the Northern District of Texas, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **L.J. Britt, a.k.a. "Capone** did intentionally and knowingly carry and use firearms, and did discharge such firearms, during and in relation to a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 1 and Count 3 of this Indictment; and in the course of such violation did cause the death of Johnny Lee Shelton through the use of such firearms, such killing being murder as defined in Title 18, United States Code, §1111.

A violation of Title 18, United States Code, §924(j).

Count Eight

On or about May 9, 1999, in the Northern District of Texas, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Angelo Harris, a.k.a. "Step",** did intentionally and knowingly possess firearms in furtherance of a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 2 and Count 3 of this Indictment.

A violation of Title 18, United States Code, §924(c)(1)(A)(i).

Count Nine

On or about May 9, 1999, in the Northern District of Texas, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Angelo Harris, a.k.a. "Step",** did intentionally and knowingly carry and use firearms, and did brandish such firearms, during and in relation to a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 2 and Count 3 of this Indictment.

A violation of Title 18, United States Code, §924(c)(1)(A)(ii).

Count Ten

On or about May 9, 1999, in the Northern District of Texas, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Angelo Harris, a.k.a. "Step",** did intentionally and knowingly carry and use firearms, and did discharge such firearms, during and in relation to a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 2 and Count 3 of this Indictment.

A violation of Title 18, United States Code, §924(c)(1)(A)(iii).

Count Eleven

On or about May 9, 1999, in the Northern District of Texas, defendants **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"** and **Angelo Harris, a.k.a. "Step",** did intentionally and knowingly carry and use firearms, and did discharge such firearms, during and in relation to a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 2 and Count 3 of this Indictment; and in the course of such violation did cause the death of Juan Reyes through the use of such firearms, such killing being murder as defined in Title 18, United States Code, §1111.

A violation of Title 18, United States Code, §924(j).

Count Twelve

1. On or about July 12, 1999, in the Fort Worth Division of the Northern District of Texas, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face", L.J. Britt, a.k.a. "Capone, Hendrick Ezell Tunstall, Tyrone Bryant, Christhian Morales,** and **Edy Sonia Zamudio,** defendants, aided and abetted by each other, did intentionally and knowingly possess with intent to distribute more than 5 kilograms of a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance.

2. While engaging in such offense, which is punishable under the provisions of Title 21, United States Code, §841(b)(1)(A), the aforesaid defendants did intentionally kill Rudolfo Resendez and did intentionally counsel, command, induce, procure, and cause the intentional killing of Rudolfo Resendez ,and such killing resulted.

A violation of Title 21, United States Code, §841(a)(1); the penalty for which is found at Title 21, United States Code, §848(e)(1)(A).

Count Thirteen

1. On or about July 12, 1999, in the Fort Worth Division of the Northern District of Texas, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face", L.J. Britt, a.k.a. "Capone, Hendrick Ezell Tunstall, Tyrone Bryant, Christhian Morales,** defendants, did intentionally and knowingly possess firearms in furtherance of a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 2 and Count 3 and Count 12 of this Indictment.

2. For the conduct alleged in paragraph 1 of this Count, **Edy Sonia Zamudio,** defendant, is criminally responsible as a co-conspirator of the aforesaid defendants in the conspiracy alleged in Count 2 of this Indictment, such conduct having been committed in furtherance of the such conspiracy and being reasonably foreseeable by the defendant **Edy Sonia Zamudio**.

3. For the conduct alleged in paragraph 1 of this Count, **Edy Sonia Zamudio,** defendant, is criminally responsible in that she did willfully aid, abet, counsel, command, induce and procure the commission of such conduct.

A violation of Title 18, United States Code, §924(c)(1)(A), the penalty for which is found at Title 18, United States Code, §§ 924(c)(1)(A)(i) and 924(c)(1)(C).

Count Fourteen

1. On or about July 12, 1999, in the Fort Worth Division of the Northern District of Texas, **L.J. Britt, a.k.a. "Capone,** and **Hendrick Ezell Tunstall,** defendants, did intentionally and knowingly carry and use firearms, and did discharge such firearms, during and in relation to a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 2 and Count 3 and Count 12 of this Indictment.

2. For the conduct alleged in paragraph 1 of this Count, **Edy Sonia Zamudio, Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face", Tyrone Bryant,** and **Christhian Morales,** defendants, are each criminally responsible as a co-conspirator of the aforesaid defendants in the conspiracy alleged in Count 2 of this Indictment, such conduct having been committed in furtherance of the such conspiracy and being reasonably foreseeable by the defendants **Edy Sonia Zamudio, Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face", Tyrone Bryant,** and **Christhian Morales,**.

3. For the conduct alleged in paragraph 1 of this Count,, **Edy Sonia Zamudio, Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face", Tyrone Bryant,** and **Christhian Morales,** defendants, are each criminally responsible in that she did willfully aid, abet, counsel, command, induce and procure the commission of such conduct.

A violation of Title 18, United States Code, §924(c)(1)(A), the penalty for which is found at Title 18, United States Code, §§ 924(c)(1)(A)(iii) and 924(c)(1)(C).

Count Fifteen

1. On or about July 12, 1999, in the Fort Worth Division of the Northern District of Texas, **L.J. Britt, a.k.a. "Capone,** and **Hendrick Ezell Tunstall,** defendants, did intentionally and knowingly carry and use firearms, and did discharge such firearms, during and in relation to a drug trafficking crime for which the said defendants may be prosecuted in a court of the United States, namely: the offenses alleged in Count 2 and Count 3 and Count 12 of this Indictment; and in the course of such violation did cause the death of Rudolfo Resendez through the use of such firearms, such killing being murder as defined in Title 18, United States Code, §1111.

2. For the conduct alleged in paragraph 1 of this Count, **Edy Sonia Zamudio, Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face", Tyrone Bryant,** and **Christhian Morales,** defendants, are each criminally responsible as a co-conspirator of the aforesaid defendants in the conspiracy alleged in Count 2 of this Indictment, such conduct having been committed in furtherance of the such conspiracy and being reasonably foreseeable by the defendants **Edy Sonia Zamudio, Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face", Tyrone Bryant,** and **Christhian Morales,**.

3. For the conduct alleged in paragraph 1 of this Count,, **Edy Sonia Zamudio, Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face", Tyrone Bryant,** and **Christhian Morales,** defendants, are each criminally responsible in that she did willfully aid, abet, counsel, command, induce and procure the commission of such conduct.

A violation of Title 18, United States Code, §924(j).

Count Sixteen

On or about November 8, 2000, in the Fort Worth Division of the Northern District of Texas, **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, possessed two firearms, to wit: one BFI .223 caliber semi-automatic assault rifle, serial number P05130; and one 45 caliber UZI pistol, serial number UP52637 in furtherance of a drug trafficking crime for which the defendant may be prosecuted in a court of the United States, namely, the offense alleged in Count 1 of this Indictment and the possession by **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, with the intent to distribute 4.316 kilograms (approximately 9 pounds) of marijuana, a Schedule I controlled substance.

A violation of Title 18, United States Code, §924(c)(1)(A), the penalty for which is found at Title 18, United States Code, § 924(c)(1)(A)(i).

Count Seventeen

On or about November 8, 2000, in the Fort Worth Division of the Northern District of Texas, **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face"**, defendant, possessed three firearms, to wit: one 9mm UZI pistol, serial number 18740; one Smith & Wesson .357 caliber pistol, serial number 5224575; and one SKS 7.62x39 semi-automatic assault rifle, serial number 1510198P, in furtherance of a drug trafficking crime for which the defendant may be prosecuted in a court of the United States, namely, the offense alleged in Counts 1, 2, and 3 of this Indictment.

A violation of Title 18, United States Code, §924(c)(1)(A), the penalty for which is found at Title 18, United States Code, §§ 924(c)(1)(A)(i) and 924(c)(1)(C).

A TRUE BILL

Foreman of the Grand Jury

PAUL E. COGGINS
UNITED STATES ATTORNEY

FREDERICK M. SCHATTMAN
Assistant United States Attorney
State Bar of Texas No. 17728400
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
Telephone: (817) 252-5200
Facsimile: (817) 978-3094

A True bill,

FORT WORTH Foreman

Filed in open court this 19th day of June, 2001

Clerk

WARRANT TO ISSUE FOR DEFENDANT **TAMIEKA SIBLEY (26)**
FANISHA HILL (10), RICHARD SMART (16), KIMBERLY JOHNSON (24) ON **BOND**
ALL OTHER DEFENDANTS IN CUSTODY

Charles Bleil

UNITED STATES MAGISTRATE JUDGE

No. CRIMINAL NO.4:00-CR-0260-Y [Supersedes Indictments Returned Nov. 2, 2000 and April 19, 2001 as to the named defendants]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

THE UNITED STATES OF AMERICA

VS.

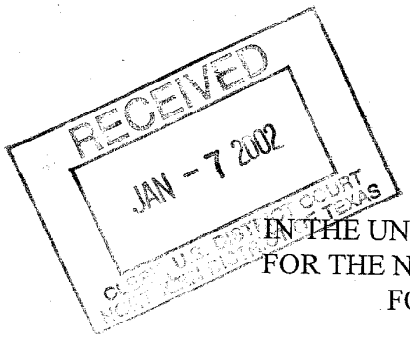
NATHAN DESHAWN HENDERSON, a.k.a. "Cash", a.k.a. "Nate" (01),
JULIUS OMAR ROBINSON, a.k.a. "Scarface, a.k.a. "Scar", a.k.a. "Face" (02),
JASON GEHRING (03), VICTOR JIMENEZ, a.k.a. "Vic" (05),
JAVIER GUADALUPE AGUILAR (06), MARCUS JWAIN ROBINSON (07),
JOHN TURNER (08),FANISHA HILL (10), JEWELL EWING, a.k.a. "Duke" (12),
CANTRAL HUGGINS, a.k.a. "Crumb" (13), TERRENCE HOLIMON, a.k.a "Bone" (14)
L.J. BRITT, a.k.a. "Capone" (15), RICHARD SMART, a.k.a "Black" (16), TRAVIS DIXON (21)
STEVEN TOSTON (22), ANGELO HARRIS, a.k.a. "Step" (23), KIMBERLY JOHNSON (24),
TAMIEKA SIBLEY (26), HENDRICK EZELL TUNSTALL (38), TYRONE BRYANT (39)
CHRISTHIAN MORALES (40), EDY SONIA ZAMUDIO (41) ,
DAKARI WARNER, a.k.a. "Dakari Sells", a.k.a. "DK" (43), LEON JENKINS (44)

INDICTMENT

21 U.S.C. § 846, 848, 841(a)(1),
18 U.S.C. 924(c), 924(j).

Conspiracy to Distribute More Than 100 Kilograms of Marihuana,
Conspiracy to Distribute More Than 5 Kilograms of Cocaine,
Continuing Criminal Enterprise,
Possession of Firearm in Furtherance of Drug Trafficking Crime,
Carry, Use, and Brandishing a Firearm in Relation to Drug Trafficking Crime,
Carry, Use, and Discharging a Firearm in Relation to Drug Trafficking Crime,
Murder Using a Firearm in Relation to Drug Trafficking Crime,
Possession of More than 5 Kilograms of Cocaine with Intent to Distribute.

(17 COUNTS)



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

COPY

UNITED STATES OF AMERICA Plaintiff	§	
VS.	§	CRIMINAL NO. 4:00-CR-260-Y
JULIUS OMAR ROBINSON (2) Defendant	§	

BEFORE:

HON. TERRY R. MEANS, U.S.D.J.

MOTION AND BRIEF REGARDING GOVERNMENT'S INTENT TO SEEK THE DEATH PENALTY

WES BALL
Attorney for Defendant
4025 Woodland Park Blvd., Suite100
Arlington, TX 76013
Tel.: (817) 860-5000
Fax: (817) 860-6645
State Bar No. 01643100

JACK V. STRICKLAND
Attorney for Defendant
909 Throckmorton Street
Fort Worth, Texas 76102
Tel.: (817) 338-1000
Fax: (817) 338-1020
State Bar No. 19397000

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"Survey of the Federal Death Penalty (1988-2000),"
U.S. Department of Justice, Washington, D.C.,
September 12, 2000

STATEMENT OF THE CASE

1. THE OVERALL CHARGES; JULIUS OMAR ROBINSON'S ROLE IN THE OFFENSE

The indictment alleges in Counts 1 and 2 conspiracies to distribute marihuana and cocaine and include numerous overt acts involving a number of illegal narcotics transactions. In Count 3, 7, 11, 12, and 15 allege offenses for which the death penalty is a possible punishment. These allegations are plead under 21 U.S.C. § 848 (Continuing criminal enterprise) Count 7, 11 and 15 allege murders in the course of a drug trafficking crime under 18 U.S.C. §924(j). Count 12 alleges possession of a controlled substance with intent to distribute with the intentional killing of an individual in violation of 21 U.S.C. §841(a)(1) and 848(e)(1)(A).Counts 4, 5, 6, 8, 9 , 10, 13 and 14 , allege firearms offenses in furtherance of a drug trafficking crime in violation of 18 U.S.C. §924(c)(1)(A).

The government's theory of the case is that the defendant Robinson and others named in the indictment conspired to distribute cocaine and marihuana. In the course of the conspiracy, the government claims that some of the conspirators participated in what were referred to as "licks" which was understood to be robberies of individuals for money or drugs related to drug trafficking activity. The conspiracy is claimed to have covered multiple states and jurisdictions, including Texas, Oklahoma, Missouri, and Arkansas. It is claimed that defendant Robinson was acting in a managerial or supervisory role.

The indictment alleges that three individuals were killed in the course of and furtherance of the conspiracy and its activities. It is alleged that the defendant, acting with others participated in

the killing and shooting death of Johnny Lee Shelton on or about December 3, 1998 in Dallas, Texas. The government asserts that the defendant and other conspirators had been robbed of money intended to purchase marihuana. The defendant and other conspirators believed that an individual known as "Big Friday" had set up the robbery. The government alleges that the defendant and other conspirators mistakenly believed that Johnny Lee Shelton was "Big Friday" and that Mr. Shelton was killed in retaliation for the robbery of the defendant and other conspirators.

The indictment alleges the killing and shooting death of an individual named Juan Reyes on or about May 9, 1999 in Dallas, Texas. The government's theory is that the defendant and other conspirators arranged to purchase a kilogram of cocaine. The cocaine and money were exchanged and upon inspection, the kilogram was fake and consisted largely of a block of wood. It is claimed that Mr. Reyes was killed in retaliation for the sale of the false kilogram.

The indictment alleges the killing and shooting death of an individual named Rudolfo Resendez by the defendant and other conspirators in Tarrant County, Texas on or about July 12, 1999. The government's theory is that a distributor of cocaine had 20 kilograms of cocaine stolen from him and desired to recover his cocaine from whoever had stolen it. This drug distributor and others believed that Mr. Resendez was in possession of this cocaine and was the perpetrator of the theft. Arrangements were made to set up a drug transaction with Mr. Resendez as a ruse to purchase the 20 kilograms of cocaine, when in fact, it was the purpose of the conspirators to rob Mr. Resendez of the cocaine or in their vernacular do a "lick." Mr. Resendez was lured to a meeting for the purchase of this cocaine by the defendant and other conspirators. Mr. Resendez, expecting to

conduct a drug transaction went with the conspirators as a passenger in a vehicle. During the drive, Mr. Resendez was shot and killed. The cocaine Mr. Resendez had brought for the exchange was split among some of the conspirators. It is claimed that the defendant was involved by being present in a vehicle which was following the vehicle containing Mr. Resendez and in which Mr. Resendez was shot and killed.[1]

B. THE GOVERNMENT'S DEATH-NOTICE

As summarized in the section of this brief outlining the operation of the Federal Death Penalty Act, *infra* at pp. 19-24, a jury that has convicted a defendant of a capital offense must first decide whether that defendant acted with one (and only one) of the "gateway" culpable mental states specified at 18 U.S.C. § 3591(a)(2) or 21 U.S.C § 848 (e)(A).[2] If the jury unanimously finds a culpable mental state, the jury goes on to consider whether any of the 16 statutory aggravating factors specified at 18 U.S.C. § 3592(c) or 21 U.S.C. §848(n) have been established. Assuming that finding has been made, the jury may or may not (depending

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[1]"A" to designate the appendix to this brief. Mr. Robinson has also filed a separately-bound Special Appendix containing the report of the Department of Justice on the federal death penalty system, "Survey of the Federal Death Penalty System, 1988-2000" U.S. Department of Justice, September 12, 2000. ["DOJ Study"]

[2]These state-of-mind elements appear to be a congressional effort to keep faith with the opinions of the Supreme Court in *Tison v. Arizona*, 481 U.S. 137 (1987) (Eighth Amendment prohibits death penalty in felony-murder context unless the defendant participated in a major way in the felony and acted with reckless indifference to human life, watched the killing, and did not come to the aid of the victim, distinguishing *Enmund v. Florida*) and *Enmund v. Florida*, 458 U.S. 782 (1982) (Eighth Amendment prohibits death penalty for those who aid and abet murders, but who do not themselves kill, attempt to kill or intend that killing result).

on how this Court rules on this aspect of the motions) be permitted to consider non-statutory aggravating factors. All of the jury's findings regarding mental state and aggravating factors must be unanimous and be established by proof beyond-a-reasonable-doubt. The focus then shifts to mitigating factors, where the findings need not be unanimous and where the standard is preponderance of the evidence, and, thence, to a final balancing of aggravating and mitigating factors. A verdict of death must be unanimous; if a jury is not able to agree on death as the appropriate verdict, the Court imposes a life sentence.

Here, the government has announced that, assuming a conviction, it intends to seek a death sentence as to JULIUS OMAR ROBINSON on Counts 3, 7, 11, 12 and 15. The aggravating factors alleged as to JULIUS OMAR ROBINSON are set out in the government's notice in this case, many of which, as can be seen, are permutations and reiterations of a common set of recurring facts and circumstances. The actual notice is reproduced at A1.

INTRODUCTION TO THE ARGUMENTS

A. THE SUPREME COURT'S DEATH-PENALTY JURISPRUDENCE: 1972 TO THE PRESENT

In *Furman v. Georgia*, 408 U.S. 238 (1972), a divided Supreme Court struck down all existing state death-penalty schemes as incompatible with the guarantees of the Eighth and Fourteenth Amendments to the United States Constitution. Although each of the five justices who concurred in the *Furman* Court's one paragraph *per curium* opinion advanced separate reasoning, the Court has long accepted the view that the fundamental basis of

Furman was the Court's unwillingness to tolerate the arbitrary and capricious manner in which death sentences had been meted out this nation.[3] Justice Stewart's comparison between receiving a sentence of death and being struck by lightning is the very essence of *Furman*. Justice Stewart wrote:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders, . . . many just as reprehensible as these, the petitioners are among a capriciously selected handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Furman v. Georgia, 408 U.S. at 309-10 (Opinion of Stewart, J., concurring; citations and footnotes omitted). Members of the Court also took note, utilizing language particularly appropriate to this case, that the death penalty was often sought selectively, "feeding

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[3]In *Zant v. Stephens*, 462 U.S. 862 (1983), for example, Justice Stevens, speaking for a majority of the Court, noted:

> A fair statement of the consensus expressed by the Court in *Furman* is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Id. at 874, quoting the plurality opinion of Justices Stewart, Powell and Stevens in *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority . . . ." *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

In reaction to *Furman*, many states with a long history of capital punishment and *de jure* segregation – principally those in the deep South – rushed to enact new capital punishment schemes aimed at avoiding, and in many cases obscuring, the concerns articulated in *Furman*.[4] A scant four years after *Furman*, the issue of capital punishment came once again before the Court, this time in the cases of five men who had been prosecuted and sentenced to death – all in the South – under post-*Furman* statutes.[5] On July 2, 1976, the Court issued opinions in those five cases. In three of the cases, the Court concluded that the states had successfully overcome the constitutional concerns embodied in the *Furman* opinion. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). Two other state schemes were struck down,

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[4]For a discussion of the Florida experience in this regard, *see* David Von Drehle, *Among the Lowest of the Dead: the Culture of Death Row* (Times Books/Random House 1995). In reaction to *Furman*, the governor of Florida called the Florida Legislature into special session which was to continue until that body voted out a new death-penalty bill.

[5]The death penalty, at least in the 20th century, has been a southern phenomena, often linked to racial discrimination, and continues to be a southern phenomena as we enter the 21st century. Since *Gregg* was decided in 1976, there have been 667 executions in this country. Of those, 543 have taken place in the South, principally in what is sometimes referred to as "the death belt" – Texas, Virginia, Florida, Missouri, Oklahoma, Louisiana, South Carolina, Georgia, Alabama and Arkansas. Two states – Virginia and Texas – have carried out a combined total of 311 executions, nearly half of all post-*Gregg* executions. As discussed *infra*, federal districts in Virginia, Missouri and Texas account for twelve of the 19 inmates on the federal death row. [A2.]

principally because they *automatically* called for death sentences upon particular classes of convicted murders without requiring "particularized consideration of all relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (Opinion of Justices Stewart, Powell and Stevens); *see also, Roberts v. Louisiana*, 428 U.S. 325 (1976).

In the nearly 25 years since *Gregg,* the United States Supreme Court has decided well in excess of 100 death-penalty cases and has thereby created a complex and substantial body of death-penalty law. From that body of law, however, several core principles of death-penalty jurisprudence emerge: (1) death is a different kind of punishment and, therefore, every stage of a capital case must be marked by heightened standards of review and scrutiny; (2) a constitutional death-penalty scheme must provide for meaningful appellate review; (3) vague, duplicative, or all-encompassing aggravating factors are constitutionally invalid since such factors do not genuinely narrow the class of murders for which the death penalty is appropriate, or otherwise justify the imposition of a death sentence on one defendant as compared to others found guilty of murder; (4), no limitation may be placed on a defendant's right to present evidence in mitigation of a sentence of death; and (5), in jurisdictions which employ a "weighing" genre of death-penalty scheme, the submission to a jury of a single

invalid aggravating factor will lead to automatic reversal of any death sentence returned. A discussion of each of these principles follows.[6]

1. Death is different.

The first principle of capital jurisprudence – that "death is different" – informs and defines the entire body of capital jurisprudence. Death-penalty cases are not the same as other cases and cannot be treated the same as other cases.[7] Commencing with the 1976 quintet of cases that mark the beginning of modern death-penalty jurisprudence, the Supreme Court has taken numerous opportunities to express its recognition of the differences between death as a punishment and all others. In *Woodson*, for example, a decision striking down North Carolina's initial post-*Furman* death-penalty scheme, the Court observed:

> The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.

Woodson, supra, 428 U.S. at 305. The following year, in *Gardner v. Florida*, 430 U.S. 339 (1977), the proposition was reiterated:

> [D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality.

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[6]For an excellent *précis* of this area, *see* "Twenty-Ninth Annual Review of Criminal Procedure," 88 *Georgetown L.J.* 799, 1560-1588 (2000).

[7]In 1995, Justice Stevens, citing seven separate decisions, noted, "Our opinions have repeatedly emphasized that death is a fundamentally different kind of penalty from any other that society may impose." *Harris v. Alabama*, 513 U.S. 504, at n.1 (1995) (Stevens, J., dissenting).

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner, 430 U.S. at 357-58.

This first guiding principle – that "death is different" – is not simply the dramatic recitation of an obvious truth. Rather, this principle forms the bedrock of a death-penalty jurisprudence that is defined by sharply increased judicial attention to every step of the process through which the irrevocable sanction of death is sought and carried out.[8] The post-*Furman* Court has described this jurisprudence as mandating a "heightened standard of reliability" for the entire process through which the sovereign claims the legal and moral authority to kill one of its citizens. This heightened concern for reliability is "the natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); "[T]he qualitative difference of death from all other punishments *requires* a correspondingly greater degree of scrutiny of the capital sentencing determination." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (emphasis added).

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[8]Based on figures current as of September 28, 2000, there are 3,682 inmates under a sentence of death in this country. 667 executions have been carried out since 1976. In 1999, there were 98 executions; so far in the year 2000 there have been 69 executions. [*Id.*]

2. A constitutional death-penalty scheme must provide for meaningful appellate review.

It is a fair summary of the overall thrust of the *Gregg-Jurek-Proffitt* trilogy that capital sentencing schemes successfully withstand constitutional challenge only to the extent (1), that a particular scheme genuinely narrows the class of murderers for whom the ultimate penalty is available, and (2), provides the heightened procedural safeguards that avoid the evils identified in *Furman*, principally the arbitrary, capricious and/or discriminatory imposition of the ultimate penalty. *See, e.g. Zant v. Stephens*, *supra*, 462 U.S. at 890.

One vitally important procedural safeguard, emphasized by the Court from the earliest post-*Furman* cases forward, is the availability of "meaningful appellate review." *Pulley v. Harris*, 465 U.S. 37, 55 (1984) (Stevens, J., concurring). While *Pulley* ultimately held that a specialized form of capital appellate scrutiny known as "proportionality review" was not required by the Eighth and Fourteenth Amendments,[9] the Court has been steadfast in its view that meaningful appellate review is an essential component of a constitutional death-penalty scheme. In *Zant*, for example, the Court explained the basis of its original approval of Georgia's capital-sentencing procedure in *Gregg* as

> rest[ing] primarily on two features of the scheme: That the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the State Supreme Court reviewed the record of every death-penalty

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[9]In *Pulley*, the Court defined capital proportionality review as an inquiry to determine whether a sentence of death in a particular case is disproportionate to the penalties imposed in similar cases. *Pulley*, 465 U.S. at 43, 44.

> proceeding to determine whether the sentence was arbitrary or disproportionate.

Zant, 462 U.S. at 876. In *Godfrey v. Georgia*, 446 U.S. 420 (1979), the Court discussed three independent criteria as indispensable to a finding that a particular capital scheme effectively and constitutionally channeled the sentencing authority's discretion. Among these bedrock criteria was the availability of rational appellate review of the "process for imposing a sentence of death." *Godfrey*, 446 U.S. at 428. In *Parker v. Dugger*, 498 U.S. 308 (1991), the Court re-visited and re-affirmed the importance of meaningful appellate review in determining the constitutionality of a death-penalty scheme:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.

Parker, 498 U.S. at 321.

The emphasis on appellate review is significant in this case since, as is argued *infra* at pp. 14-16, the FDPA has purported to remove plain-error jurisdiction from appellate courts reviewing a sentence of death imposed pursuant to the FDPA.

3. A constitutional death-penalty scheme may not employ aggravating circumstances that are vague, duplicative, overly broad, or which do not justify the imposition of a more severe sentence on the defendant as compared to others found guilty of murder.

The FDPA capital punishment statute is of the "weighing" genre of death-penalty schemes in that it requires a penalty-phase jury to decide, initially, whether or not certain aggravating factors have been unanimously established beyond a reasonable doubt, and then

to weigh any aggravating factors against mitigating factors.[10] 18 U.S.C. § 3593(e). It is the "weighing" process which leads the jury to decide whether or not the sentence should be death. As noted in *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), however, "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury's discretion." In light of the critical narrowing function performed by aggravating factors, it follows that if a particular factor is vague to the point of defying definition or, alternatively, could be interpreted by a particular sentencing authority – whether judge or jury – as applicable to any, and therefore *all* murders, that factor fails to perform a constitutional narrowing function and is invalid.

Additionally, aggravating factors – especially where utilized in a weighing jurisdiction – may not be alleged in duplicative fashion. This is to avoid the effect of having the same conduct or circumstance found separately and weighed more than once. Duplicative aggravating factors – like invalid aggravating factors – have the undeniable tendency to "skew the weighing process and create the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996) (Reversing a sentence of death imposed pursuant to § 848(e)). In *Stringer v. Black*, 503 U.S. 222 (1992), the Court observed that the difference between a "weighing state and

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[10]A discussion of the operation of the FDPA scheme begins at p.18 of this brief. The weighing of aggravating factors against mitigating factors, while required by the federal statute, is not required by the Constitution. *See, e.g. Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

a non-weighing state is not one of 'semantics,' . . . but of critical importance." *Id.* at 231. The risk is that an invalid aggravating factor may result in the placement of a "thumb [on] death's side of the scale," *id.* at 243; *see also, Flamer v. Delaware,* 68 F.3d 736, 745-49 (3d Cir. 1995) (*en banc*); *see also, United States v. Jones*, 132 F.3d 232 (5th Cir. 1998); *aff'd, on other grounds, Jones v. United States*, 119 S.Ct. 2090 (1999).

The Court has also recognized consistently that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Zant v. Stephens*, 462 U.S. at 877, and, most fundamentally, must be relevant in assisting the jury in distinguishing "those who deserve capital punishment from those who do not," *Arave v. Creech*, 507 U.S. 463, 474 (1993). In *Godfrey v. Georgia, supra,* for example, the defendant was sentenced to death upon a finding that the murder was "outrageously or wantonly vile, horrible or inhuman." 446 U.S. at 422. In striking down this aggravating circumstance and vacating the sentence of death, Justice Stewart's opinion for the plurality reasoned that the language of this particular aggravating circumstance failed to provide "inherent restraint on the arbitrary and capricious infliction of the death sentence," since virtually every murder could be said to fit those criteria. *Id.* at 428-29. Moreover, since the facts and circumstances of the murder in *Godfrey* did not stand out from other murders, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not." *Id.* at 433. In *Tuilapea v. California,* 114

S.Ct. 2630 (1994), the Court reiterated the two constitutional tests which aggravating factors must meet: (1) a valid aggravating factor must not apply to every defendant convicted of murder, but only to a rationally-selected sub-class of murderers; and (2), the circumstances must be defined in such a way by the statute so as not to be vague. *Id.* 972.

Additionally, the constitutionality of aggravating factors that are quite similar in language may rise or fall on how that language is construed, limited and/or otherwise presented to the sentencing authority. In *Proffitt*, for example, a death sentence imposed in Florida under an aggravating factor defined as "especially heinous, atrocious, or cruel" was held to be constitutional because, as construed and narrowed by the Florida Supreme Court, its inherent vagueness and over breadth were corrected. By contrast, in *Maynard v. Cartwright*, 486 U.S. 356 (1988), an Oklahoma aggravating circumstance virtually identical in language to the one upheld in *Proffitt* was struck down as overly-broad and unconstitutionally vague since its potential reach had not been effectively narrowed through judicial construction. *See also, Shell v. Mississippi*, 498 U.S. 1 (1990) (Trial judge's attempt to limit the reach of Mississippi's "especially heinous, atrocious, or cruel" aggravating factor was constitutionally insufficient).

Aggravating factors, therefore, serve a vital function in death-penalty jurisprudence. *See* Note, "Criminal Law: An Evolutionary Analysis of the Role of Aggravating Factors in Contemporary Death Penalty Jurisprudence – From *Furman* to *Blystone*," 32 *Washburn L.J.* 77 (1992). In *Gregg v. Georgia, supra*, 428 U.S. at 189, the Court stated, "[W]here

discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

4. No limitation may be placed on the right of the accused to present relevant mitigating evidence during the penalty trial.

A fourth aspect of a constitutional death-penalty scheme is that no limitation may be placed on the right of the accused to present for the sentencer's consideration all relevant mitigating evidence. In this regard, the Supreme Court has struck down state death penalty schemes, as applied to particular defendants or cases, where the same scheme had survived prior facial challenges. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) where the Court declared the Texas death-penalty scheme unconstitutional as applied since, in the area of a capital defendant's mental retardation, the scheme failed to provide the jury any meaningful opportunity "to consider and give effect to mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." *Id.* at 340.

The aspect of death-penalty jurisprudence requiring courts to allow a defendant to present all relevant evidence in mitigation is rooted in *Lockett v. Ohio*, 438 U.S. 586 (1978), where a plurality of the Court held that "in all but the rarest kind of capital cases," a sentencing authority may not "be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record . . . as a basis for a sentence less than death." *Id.* at 113-14 (emphasis in original); *see also, Skipper v. North Carolina*, 476 U.S. 1 (1986);

Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court held that a constitutional death-penalty scheme

> cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Id. at 305-06; *see also*, *Green v. Georgia*, 442 U.S. 95 (1979) (State's evidence rules may not be invoked to bar otherwise relevant mitigating evidence.)

The importance of the *Lockett* line of cases was underscored by the Supreme Court two years ago in *Buchanan v. Angelone*, 522 U.S. 269 (1998), where Chief Justice Rehnquist, writing for a majority of the Court, stated:

> [I]n the [penalty] phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.
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> * * *
>
> In the [penalty] phase, our cases have established that the sentencer may not be precluded from considering any constitutionally relevant mitigating evidence.

Id. at 276 (citations omitted). In *Williams v. Taylor*, 529 U.S. 1495, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 2837 (2000), the Court noted that mitigating evidence can serve to lessen a defendant's "moral culpability" even where such evidence "does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 120 S.Ct. at 1515-16. Mitigating evidence is so critical in capital cases that, as held in *Williams*, the failure of counsel to investigate,

develop and present such evidence can deny a capital defendant the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments.

5. In a weighing jurisdiction – such as the FDPA scheme – if even a single invalid aggravating factor is found by a death-sentencing jury, the death verdict must be set aside.

The FDPA scheme of capital punishment is, as noted several times, of the weighing genre. In *Stringer v. Black*, *supra*, the difference between capital punishment schemes which, on the one hand, allow juries to weigh aggravating factors against mitigating factors and, on the other, non-weighing, so-called "guided-discretion" schemes, was described by the Court as of "critical importance." *Id.* at 231. Where an invalid aggravating factor has been improperly submitted and found, the delicate balancing process is upset, a circumstance that, in the language of *Stringer*, "creates the possibility . . . of randomness" and may fatally skew the process by placing "a thumb . . . on death's side of the scale." *Id.* at 243. The *Stringer* Court also identified as dangers associated with the submission of invalid aggravating factors in a weighing jurisdiction: (1) the risk of the jury deciding that the defendant was more deserving of the death penalty given the sheer volume of aggravating factors; and (2), the creation, through the same process, of an overall jury bias in favor of a sentence of death. *Id.* at 235; *see also* the Third Circuit's protracted *en banc* discussion of this issue in *Flamer v. Delaware, supra*, 68 F.3d at 745-49.

Even in jurisdictions such as Alabama, Delaware, Florida, and Indiana, where judges have the statutory ability to override a jury's life or death recommendation, or where such

verdicts may be merely advisory, the submission to the jury of an invalid aggravating factor will vitiate any sentence of death imposed by the judge no matter what the jury's actual recommendation. *Harris v. Alabama, supra*; *Espinosa v. Florida*, 505 U.S. 1079 (1992). This is so because the judicial review function is not plenary and is necessarily influenced by the jury's actions, even where the jury's verdict is purely advisory. The Court has recognized that an appellate court may perform the necessary re-weighing function. *Clemons v. Mississippi*, 494 U.S. 738 (1990).

B. THE FEDERAL DEATH PENALTY ACT OF 1994

In light of *Furman*, and in the absence of congressional action, it was widely assumed that the capital aspects of existing federal criminal statutes that carried death sentences were not constitutional and, in fact, all federal capital prosecutions ceased.[11] Matters remained that way until, in 1988, Congress enacted the first "modern" – *i.e.*, post-*Furman* – federal death penalty by authorizing capital punishment for murders occurring in the context of drug trafficking. 21 U.S.C. § 848(e). The reach of the federal death penalty was greatly expanded on September 13, 1994, when President Clinton signed into law the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.*, the capital statute via which the government seeks

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[11]In practice, there had been a *de facto* moratorium on federal capital prosecutions for the decade prior to *Furman*. *But see, United States v. Cheely*, 36 F.3d 1439 (9th Cir. 1994) (Attempt to bring federal capital prosecution under mail-bombing statute barred).

sentences of death in this case.[12] The statute permits the death penalty to be considered in the following circumstances:

> § 3591. **Sentence of death** – (a) A defendant who has been found guilty of – (1) any . . . offense for which a sentence of death is provided, if the defendant as determined beyond a reasonable doubt at the hearing under section 3593 – (A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; (C) 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, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act. . . .

18 U.S.C. § 3591(a). [See also prevision under 21 U.S.C §848 (n)]

In order to set into motion what Justice Blackmun called "the machinery of death,"[13] the government must serve and file a pretrial notice that the death penalty will be sought and

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[12]For an exhaustive history of the federal death penalty, including an overview of the FDPA, *see* R.K. Little, "The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role," 26 *Fordham Urban L.J.* 347 (1999). Professor Little writes from the perspective of a former Justice Department attorney who served on Attorney General Reno's Review Committee on Capital Cases. *See also,* D.J. Novak, "Trial Advocacy: Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors,"50 *S.C.L.Rev.* 645 (1999).

[13]*See Callins v. Collins*, 510 U.S. 1141, 114 S.Ct. 1127, 1130 (1994) ("From this day forward, I no longer shall tinker with the machinery of death.") (Blackmun, J., dissenting from the denial of *certiorari* and announcing his view that the death penalty is, as applied and administered, unconstitutional.)

specify in that notice those aggravating factors which the government will seek to prove if the case goes to a penalty trial. 18 U.S.C. § 3593(a). If a defendant is found guilty of an offense of the kind enumerated in § 3591, a separate sentencing hearing must be conducted. The death penalty hearing may take place before the trial judge or before a jury. A defendant may waive jury-sentencing, however, only if the government consents. 18 U.S.C. § 3593(b)(3). A trial court also has the authority to convene a separate penalty jury where the original jury has been discharged "for good cause." 18 U.S.C. § 3593(b)(2)(C).

The penalty hearing is, for all intents and purposes, a separate trial at which both sides may call witnesses and present "information." The statute first requires the government to establish that the defendant is "eligible" for the death penalty. To do so, the government must convince the jury, unanimously and beyond a reasonable doubt, that one (and only one) of the "intent" findings set forth in § 3591(a)(2)(A) - (D) exists. If the jury so finds, it must next unanimously find beyond a reasonable doubt that at least one of the statutory aggravating factors set forth in § 3592(c)(1) through (16) also exists. 18 U.S.C. § 3593(c). If the jury does not unanimously find, in sequence, that, beyond a reasonable doubt, both statutory requirements have been met, the penalty trial is over and the court must impose a sentence other than death.[14] If, however, the government successfully carries its burden of proof in establishing both the existence of an intent factor under § 3591, and one or more of the "(c)" aggravating factors, the jury may also consider whether the government has

established any non-statutory aggravating factor – arguably limited to victim-impact – for which pre-trial notice was provided pursuant to 18 U.S.C.§ 3592.

In attempting to provide guidance as to what a jury may consider at a penalty trial, Congress spoke in terms of "information," not "evidence."[15] "Information" may be presented to the jury, by either side, "regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[16] 18 U.S.C. § 3593(c).

If the government meets its threshold burdens, the jury is required to consider mitigating factors. The statute, at § 3592(a)(1) - (8), provides seven specific mitigating factors and one *Lockett*-derived "catch-all" provision: that "[O]ther factors in the defendant's background, record or character or any other circumstance of the offense mitigate against imposition of the death sentence." 18 U.S.C. § 3592(a)(8). Mitigating factors must be established by the defendant by a mere preponderance of the evidence. 18 U.S.C. § 3593(c). Findings with respect to mitigating factors need not be unanimous. Any member of the jury who finds the existence of a mitigating factor may consider such a factor established for the purposes of the final weighing process set out in subsection§ 3593(e), regardless of the

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[15]The legislative history of the 1994 Act is virtually non-existent. There were no committee reports or hearings.

[16]This is a variation on the language of F.R.Evid. 403, which permits a court to exclude otherwise relevant evidence where its probative value is "*substantially* outweighed by the danger of unfair prejudice . . ." [Emphasis added.]

number of other jurors who concur that the factor has been established. 18 U.S.C. § 3593(d), giving effect to *Mills v. Maryland*, 486 U.S. 367 (1988). By contrast, findings with respect to aggravating factors must be unanimous. 18 U.S.C. § 3593(d).

Once the jury has completed its fact-findings, it considers whether the aggravating factor or factors found to exist "sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death." 18 U.S.C. § 3593(e). Thus, the FDPA is a weighing death penalty statute which requires a penalty phase jury to decide, initially, whether certain aggravating factors have been unanimously established beyond a reasonable doubt and, if so, to weigh those aggravating factors against any mitigating factors. 18 U.S.C. § 3593(e). It is the weighing process which leads to the jury's ultimate decision whether the defendant should be sentenced to death. The so-called "Drug Kingpin" federal death-penalty, 21 U.S.C. § 848(e), contains the following provision:

> The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

21 U.S.C. § 848(k). Finally, after considering all factors, the jury votes and returns its findings. Unless the jury unanimously recommends death or life without possibility of release, the Court must impose a sentence less than death, up to life without possibility of

release.[17] A jury unable to agree on a unanimous death verdict spares the defendant's life.[18] Whether the jury "recommends" a verdict of life or death, that decision is binding upon the court. 18 U.S.C. § 3594. Thus, there is no provision for a judicial override of the jury's capital sentencing decision one way or the other. *Id.*

No matter how the deliberations turn out, each juror is required to sign a certificate that their decision was not influenced by the "race, color, religious beliefs, national origin or sex of the defendant or of any victim. . . ." 18 U.S.C. § 3593(f) and 21 U.S.C. §848(0). In the event of a death sentence, the defendant has a right of appellate review, 18 U.S.C. § 3595 and 21 U.S.C. §848 (q), under which the reviewing court is permitted to grant relief from a sentence of death if: (1) the death sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor," (2) "the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor," or (3)" the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure." 18 U.S.C. § 3595(c)(2). The Third Circuit has recently ruled that the FDPA

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[17]Whether by operation of the Sentencing Guidelines, or by the structure of the statutes carrying possible sentences of death, the sole alternative to a sentence of death in this case is life imprisonment.

[18]This was the holding of the first FDPA case to reach the Supreme Court. *Jones v. United States,* 119 S.Ct. 2090 (1999) (If jury is unable to agree at penalty phase, defendant may not be sentenced to death; there is no "hung-jury" re-trial.)

does not mandate an appeal from a sentence of death and that an appeal, once filed, may be withdrawn. *United States v. Hammer*, 226 F.3d 229, 2000 (3d cir. 2000).

To date, death sentences imposed pursuant to the FDPA have been reviewed by the Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits. *See, United States v. Paul,* 217 F.3d 989 (8th Cir. 2000) (Affirming sentence of death); *United States v. Barnette,* 211 F.3d 803 (4th Cir. 2000) (Vacating sentence of death); *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999) (Vacating sentences of death in first case indicted pursuant to FDPA); *United States v. Battle*, 163 F.3d 1 (11th Cir. 1998) (Affirming sentence of death); *United States v. Webster*, 162 F.3d 308 (5th cir. 1998) (Affirming sentence of death); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (Affirming sentence of death); *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998) (Affirming sentence of death).

LEGAL ARGUMENT

POINT ONE

A SYSTEM WHERE THE DEATH PENALTY IS SOUGHT ON THE IMPERMISSIBLE BASIS OF RACE, AND THE ARBITRARY AND CAPRICIOUS BASIS OF GEOGRAPHY, SHOULD NOT BE ENFORCED AND THIS COURT SHOULD DISMISS THE NOTICE OF AGGRAVATING FACTORS.

"Plus ça change, plus ça même chose."

– French proverb

A. INTRODUCTION

Thirteen years ago, dissenting in *McCleskey v. Kemp*, *supra*, Justices Brennan Marshall, Blackmun and Stevens hypothesized an attorney-client conversation where an African-American defendant charged with capital murder asked his attorneys what the chances were that he would be sentenced to death. Based on the statistical analysis presented to the Court in *McCleskey*, it was the four dissenters' conclusion that, at some point in the dialogue, defense counsel would have to level with the client and tell him that race would play an important role – perhaps a determinative one – in the process of deciding whether he lived or died:

> The story could be told in a variety of ways, but [the client] could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.

McCleskey, 481 U.S. at 322 (Opinion of Brennan, Marshall, Blackmun and Stevens, J.J., dissenting).[19]

In a press conference that took place on June 28, 2000, President Clinton was asked about a highly-publicized execution that had taken place the previous week in Texas and whether he believed it was time "for the American people to stop and reassess where we

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[19]After his retirement from the bench, Justice Powell stated that his greatest regret was that he had voted with the majority, and authored the 'court's opinion, in the 5-4 decision upholding the death-penalty in *McCleskey*. *See,* Jeffries, *Justice Lewis F. Powell, Jr.* (1994) at pp. 451-52.

stand on implementation of the death penalty." Responding to that question, the President had the following to say about the federal death penalty:

> The issues at the federal level relate more to the disturbing racial composition of those who have been convicted and the apparent fact that almost all the convictions are coming out of just a handful of states, which raises the question of whether, even though there is a uniform law across the country, what your prosecution is may turn solely on where you committed the crime. I've got a review underway of both those issues at this time.

[Transcript of President Clinton 6/28/2000 press conference; pertinent excerpts A3.]

On September 12, 2000, the Department of Justice released a comprehensive study of how the "modern" federal death penalty has been administered, tracking the process from 1988 to the present.[20] The essence of that study's findings is that the federal death penalty has been disproportionately sought against minority-group defendants and irrationally sought on a regional basis.[21] Moreover, as reported in the DOJ Survey, the end result of 12 years of discriminatory and irrational charging decisions, is that the federal death row, housed at USP/Terre Haute, now consists of 19 men, of whom two are white, 13 are black, one is

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[20]A complete copy of that study, entitled, ""Survey of the Federal Death Penalty System (1988-2000)," [hereinafter cited as "DOJ Death Penalty Study"] . It is also available on the Justice Department website at <www.usdoj.gov/dag/pubdoc/dpsurvey.html> and may be accessed via this hyperlink. The body of the report is 49 pages long; with its appended statistical tables, the document is in excess of 400 pages.

[21]Consistent with the historical roots of the death penalty, 14 of the 19 defendants on federal death row were sentenced in the South.

Hispanic, and one is categorized as "other."[22] [A profile of the men who make up the present federal death row is appended to this brief at A51.] The cut-off date for the Justice Department's analysis was July 20. However, as noted in the profile, four more inmates (two black and two Hispanic) are on their way to death row at Terre Haute after federal juries in Texas and Kansas recently returned death verdicts in those cases. [A52.]

In addition to the racial disparity in federal death-penalty prosecutions, the study revealed a regional bias to enforcement of the federal death penalty. From 1995 onward, of the 94 federal districts in the federal system, only 49 have submitted a case recommending capital prosecution. [DOJ Study at 14.] Twenty-two federal districts have never submitted a case for review at all. [DOJ Study at T-59.] This is a particularly shocking figure (representing 23% of all federal districts) given the broad variety of homicide offenses that are potentially punishable by death under the federal criminal code.[23] Twenty-one federal

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[22]The "other" is Bountaem Chanthadara, an Asian immigrant sentenced to death in the District of Kansas for his role in a murder that took place during the robbery of a Chinese restaurant in Wichita. Federal capital jurisdiction derived from the Hobbs Act. *See, United States v. Chanthadara,* 928 F.Supp 1025 (D.Kans. 1996); *United States v. Nguyen*, 928 F.Supp 1525 (D.Kans. 1996); *United States v. Nguyen*, 155 F.3d 1219 (10th Cir. 1998) (Affirming conviction of co-defendant who was not sentenced to death).

As of the closing date of the study – July 20, 2000 – four other men, two blacks and two Hispanics, who had been sentenced to death by a juries, respectively, in Kansas and Texas, were awaiting formal pronouncement of judgment and transfer to Terre Haute. [A52.]

[23]Any murder committed with a gun during a robbery is a potential federal death penalty case. 18 U.S.C. § 924. In the *Chanthadara* case discussed *supra* at n. 27, on a Hobbs Act theory of federal prosecution, a defendant was sentenced to death for a murder committed in the course of the robbery of a restaurant.

districts, although submitting one or more cases for review, have never sought permission to seek the death penalty in any case.[24] [*Id.*]

The release of the report drew the following public reactions from officials at the Justice Department:

> Saying she was "sorely troubled" by stark racial disparities in the federal death penalty, Attorney General Janet Reno today ordered United States attorneys to help explain why capital punishment is not applied uniformly across ethnic groups.

M. Lacey and R. Bonner, "Reno Troubled by Death Penalty Statistics," *The N.Y. Times*, September 13, 2000. *The Times* also reported the reaction of Deputy Attorney General Eric Holder, the highest-ranking African American at the Justice Department:

> "I can't help but be personally and professionally disturbed by the numbers that we discuss today," Deputy Attorney General Eric Holder said. "To be sure, many factors contributed to the disproportionate representation of racial and ethnic minorities throughout the federal death penalty process. Nevertheless, no one reading this report can help but be disturbed, troubled, by this disparity."

Id. at A53, 54. CNN, also reporting on the story, noted that Attorney General Reno wanted

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[24]The recommendation that accompanies a submission is of great importance. In 91% of cases where the local United States Attorney did not want to prosecute the case as a death-penalty case, that recommendation was followed by the Attorney General. [DOJ Study at 43.] In 83% of cases where death-penalty authorization was requested, that recommendation was also followed by the Attorney General. [*Id.*] These figures are based on the 575 defendants whose cases were reviewed by the Attorney General from 1995-2000. In the "pre-protocol" period – November of 1998 through January 27, 1995 – the only cases reviewed were those where the local United States Attorney affirmatively requested capital-authorization. The approval rate for those cases was 90%. [DOJ Study at 10.]

"a broader analysis." White House deputy press secretary Jake Siewert responded to the release of the report in the following manner: "'At first glance, those numbers are troubling. We need to know what's behind the numbers.'"

It is the core of this motion that JULIUS OMAR ROBINSON is entitled to know what is "behind the numbers" and that, in the absence of a convincing race- and region-neutral explanation for the Department of Justice's capital-charging practices, his death-notice must be dismissed.

In truth, there is nothing that is either new or surprising about what the DOJ Study reveals. Attorneys in federal death penalty cases have been rasing the racial disparity issues for years. For just as long, Justice Department attorneys, pleading privilege, confidentiality and the end of civilization as we know it, have doggedly resisted defense efforts to gather the kind of information that the Justice Department has just disgorged voluntarily. *See, e.g., United States v. Bradley*, 880 F.Supp. 271 (M.D.Pa. 1994). In March of 1994 – more than seven years ago – glaring racial disparities in the prosecution of federal death penalty cases were the subject of a report from the House Subcommittee on Civil and Constitutional Rights, which concluded as follows:

> Race continues to plague the application of the death penalty in the United States. On the state level, racial disparities are most obvious in the predominant selection of cases involving white victims. On the federal level, cases selected have almost exclusively involved minority defendants.

[A61.] "Racial Disparities in Federal Death Penalty Prosecutions 1988-1994," Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, 103rd Congress, 2nd Session, March 1994. That report notes that as of 1994 there had been 37 defendants targeted for capital punishment under the § 848(e) scheme, of whom 33 (87%) were black or Hispanic. Earlier evidence of the race-effect of the death penalty was provided by the General Accounting Office in 1990. At the time Congress enacted the § 848(e) death penalty, the GAO was directed to undertake a study of the potential influence of race on the death penalty. 21 U.S.C. § 848(*o*)(2). The GAO in fact undertook that study and concluded as follows:

> Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty after the Furman decision.
>
> In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e. those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods and analytic techniques. The finding held for high, medium, and law quality studies.

"Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities" (GAO/GGD-90-57, Feb. 1990) at p. 5. In his 1999 law review article, Professor Little, who once served as a member of the Attorney General's Review Committee on Capital Cases, raised questions about regional and racial disparities that had not been cured by the administrative process of the Justice Department. R.K. Little, *supra*, 26 *Fordham Urban L.J.*, at pp. 450-490. With

the first federal executions now imminent, it appears that this issue has now come to the forefront.

More than a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court observed that application of seemingly neutral laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances" amounts to a denial of equal protection. *Id.* at 373-74. In *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974), the court commented:

> Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights as the basis for determining its applicability.

Id. at 1209.

The historical truth is that in the United States capital punishment and race have always been, and, regrettably, probably always will be – at least until we can say honestly that racism has disappeared from our society – shamefully and inextricably intertwined. *See, e.g.*, S. Bright, "Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty," 35 *Santa Clara L.Rev.* 433 (1995); D. Baldus, "Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention, Detection and Correction," 51 *Wash. & Lee L.Rev.* 359 (1994); Bienen, Weiner, Denno, Allison and Mills, "The Reimposition of Capital Punishment

in New Jersey: The Role of Prosecutorial Discretion," 41 *Rutgers L.Rev.* 27, 100-57 (1988).[25]

In *Furman*, Justice Douglas traced at length this ugly correlation and concluded:

> In a Nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, lacing political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law, a Brahman was exempt from capital punishment, and in those days, "[g]enerally, in the law books, punishment increased in severity as social status diminished." We have, I fear, taken in practice the same position . . . .

Furman, 408 U.S. at 255 (Douglas, J., concurring; footnotes omitted.) Indeed, even as late as 1991 – more than 15 years after *Furman* – the execution of a white man for the murder of a black man was front-page news as an event that had not occurred in the nation for half-a-century. *See*, "Rarity for U.S. Executions: White Dies for Killing Black," *N.Y. Times*, September 7, 1991, p.1, col. 1.

Whether viewed historically, or from the stark immediacy of the Department of Justice study, this is a disturbing picture. Quite bluntly, this pattern should disturb the United States

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[25]This article reviewed all empirical studies of the application of the death penalty both pre- and post-*Furman*. From those studies emerged a single, consistent theme: race has always been a factor in the administration of capital punishment in this country, with black defendants significantly more likely to be sentenced to death than whites, and all defendants significantly more likely to be sentenced to death where the victim is white. The article notes, for example, that when capital punishment was available in the case of rape, it was almost exclusively a punishment visited on black men convicted of raping white women. 41 *Rutgers L.Rev.* at 106.

Attorney for this district as well as the assistants handling this very case since it is their actions and decisions which have served to continue the historical patterns of discrimination. This preliminary showing, whether or not it continues to disturb anyone in the Justice Department, is sufficient to establish a colorable case of discrimination, and to shift the burden to the government to produce a credible non-discriminatory explanation for its practice of disproportionately seeking death sentences for minority defendants and to explain the arbitrary manner in which the federal death penalty has been administered. *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986). JULIUS OMAR ROBINSON, of African-American heritage, facing the ultimate penalty, is legitimately entitled to inquire further since, to all appearances, there is "a clear pattern, unexplainable on grounds other than race." *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). The burden is now properly on the government to explain and justify, if it can, its capital-charging policies.

B. NATURE OF THE FIFTH AND EIGHTH AMENDMENT CLAIMS

1. Fifth Amendment equal protection

In the past century, no judicial responsibility has laid greater claim on the moral and intellectual energies of the federal courts than "the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). The Supreme Court and the lower federal courts have striven to eliminate all forms of state-sanctioned discrimination, "whether accomplished ingeniously or ingenuously." *Smith v. Texas*, 311 U.S. 128, 132 (1940). The federal courts have staunchly forbidden

discrimination, not only where it had been imposed by statute, *see*, e.g., *Brown v. Board of Education*, 346 U.S. 483 (1954), *Nixon v. Herndon*, 273 U.S. 536 (1927), but also "look[ed]" beyond the face of . . . [a] statute . . . where the procedures implementing a neutral statute operate . . . on racial grounds." *Batson v. Kentucky*, 476 U.S. 79, 88 (1986); *Turner v. Fouche*, 396 U.S. 346 (1970); *Yick Wo. v. Hopkins*, 118 U.S. 356, 373-74 (1886).

The Supreme Court has repeatedly emphasized that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." *Hunter v. Erickson*, 393 U.S. 385, 391 (1969). This case, as a federal prosecution, is not subject to the Equal Protection Clause of the Fourteenth Amendment – which is addressed to state action – but the Due Process Clause of the Fifth Amendment which has long been held to embody this requirement, by implication. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see Weinberger v. Wisenfeld*, 420 U.S. 636, 638 n.2 (1975) ("[Our] approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment.") In the area of criminal justice, where racial discrimination "strikes at the fundamental values of our judicial system and our society as a whole," *Rose v. Mitchell*, 443 U.S. 545, 556 (1979), the Supreme Court has "consistently" articulated a "strong policy . . . of combating racial discrimination." *Id.* at 558.

The most obvious and destructive form that such discrimination can take is systematically unequal treatment of criminal defendants based upon their race. *See McLaughlin v. Florida*, 379 U.S. 184, 190 n.8 (1964), citing *Strauder v. West Virginia*, 100

U.S. 303, 306-08 (1880); *Ho Ah Kow v. Nunan*, 12 Fed. Cas. 252 (No. 6546) (C.C.C.D.Cal. 1879). Indeed, state criminal statutes, including the infamous Black Codes which prescribed harsher criminal penalties for African-Americans than for whites, were among the main evils that led to the enactment of the Fourteenth Amendment and related post-Civil War federal legislation. *See General Building Contractors Ass'n. Inc. v. Pennsylvania*, 458 U.S. 375, 386-87 (1982). The Supreme Court has insisted "that racial classification, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny' and, if they are ever to be upheld . . . be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *see Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *McLaughlin v. Florida*, 379 U.S. at 198 ("I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color a person's skin the test of whether his conduct is a criminal offense.") (Stewart, J., concurring).

None of this is new, or surprising. Nonetheless, it is worth the time to pause to recall the history and the significance of this issue. There is present in this case strong evidence – evidence produced by the government – that minority defendants are many times more likely than white defendants to face the death penalty at the hands of the federal government, because of their race. No state, as far as defendant knows, has a racial pattern of using

capital punishment that is nearly so stark and disturbing.[26] This is an urgent problem that demands the "most rigid scrutiny" described in *Loving*.

2. The Eighth Amendment

The Eighth Amendment's prohibition of the arbitrary use of the death penalty imposes constitutional limitations on capital punishment that do not apply to lesser punishments. *See*, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976) (mandatory death sentences – but not other mandatory sentences – are unconstitutional); *Lockett v. Ohio*, 438 U.S. 586 (1978) (sentencer must be free to give "independent mitigating weight" to any fact about the defendant or the offense, in a capital case); *Bullington v. Missouri*, 451 U.S. 430 (1981) (imposition of a death sentence after reversal of a sentence of life imprisonment is unconstitutional, although there is no similar *per se* ban on harsher sentencing on retrials of other criminal cases); *Turner v. Murray*, 476 U.S. 28 (1986) (capital defendants in interracial murders – but not non-capital murder defendants – are automatically entitled to have potential jurors questioned about the effects of possible racial biases).

Secondly, it is obvious that racial discrimination is a species of the arbitrariness condemned in *Furman*. This is apparent from the opinions of the Justices in the majority and of those in dissent alike. For example, Justice Douglas concluded that the capital statutes

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[26]On nation-wide basis, non-whites make up approximately 55% of death-row inmates. In the federal system, the figure is 78% and about to climb to 83% with the expected arrival of four additional minority inmates. [DOJ Study at 39]

before him were "pregnant with discrimination," 408 U.S. at 157, and thus ran directly counter to "the desire for equality . . . reflected in the ban against `cruel and unusual punishments` contained in the Eight Amendment." *Id.* at 255. Similarly, Justice Stewart lamented that "if any basis can be discerned for the selection of these few sentenced to die, it is the constitutionally impermissible basis of race." *See id.* at 364-366 (Marshall, J., concurring); *id.* at 389 n.12 (Burger, C.J. dissenting); *id.* at 449-50 (Powell, J., dissenting). Later Supreme Court cases have applied this interpretation. Thus, for example, in *Zant v. Stephens*, *supra*, the Court explained that *Furman* would be violated if a state based its capital sentencing on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant." 462 U.S. at 885.

Taken together, then, these two points can be summarized as follows: The Cruel and Unusual Punishments Clause of the Eighth Amendment imposes a constitutional prohibition against racial discrimination in the use of the death penalty that is at least as strict as the general proscription of racial discrimination in the (implicit) equal protection clause of the Fifth Amendment.

C. NON-CONSTITUTIONAL CLAIMS.

1. Explicit statutory right to justice without discrimination; supervisory powers

Subsection (f) of 18 U.S.C. § 3593 is entitled "Special precaution to ensure against discrimination," and provides that in any capital sentencing proceeding:

> [T]he court shall instruct the jury that in considering whether the sentence of death is justified, it shall not consider the race . . .

> of the defendant or of any victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race . . . of the defendant or victim may be.

Moreover, each juror in an FDPA case is required to sign a certificate "that consideration of the race . . . of the defendant or any victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation . . . no matter what the race . . . of the defendant or any victim may be." While the explicit provisions of this section deal with jury instructions and jury decision making, the purpose of this subsection is broader. This provision is unique in the Federal Criminal Code. It demonstrates extreme sensitivity on the part of Congress to the danger of racial discrimination in capital prosecutions, and a commitment to eradicate any such discrimination.

The Congressional debate on the death penalty provisions of § 848(e) – limited as it was – included extended discussion of the problem of racial discrimination, and of the Supreme Court's treatment of racial bias in the then-recent opinion in *McCleskey*. *See, e.g., Congressional Record*, 57484 (June 9, 1988) (Senator Orrin Hatch of Utah, discussing the requirements for proof of discrimination under *McCleskey*). In particular, Senator Alphonse D'Amato of New York, the prime sponsor of the § 848(e) bill, emphasized, in conjunction with the enactment of § 848(*o*), that Congress intended to "take every step possible to eliminate discrimination by the juries, *by the prosecutors*, by the judges." *Congressional Record*, S15753 (October 13, 1988) (emphasis added). In the context of that debate, Senator

D'Amato's comments reflect a clear legislative determination to take stronger measures than those already embodied in *McCleskey* and to eliminate discrimination in capital charging as well as capital sentencing. They indicate that a federal capital defendant has an affirmative *statutory* right to justice without discrimination.

Moreover, regardless of the text of § 3593(f), this court has the independent authority to curb charging discrimination in the exercise of its supervisory powers over the administration of federal criminal justice:

> "[G]uided by considerations of justice," *McNabb v. United States*, 318 U.S. 332, 341 (1943), and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights [citations omitted]; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury. [Citations omitted]; and finally, as a remedy designed to deter illegal conduct [citations omitted].

United States v. Hastings, 461 U.S. 499, 505 (1983).

A court's supervisory authority to take action "not specifically required by the Constitution" is necessarily broader than its authority to enforce particular constitutional guarantees. In state prosecutions, state courts exercise this general supervisory power, and federal courts (on certiorari in the Supreme Court or in habeas corpus) are restricted to enforcing the Constitution. In federal prosecutions, the federal courts exercise both functions simultaneously. This is why, as the Sixth Circuit noted in *United States v. Robinson*, 716

F.2d 1095, 1100 (6th Cir., 1983), when a "case is before the court on direct review, not habeas corpus relief, the standard of review is more stringent." *McCleskey*, of course, was a review of state proceedings in habeas corpus. The federal discrimination complained of here is subject to a "more stringent" standard of review.

D. THE IMPACT OF *McCLESKEY v. KEMP* ON THESE ARGUMENTS

Both of the constitutional violations here alleged (but not the statutory and supervisory-power arguments) – equal protection and the cruel and unusual punishments clause – were raised in *McCleskey v. Kemp*, 482 U.S. 920 (1987). In that case the petitioner presented detailed evidence of racial disparities in capital charging and sentencing in Georgia, based primarily on the race of the victim. Despite that evidence, the Court rejected McCleskey's constitutional claims. It is important to underscore at this point that this case presents an entirely different factual picture than *McCleskey*, in two central respects.

1. The nature of the discrimination in *McCleskey*

The major factual claim in *McCleskey* was that the State of Georgia had discriminated against some capital murder defendants because of the race of their *victims*. McCleskey's evidence demonstrated that killers of whites, regardless of their own race, were more likely to be sentenced to death than killers of African-Americans. One of the major statistical models relied on by McCleskey showed that "defendants charged with killing white victims [whatever their own race] were 4.3 times as likely to receive a death sentence as defendants

charged with killing blacks," while "black defendants were [only] 1.1 times as likely to receive a death sentence as other defendants." 481 U.S. at 287.

The State of Georgia argued that McCleskey had no standing to claim that he had been discriminated against because of the race of his victim. The Court noted that it does not, in general, recognize "standing to assert the rights of third persons," 481 U.S. at 291 n.8, citing *Arlington Heights v. Metropolitan Housing Corp.*, 419 U.S. 252, 263 (1977). Nonetheless, the Court reached the merits of McCleskey's race-of-victim claim because he was asserting his own right to be free of irrational government conduct:

> McCleskey argues that the application of the state's statute has created a classification – that is 'an irrational exercise of government power' [citation omitted] because it is not necessary to the accomplishment of some permissible state objective'. . . Because McCleskey raises such a claim, he has standing.

481 U.S. at 291 n.8.

Needless to say, it is one thing for a criminal defendant to complain that he is the subject of an *irrational* government classification, and quite another thing, as Mr. Robinson does here, to claim that he is the victim both of irrational government classification (the regional bias of the federal death penalty) and of systematic racial discrimination. In the context of the irrational-classification claim before it in *McCleskey*, the Supreme Court was willing to say that the racial discrepancies in the Georgia capital-punishment scheme represented an acceptable cost of the "discretion that is fundamental to our criminal justice process." *McCleskey*, 481 U.S. at 313. Indeed, the Court went so far as to say that the race-

of-*victim* discrepancy that McCleskey demonstrated was "a far cry from the major systematic defects identified in *Furman*."

In this case, what the DOJ Study has demonstrated is that there is an enormous increase in the odds of being selected for capital prosecution because of the defendant's *own* race. This is decidedly not a minor or acceptable defect in the system. To countenance such a discrepancy – absent a convincing constitutionally-acceptable explanation– would be to ignore and renounce decades of judicial commitment to color-blind justice.

2. Ability to ascertain the identity of the governmental decision-maker

Of great concern to the Supreme Court in *McCleskey* was the difficulty it saw in deducing a consistent state-action "policy" from the capital-sentencing performances of hundreds of juries and scores of local prosecutors. Thus, in the following language, the Court sought to distinguish traditional jury-discrimination and Title VII case analysis from the actions of *juries*, whose verdicts were the subject of the statistical studies utilized in *McCleskey*:

> The decisions of a jury commissioner or of an employer over time are fairly attributable to the commission or the employer. Therefore, an unexplained statistical discrepancy can be said to indicate a consistent policy of a decision-maker. The Baldus study seeks to deduce a state "policy' by studying the combined effects of the decisions of hundreds of juries that are unique in their composition. . . . It is also questionable whether any consistent policy can be derived by studying the decisions of prosecutors. . . . . Since the decision whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations, coordination among district attorney's offices across a State would be relatively meaningless. Thus,

> any inference from statewide statistics to a prosecutorial "policy" is of doubtful relevance.

McCleskey, 481 U.S. at 294-95, n. 15. One page later, the Court explained this further, stating:

> Requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts. [Citation omitted.]

Id. at 296, n. 17.

This case presents no such problems. The decisions of juries – those numerous dispersed one-time decision makers – are not at issue. The only claim here is prosecutorial discrimination, and, since 1988, all federal capital prosecutions – whether brought pursuant to the FDPA or §848(e) – have been personably authorized by a single officer of the United States, the Attorney General. While the evidence the Attorney General must answer is not precisely a "contemporaneous challenge to . . . [his] own acts," *id.* at 296 n.17, it is extremely close to that. To justify his department's actions he must account for the conduct of just two prior administrations, whose actions are "fairly attributable" to him. Moreover, the totality of conduct took place within the past ten years since the very first "modern" federal death-penalty prosecution was not authorized until the late spring of 1990, midway through the Bush Administration.[27] Additionally, Attorney General Janet Reno's post-1988 predecessors

[27]The first § 848 death-penalty prosecution was brought in Chicago. The notice of aggravating factors in that case was served and filed on May 15, 1990. *United States v. Cooper*, 754 F.Supp. at 636 (copy of death-notice reproduced in appendix to opinion shows

in office approved relatively few death-penalty prosecutions.[28] By contrast, the Attorney General Reno had personally reviewed approximately 730 cases where the federal death penalty was potentially applicable,[29] and personally approved 201 capital prosecutions. [DOJ Study at 5.] The Attorney General has no need to "rebut a study that analyzes the past conduct of scores of prosecutors," 481 U.S. at 296 n.17; he merely has to explain and justify the policies of his own office. That being the case, the task at hand – for the defendant, for the government, and for the Court – is incomparably easier than the necessity in *McCleskey* of "deducing a consistent policy by studying the decisions of these many unique entities."

E. CONCLUSION

The Justice Department must be made to account for these glaring and shameful racial disparities and regional variations. Mere expressions of concern from high-level political appointees do nothing to ameliorate the pattern of discrimination that exists. The

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a docketing date of May 15, 1990).

[28]The study reports that Attorney General Thornburgh approved 8 capital prosecutions; Attorney General Barr approved 20; and Acting Attorney General Gerson approved four. [DOJ Study at T-xv.] Attorney General Reno, as noted above, has approved 201. To put it another way, of the 233 post-*Furman* federal death-penalty authorizations, Attorney General Reno personally approved 86 per cent. Attorney General Ashcroft's approval statistics were unavailable at the time of drafting this Motion.

[29]As the study reports, from 1988 to January 27, 1995, a United States Attorney who wanted to seek a death sentence in a case was required to seek approval to do so from the Attorney General. Absent such a request, *i.e.* where there was a local decision *not* to seek the death penalty, the case was not reviewed at the Justice Department at all. The death-penalty protocols put into effect on January 27, 1995 require the Attorney General to review all potential capital cases, taking into consideration, but not giving preclusive effect to, the local United States Attorney's recommendation. [DOJ Study at 5.]

accountability process should begin with an order from this Court dismissing the notice of aggravating factors unless and until the Justice Department provides a convincing, constitutionally-sufficient, justification for the current state of the federal death penalty. A hearing is specifically requested.

POINT TWO

THIS MATTER MAY NOT, CONSISTENT WITH THE GRAND JURY CLAUSE OF THE FIFTH AMENDMENT, PROCEED AS A CAPITAL CASE WITHOUT GRAND JURY FINDINGS, BY WAY OF INDICTMENT, SPECIFYING THE REQUISITE MENTAL STATES FOR EACH CAPITAL OFFENSE AND THE EXISTENCE OR NOT OF THE SPECIFIC AGGRAVATING FACTORS PRESENT AS TO EACH CAPITAL OFFENSE.

Julius Omar Robinson, pursuant to the Grand Jury Clause of the Fifth Amendment, moves for an order striking the Notice of Intent to Seek the Death Penalty. The ground for this motion is that 18 U.S.C. §3593 and 21 U.S.C §848 unconstitutionally vests the decision to seek death in the hands of a prosecutor, rather than recognizing the grand jury's historic function of making all federal charging decisions for capital crimes. The recent decisions of the Supreme Court in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000) and *Jones v. United States,* 526 U.S. 227 (1999) render this argument virtually self-evident.

In this case, the decision to bypass the grand jury – a body selected at random from members of the community – is particularly odious because the decision to seek the death of another human being has been made at high levels of government, a process that ignores the grand jury's historic role as shield between the putative accused and the government. *See*

generally, 3 W.R. LaFave, J.H. Israel, & N.J. King, "Criminal Procedure § 8.1 at 5-7 (2d Ed. 1999).

A. THE FIFTH AMENDMENT AND CAPITAL CRIMES

The Fifth Amendment guarantees that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury." By the terms of the Federal Death Penalty Act of 1994, a case carrying with it a possible penalty of death does not become an actual capital case until the government files a formal notice of intent to seek the death penalty. 18 U.S.C. § 3592 and 21 U.S.C. §848(h). Thus, this was not a capital case until October 19, 2000, the date the government filed the required notice. The statute violates the Fifth Amendment's indictment clause because it arrogates to a prosecutor a decision that the constitution reserves to an independent grand jury.

Prior to filing its death notice, the United States and Mr. Robinson's counsel engaged in the process set out in the Attorney General's protocols for review of all cases in which a sentence of death might be imposed. Pursuant to that process, Mr. Robinson's counsel met with a committee chaired by the United States Attorney for this district, and met, as well, with the Attorney General's Review Committee on Capital Cases at the Justice Department by teleconference. The final action leading to this case becoming a capital case was Attorney General Ashcroft's review and decision. Thus, the statutory notice, and not any action by the grand jury, was the triggering mechanism that transformed this case from an "ordinary" murder case into a case where the death-penalty is an actual potential punishment. Indeed,

it is doubtful that the grand jurors were ever asked to consider the possibility that a death sentence would be sought in this case, nor asked to pass upon the statutory and constitutional predicates for such a sentence.

Against this factual background, the caselaw is instructive. The leading modern case is *Smith v. United States*, 360 U.S. 1 (1959). In *Smith*, the Court held that an offense under the Kidnapping Act which might have been punished by death had to be prosecuted by indictment of a grand jury, as distinct from by information, even though the government was not intending to seek the death penalty in that particular case. The Court noted that under F. R. Crim. P. 7(a), indictment cannot be waived in a death penalty case. *Smith,* therefore, stands for the proposition that grand jury review is essential anytime death may possibly be sought as a penalty. This is the key element of this motion. In non-capital cases, the defendant may waive indictment. Only a grand jury can subject a defendant to the risk of losing his or her life. Despite this, §3593 purports to vest this decision in an "attorney for the government," and, in practice, to the Attorney General of the United States, a political appointee.

Since *Furman*, the federal capital sentencing decision has been bifurcated, and a defendant is not – as the 11-page notice served on Mr. Robinson in this case amply demonstrates – death-exposed unless other significant factors are pleaded and proved. Indeed, the notice in this case is an eloquent argument for the position here taken. Over and over again, it alleges the elements of offenses and of other assertedly relevant events in

exactly the same manner as an indictment, but with two differences. The first difference is that this pseudo-indictment carries the message of death. The second difference is that this document is the action of prosecutors, and not a grand jury. Thus, the proper application of *Smith* in a post-*Furman* situation requires that a grand jury and not the Attorney General make the determination that the defendant is to stand trial for his life.[30]

In the wake of *Furman*, there are no offenses that carry an automatic penalty of death simply because one is convicted of certain conduct. Thus, in *Sumner v. Shuman*, 483 U.S. 66 (1987), the Court held that it violated the Eighth Amendment, as incorporated via the Fourteenth, for a legislature to provide that one convicted of a particular kind of crime must receive the death penalty. A defendant cannot be sentenced to death unless additional facts are proved that narrow the class of those who are eligible for death beyond the narrowing that may – depending on the scheme in use – be accomplished by conviction of the underlying offense.

Thus, one is not "held to answer" for a capital crime until it is alleged in a formal pleading that one meets some additional standards, beyond those set out as elements of the offense charged. In this case, these additional standards are contained in the death penalty statute itself, 18 U.S.C. §§3591-3594.

Under the Fifth Amendment indictment clause, the allegation of facts that, if proven,

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[30]This issue has not come up in state death penalty jurisprudence because the Fifth Amendment's grand-jury clause is not applicable to the States. *Hurtado v. California*, 110 U.S. 516 (1884).

will justify a capital penalty is uniquely the function of an independent body of citizen grand jurors. In violation of this elementary principle, the Congress has passed the death penalty statute at issue and left it to prosecutors to allege the existence of those facts said to justify a capital sentence. This is not a situation in which the answer is "prosecutorial discretion". If a grand jury validly makes the defendant death-eligible, the prosecutor may decline to seek that penalty. That is discretion. The function of choosing death is, however, a responsibility squarely put on the prosecutor according to defined principles that relate to the defendant's conduct. Findings with respect to those standards are the grand jury's province.

It is surprising that the Congress and the government have not grasped this simple principle, since it has been reflected in the Criminal Rules with respect to forfeitures since 1972. In that year, Fed. R. Crim. P. 7(c)(2) was added to implement the criminal forfeiture provisions of RICO and the drug legislation. Fed. R. Crim. P. 7(c)(2) honors the constitution by saying "No judgment of forfeiture shall be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture." The rule reflects the principle that criminal *in personam* forfeitures are punishments that can be inflicted only in harmony with the constitution. *See generally United States v. Seifuddin*, 820 F.2d 1074 (9th Cir. 1987) (Difference between penal and remedial forfeitures; the former require adherence to constitutional criminal procedure guaranties).

B. THE IMPACT OF *JONES* AND *APPRENDI*

In *Jones v. United States, supra,* the Supreme Court set out to interpret the federal car-jacking statute, 18 U.S.C. § 2119, in an effort to decide whether its provision for increased penalties, depending upon the circumstances of the offense amounted to "sentencing factors" – and thus could be entrusted exclusively to judicial review at sentencing – or, instead, amounted to elements of separate offenses and, thus, were subject to "the requirements of charge [by indictment] and jury verdict." *Jones*, 526 U.S. at 229. Perceiving "serious issues concerning the statute's constitutionality," the Court construed the statute in manner that avoided declaring it unconstitutional, "in light of the rule that any interpretive uncertainty should be resolved to avoid serious questions about the statute's constitutionality," and held that the statute in fact defined three separate offenses,[31] each of which would have to be charged by a grand jury and proved, beyond a reasonable doubt, to a jury. *Id.* In reaching its ultimate conclusion, the Court reasoned that its decision depended importantly on whether

> a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.

Id. at 232.

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[31]The statute under Supreme Court review provided for a 15-year maximum sentence, but also allowed for enhanced punishment where, on the factual setting of the particular case, the carjacking resulted in serious bodily injury (up to 25 years) or death (any term of years up to life).

In analyzing the carjacking statute, with its fact-driven escalating penalties, the Court noted that the aspects of the statute dealing with serious bodily injury or death "not only provide[d] for steeply higher penalties, but condition[ed] them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (e.g., force and violence, intimidation)." *Id.* Expanding on that observation, the Court stated:

> It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit.

Id. The Court came to this final resolution of the competing legal and constitutional competing considerations:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt.
>
> * * * * *
>
> The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedure for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the fact finder, and the burden of proof.

Id. at 243 n. 6 (emphasis added). In its concluding observations in *Jones*, the majority summarized as follows:

> Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions [serious constitutional questions on which precedent is not dispositive]. This is done by construing § 2119 as establishing three separate offenses by the specification of distinct elements, *each of which must be charged by indictment*, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

Id. at 251-52 (emphasis and bracketed matter added).

Jones thus stands plainly for the proposition that any fact that increases the maximum penalty for a crime must be alleged by indictment. In *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), the Court returned to the issues raised in *Jones* and found, as a matter of constitutional law applicable to the states, that the reasoning in *Jones* controlled, thus converting what had been an analysis based on a saving statutory construction into a broader constitutional rule. In *Apprendi*, the Court both reiterated *Jones* and discussed what went into a finding that a particular factual element of an offense triggered the constitutional protections. The Court stated: "Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense." *Apprendi*, 120 S.Ct. at 2359. As will be shown, the FDPA requires proof of additional facts before an "ordinary" murder case is transformed into a capital murder case.

Take, as an example, one of the capital counts in this indictment, count seven, alleging a violation of 18 U.S.C. § 924(j). The relevant statutory provisos are:

> (j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall -

> (1) if the killing is a murder (as defined in section 1111), be punished by death or imprisonment for any term of years or for life;

It is immediately apparent that even assuming proof of every element of this statute, a defendant is only subject to a sentence of death.

* * * * *

> (3) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct directly or proximately causes the death of any person . . . shall be *subject to the death penalty*, or imprisoned for not less than 20 years or for life, fined under this title, or both.

18 U.S.C. § 844(f) (emphasis added). It is immediately apparent that even assuming proof of every element of this statute, a defendant is only "subject to" a sentence of death. In other words, a defendant is not truly exposed to a sentence of death without more. The range of sentencing actually available does not escalate to death unless, at a minimum, a jury finds (1) the existence of one of the four "intent" factors set out at 18 U.S.C. § 3591(a)(2), and (2) the existence of one or more of the 16 statutory aggravating factors specified at 18 U.S.C. § 3592(c). The statute provides that, "If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law." 18 U.S.C. § 3593(d.).

Each of the capital counts of this indictment charge each of Mr. Robinson's co-defendants. With the exception of Mr. Robinson and L. J. Britt, however, none of Mr. Robinson's co-defendants face a sentence of death, despite the fact that each is charged with

all the elements of an offense that *potentially* calls for a sentence of death. Thus, it seems obvious that more must be alleged and proven before the range of penalties attendant to the murder charges in this case increases from life to a maximum of life or death.

By direct analogy to *Jones v. United States*, the argument here is that, like the carjacking statute reviewed in that case, a murder in the federal system may be seen as of two varieties: non-capital murder and capital-murder. In order to establish the offense of capital-murder, it is necessary to establish additional facts and circumstances beyond the threshold elements of non-capital murder; additional elements such as a prescribed state-of-mind and the existence of a statutory aggravating factor. Thus viewed, the intent factors and statutory aggravating factors function as elements of the offense that must be charged and established in order to expose a defendant to a sentence of death, just as in the carjacking situation it was necessary to establish serious bodily injury in order to increase the range of sentencing exposure from 15 to 25 years. That being the case, and this being a forum in which grand jury review is constitutionally required, this case may not proceed as a capital case on simply the say-so of a government official. To adapt the language of *Jones* to this case,

> Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions [serious constitutional questions on which precedent is not dispositive]. This is done by construing [the capital allegations in this case] as establishing separate offenses [murder and capital-murder] each with distinct elements, *each of which must be charged by indictment*, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

Paraphrasing *Jones v. United* States, *supra*, 526 U.S. at 251-52 (emphasis and bracketed matter added).

The *Apprendi* opinion was not unmindful that there are states, such Arizona, where judges ultimately decide who is sentenced to death. The Court saw no constitutional problem with such schemes, with one critical caveat – that a judge could enter the process only "after a jury verdict holding a defendant guilty of a capital crime." *Id.* at 2366. As the above discussion shows, conviction under a statute such as 18 U.S.C. § 844(f) (or either of the other two capital charging statutes) does not yield a "verdict holding a defendant guilty of a capital crime." It is not until there are a further findings-of-fact, namely the existence of a requisite intent and at least one statutory aggravating factor, that the defendant becomes exposed to the death penalty under the FDPA capital-punishment scheme. In this specific regard, the *Apprendi* Court stated:

> [T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, *after a jury verdict holding a defendant guilty of a capital crime*, to find specific aggravating factors before imposing a sentence of death. . . . For reasons we have explained, the capital cases are not controlling:
>
> > *"Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense.* What the cited cases hold is that, once a jury has found the defendant guilty of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether the maximum penalty, rather than a lesser

> one, ought to be imposed . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge." *Almendarez-Torres*, 523 U.S. at 257, n.2 (SCALIA, J., dissenting)

Apprendi, 120 S.Ct. at 2366 (citation omitted; emphasis added).

The key to *Apprendi*, in ascertaining whether something could be characterized as a "sentencing fact," as distinct from an element of an offense, was whether proof of the fact at issues increased the range of penalties. If the answer was yes, the "fact" was an element of the offense. The Court stated, "Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense." *Apprendi*, 120 S.Ct. at 2359.

When a jury is asked to determine whether or not a murder was carried out with a particular state of mind, or during the commission of another offense, or under circumstances creating grave risk of death to additional persons, or came about as the result of substantial planning and premeditation, or involved multiple killings or attempted killings, that jury is being asked to make factual determinations. That being the case, those findings involve elements of an offense and a grand jury must make those allegations in the first instance.

Because §3593 prescribes a constitutionally impermissible mechanism for holding the defendant to answer for a capital crime, the notice must be stricken and the case tried as non-capital.

POINT THREE

THE STATUTORY FACTOR OF "SUBSTANTIAL PLANNING AND PRE-MEDITATION" SHOULD BE STRICKEN FROM THE GOVERNMENT'S NOTICE OF INTENTION TO SEEK THE DEATH PENALTY.

In embarking on this analysis, it is important to underscore the difference in the scope of review and authority which a federal court possesses when reviewing a federal statute as distinct from exercising its *habeas corpus* jurisdiction. As the Supreme Court has said many times, most recently in *Harris v. Alabama*, a federal court's role in reviewing a state capital punishment statute is quite sharply curtailed:

> What purpose is served by capital punishment and how a State should implement its capital punishment scheme – to the extent that those questions involve only policy issues – are matters over which we, as judges, have no jurisdiction. Our power of judicial review legitimately extends only to determine whether the policy choices of the community, expressed thorough its legislative enactments, comport with the Constitution.

Harris, 130 L.Ed.2d at 1013. In the current case, however, this Court is reviewing federal legislation and its scope of oversight extends, for example, to legislative interpretation and enforcement of legislative intent.

Moreover, in construing penal legislation, this Court is bound by the doctrine of lenity. Thus, where there are two or more rational readings of a criminal statute, one harsher than the others, "[a court] is to choose the harsher only when Congress has spoken in clear and definitive language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see also, Bell v. United States,* 349 U.S. 81, 83 (1955) ("It may fairly be said to be a presupposition of our

law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."); *United States v. Kozminski,* 487 U.S. 931, 952 (1988) ("We adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." The Court went on to describe the principles undergirding the lenity doctrine as follows:

> The principles underlying the rule of lenity [are] to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement and to maintain the proper balance between Congress, prosecutors and courts . . . .

Id. at 952.

One of the aggravating factors set forth in the government's notice of intention to seek the death penalty is that Mr. Robinson accomplished the murders of Johnny Shelton, Juan Reyes and Rudolfo Resendez "after substantial planning and premeditation." As outlined earlier in this brief, it is a necessary element of aggravating factors that they not be vague in language. *Tuilapea v. California, supra.* In the present case, the term "substantial" defies a definition clear enough to guide a jury in distinguishing between the murderer who "simply" plans and pre-meditates a murder and one who *substantially* plans and pre-mediates a murder. The difference is so fine and so susceptible of irremediably subjective interpretation that it cannot serve to distinguish among classes of murderers in any meaningful way.

As a matter of vagueness, this factor must be dismissed.

POINT FOUR

AS SPECIFIED BELOW, CERTAIN OF THE GOVERNMENT'S NON-STATUTORY AGGRAVATING FACTORS MUST BE DISMISSED, AND/OR CERTAIN IMPROPER LANGUAGE OR ARGUMENT MUST BE STRICKEN FROM THE GOVERNMENT'S DEATH-NOTICE. [32]

A. THE PROPER ROLE OF AGGRAVATING FACTORS

Earlier in this brief, Mr. Robinson outlined the proper role to be served by aggravating factors in a death-penalty scheme. Several of those principles bear brief review at this point.

For one thing, aggravating factors – especially where utilized in a weighing jurisdiction – may not be alleged in duplicative fashion. This is to avoid the effect of having the same conduct or circumstance found repeatedly and weighed repeatedly. Duplicative aggravating factors – like invalid aggravating factors – have the undeniable tendency to undermine the integrity of the weighing process, since the same factor is weighed more than once by the jury. *See, United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996) (Reversing a sentence of death). The effect of duplicative factors – like invalid factors – is to place "the

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[32]Were this Court to dismiss all of the non-statutory aggravating factors alleged by the government, it would not be necessary to reach the broader constitutional challenges to utilization of non-statutory aggravating factors pursuant to the FDPA. *See, United States v. Jones*, *supra*, where, interpreting the federal carjacking statute, the Court observed, "Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions [serious constitutional questions on which precedent is not dispositive]." *Jones v. United States,* 526 U.S. at 251-52.

thumb [on] . . . death's side of the scale." *Stringer v. Black, supra,* 503 U.S. at 232. In *McCullah,* the court stated:

> [D]ouble counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally. [citation omitted] As the Supreme Court of Utah pointed out, when the same aggravating factor is counted twice, the "defendant is essentially condemned 'twice for the same culpable act,'" which is inherently unfair. *Parsons v. Barnes*, 871 P.2d 516, 519 (Utah) (quoting *Cook v. State*, 369 So.2d 1251, 1256 (Ala. 1979), *cert. denied*, ___ U.S. ___, 115 S.Ct. 431, 130 L.Ed.2d 322 (1994).

McCullah, 76 F.3d at 1111-12. The *McCullah* court also noted that "the mere finding of an aggravating factor cannot but imply a qualitative value to that factor." *Id.* at 1112. In essence, the more aggravating factors there are – and a scheme which allows prosecutors to allege non-statutory factors guarantees numerosity – the further the death-side of the balance will tip, even if the same conduct has been subtly, or not so subtly, recast and reborn as an ostensibly new and separate aggravating factor. It is a further aspect of aggravating factors that they cannot be so generic that they could apply to all murders. Neither may aggravating factors be so vague that they do not provide the sentencer with adequate guidance as to when the factor is present and when it is not. *See, e.g., Tuilaepa v. California,* 512 U.S. 967, 972 (1994); *Arave v. Creech*, 507 U.S. 463, 474 (1993); *Maynard v. Cartwright*, 486 U.S. 356 (1988).

Finally, as noted earlier, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877, and must assist the jury in distinguishing "those who deserve capital punishment from those who do not," *Arave v. Creech*, 507 U.S. at 474. In *Godfrey v. Georgia, supra,* the defendant was sentenced to death upon a finding that the murder was "outrageously or wantonly vile, horrible or inhuman." 446 U.S. at 422. In striking down this aggravating circumstance and vacating the sentence of death, Justice Stewart's opinion for the plurality concluded that the language of this particular aggravating circumstance failed to provide "inherent restraint on the arbitrary and capricious infliction of the death sentence," since virtually every murder could be said to fit that criteria. *Id.* at 428-29. Moreover, since the facts and circumstances of the murder in *Godfrey* did not stand out from other murders, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not." *Id.* at 433. In *Tuilapea, supra,* the Court reiterated the two constitutional tests which aggravating factors must meet: (1) a valid aggravating factor must not apply to every defendant convicted of murder, but only to a rationally-selected sub-class of murderers; and (2), the circumstances must be defined in such a way by the statute so as not to be vague. *Id.* at 972.

In *United States v. Davis*, 912 F.Supp. 938 (E.D.La. 1996),[33] the government alleged as a non-statutory factor in the capital prosecution of a New Orleans police officer that the officer "lacked remorse" and had a "low potential for rehabilitation."[34] In ultimately striking that factor, the Court took time out to review the limits on the government's resort to non-statutory aggravating factors, stating:

> [A]re there then no limits on the "other" information that can be introduced at the penalty phase of a capital case? The answer is clearly no. The statute requires that any such information must be "relevant." And by relevant, it must mean sufficiently relevant to the consideration of who should live and who should die. What might be relevant in an administrative disciplinary proceeding, or even in a sentencing hearing where the choices are between varying terms of imprisonment, is not necessarily sufficiently relevant to deciding who should be sentenced to death.

Id. at 943.

The Court noted, as well, that a weighing statute carries with it the danger that the more that gets tossed on death's side of the balance, the greater the temptation is for jurors to consider the evidence in a *quantitative*, as distinct from *qualitative*, manner:

> The statute [FDPA] is a "weighing" statute. Once the evidence of all the aggravating and mitigating factors is in, the jury is to consider whether all of the former factors "outweigh" the latter. § 3593(e). To carefully define the statutory aggravating factors, but then allow wholesale introduction of non-statutory

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[33]Both capital defendants in *Davis* were sentenced to death. Those sentences, however, were eventually vacated by the Fifth Circuit and remanded for a new penalty trial. *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999).

[34]The government makes the same allegations here.

> aggravating information would defeat the goal of guided and measurable jury discretion and return us to an unconstitutional system where the death penalty is "wantonly" and "freakishly" imposed. It cannot be presumed that Congress intended to create a statute that is so self-defeating, much less one that would be unconstitutional. Additionally, as noted in Gregg, juries have little, if any, experience with sentencing and "are unlikely to be skilled in dealing with the information they are given." 96 S.Ct. at 2934. Any guidance that can be provided – particularly in a decision so fundamental and profound as that made in a capital case – must be provided. *All of the above mandates that judicial discretion be exercised and the non-statutory factors be carefully screened. In doing so, this court must seek to fulfill the intent of Congress and at the same time construe the statute in a manner that maintains its constitutionality.*

Davis, 912 F.Supp. at 943 (footnote omitted; emphasis added).

Other district court judges have expressed similar concerns, and have translated those concerns into action, dismissing aggravating factors, on a case-by-case basis, when faced with overreaching behavior on the part of prosecutors who have elected to allege non-statutory factors without regard to the undergirding purposes of aggravating factors in a death-penalty case. In an opinion from the Southern District of New York, for example, Judge Mukasey, in *United States v. Cuff*, 28 F.Supp.2d 282 (S.D.N.Y. 1999), dismissed the non-statutory aggravating factor alleged by the government that the death penalty was justified because several of the murders charged in that case had been committed with a firearm. Judge Mukasey observed:

> A predicate to fulfilling the constitutional conditions for an aggravating factor is that the disputed factor be an aggravating factor in the first place. Use of a firearm in connection with a

> homicide does not meet that predicate for the simple reason that, in any rational sense, it does not make a homicide worse, whether one looks at it from the standpoint of the crime, the victim or the perpetrator.

Id. at 288; *see also*, *United States v. Nguyen, supra*, 928 F.Supp at 1544 (Striking "low potential for rehabilitation;" *United States v. Chanthadara, supra*, 928 F.Supp at 1058 (Same result, co-defendant's case).

More recently in *United States v. Friend*, 92 F.Supp.2d 534 (E.D.Va. 2000), Judge Payne reviewed the constitutional principles that govern the presentation of non-statutory aggravating factors in a federal capital prosecution. The Court first summarized the "'two sometimes-competing, but nonetheless fundamental, constitutional principles'" that control capital cases. *Id.* at 538, quoting *United States v. Beckford*, 964 F.Supp 993, 999 (E.D.Va. 1997). The Court stated:

> The first of these principles demands a heightened reliability in capital sentencing because the sentence of death is final, and therefore qualitatively different from other punishments. The second principle emphasizes the importance, indeed the constitutional necessity, for presenting to the sentencing jury as much information as possible to assure that the sentence is individualized.

Friend, at *id.* (footnotes and citations omitted). With specific regard to the role of aggravating factors, the Court deduced from the Supreme Court's capital jurisprudence four essential aspects that an aggravating factor must posses in order to pass constitutional muster: (1) an aggravating factor must not be overly broad, *i.e.*, quoting *Tuilaepa v. California,* 512 U.S. at 972, it "'may not apply to every defendant convicted of a murder; it must apply only

to a sub-class of defendants convicted of murder;'" (2) an aggravating circumstance may not be unconstitutionally vague, as "ascertained by whether an aggravating factor is defined in terms too vague to proved adequate guidance to the sentencer;" (3) aggravating factors "must be focused on circumstances that are considered by civilized society to be 'particularly relevant to the sentencing decision,'" quoting *Gregg v. Georgia, supra*, 428 U.S. at 192, and "must be relevant in assisting the jury in distinguishing 'those who deserve capital punishment from those who do not,'" quoting *Arave v. Creech*, 507 U.S. at 474 ; and (4), "it is essential that an aggravating factor be measured in perspective of the fundamental requirement of heightened reliability that is the keystone in making 'the determination that death is the appropriate punishment in a specific case.'" Quoting *Woodson v. North Carolina, supra,* 428 U.S. at 474. *United States v. Friend*, 92 F.Supp.2d at 541. Having undertaken a correct analysis, grounded in plain Supreme Court precedent, Judge Payne noted that the concept of heightened reliability had a particularly important role to play "when assessing a nonstatutory aggravating factor – which, by definition, lacks the stamp of approval that Congress has bestowed upon the statutory aggravating factors – . . . ." *Id.* at 542.

With these general principles in mind, Mr. Robinson will turn to the specifics of the notice in this case.

B. CHALLENGES TO PARTICULAR AGGRAVATING FACTORS AND/OR APPLICATIONS TO STRIKE PARTICULAR LANGUAGE AND ARGUMENTS

1. Duplicative use of the same events: grave risk of death to additional persons; heinous, cruel or depraved manner; victim-impact evidence

As summarized in the *McCullah* opinion, duplicative utilization of the same conduct to support more than one aggravating factor has a prejudicial tendency to produce arbitrary and capricious death verdicts. In this case, as will be seen, the government has chosen, to a limited but harmful degree, to utilize the same conduct in a repetitive manner by taking a single course of conduct to create four separate aggravating factors: (1) grave risk of death to others; (2) multiple killings or attempted killings; (3) victim-impact; and (4), heinous, cruel and depraved manner that involved torture or serious physical abuse.

The government's multiple use of overlapping and indistinguishable elements of the offense creates precisely the danger discussed in *McCullah* and *Stringer, supra.* A jury, passing on a single course of conduct, will, if the government prevails, find four separate factors from that conduct and load them all in the death-side of the balance. The government should be required to revise and re-state its notice in this regard to eliminate duplicative aggravating factors.

2. Future dangerousness premised, *inter alia*, on low rehabilitative potential, lack of remorse

In support of an argument that Mr. Robinsonis a future danger who, ostensibly while confined for life in a United States prison, "is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to others", the government argues that Mr. Robinson"has demonstrated low rehabilitative potential, and lack of remorse."

In *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991), the Court vacated a Pennsylvania death sentence on the basis of a prosecutor arguing to a penalty-phase jury that the defendant showed "no remorse" for his crime. In *United States v. Davis, supra,* the Court struck the allegation of "no remorse" from the notice of aggravating factors in that FDPA case, stating:

> Lack of remorse is a subjective state of mind, difficult to gage objectively, since behavior and words don't necessarily correlate with internal feelings. In a criminal context, it is particularly ambiguous since guilty persons have a constitutional right to be silent, to rest on the presumption of innocence and to require the government to prove their guilt beyond a reasonable doubt.

Davis, 912 F.Supp. at 946. As noted earlier, several courts – including the case just cited – have stricken the allegation of low rehabilitative potential from a notice of aggravating factors. It is difficult to understand how "rehabilitation" enters into the equation given a mandatory life sentence.

The lack-of-remorse allegation, along with the allegation of low potential for rehabilitation, should be stricken from the government's death-notice.

3. The non-statutory aggravating factor of "future dangerousness" is inherently vague

Several times in this brief, defendant has pointed out that one of the bedrock principles of death-penalty jurisprudence that aggravating factors may not be overly-broad or incapable of even-handed and/or consistent application.[35] It is another aspect of aggravating factors that they cannot be so generic that they could apply to all murders.

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[35] *See* discussion at pp. 13-19.

Neither may aggravating factors be so vague that they do not provide the sentencer with adequate guidance as to when the factor is present and when it is not. *See, e.g., Tuilaepa v. California, supra, Arave v. Creech, supra.*

In this case the government purports to be able to construe, narrow and define the concept of "future dangerousness" and alleges it will be able to explain and prove that concept to a jury, namely, in the language of the death-notice, that:

> [There is a] "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Where, as in this case, Mr. Robinson will be jailed for the rest of his life if this case proceeds to a penalty-phase, the concept of "future dangerousness" must be placed in the context of life in prison. *Simmons v. South Carolina*, 512 U.S. 154 (1994). None of the specific allegations set forth in the notice relate to a prison setting. (In essence, the government has announced that it will attempt to predict future dangerousness in prison on the basis of what the government actions in the "free world".) The term "future dangerousness" is inherently vague and, as well, may be viewed by the jury as applying to all murderers. Thus, a rational jury might conclude that anyone willing to take a life even once is always potentially a future danger. Under such circumstances, the factor would not perform a narrowing function.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court reviewed the concept of "future dangerousness" in connection with the Texas death-penalty scheme, a scheme that is unique among the many various schemes adopted by the states with capital punishment statutes. In

Texas, in order to determine whether or not a person should be sentenced to death, a jury is required to answer three questions: (1) whether the homicide was deliberate; (2) whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;" and (3), if there was provocation by the victim, whether the response by the defendant was "unreasonable." If the jury answers each question in the affirmative, a death verdict is required. *Barefoot*, 463 U.S. at 884. In *Simmons,* the Court held that where a state wished to allege future dangerousness as an aggravating factor, the jury must be advised of the defendant's eligibility (or lack thereof) for release on parole.

The language of the non-statutory aggravating factor used by the government in this case, goes far beyond that approved by the Court in *Barefoot*. The reality is that Mr. Robinson will not present a continuing danger to society since he will, if convicted of one or more of the capital counts, be incarcerated for the rest of his natural life under stringent conditions of confinement. This non-statutory aggravating factor must be dismissed.

POINT FIVE

THE FDPA DOES NOT AUTHORIZE THE UTILIZATION OF NON-STATUTORY AGGRAVATING FACTORS

A. INTRODUCTION – THE ROLE OF NON-STATUTORY AGGRAVATING FACTORS IN A DEATH-PENALTY SCHEME

Aggravating factors serve a vital function in death-penalty jurisprudence. In *Gregg v. Georgia*, 428 U.S. at 189, the Court stated that "where discretion is afforded a sentencing

body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." The Court has consistently recognized that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877.

In the case of the FDPA, it is obvious that the aggravating factors (statutory and non-statutory) are intended to perform this necessary narrowing function. The choice of schemes reflects a conscious legislative decision that not all murderers deserve the death penalty.[36] Instead, the class of such murderers is to be narrowed by reference to particular facts and circumstances about the crime or the criminal. Moreover, in a weighing jurisdiction, the sheer numbers of aggravating factors becomes of particular concern leading a prosecutors to believe they are permitted to make aggravating factors up as they go along. The combination of a weighing jurisdiction which permits non-statutory factors can yield, with deadly effect, the placement of a "thumb on death's side of the scale." *Stringer v. Black,* 503 U.S. at 230.

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[36]In *Lowenfeld v. Phelps,* 484 U.S. 231 (1988), the Court pointed out that a constitutionally valid death-penalty scheme may be enacted which performs the necessary narrowing at the guilt phase and need not require proof of further aggravating circumstances so long as the fact-finder is permitted to consider and give weight to mitigating factors.

In *United States v. Davis, supra,* the trial court also had occasion to discuss utilization of non-statutory aggravating factors in a case brought pursuant to the FDPA, concluding as follows:

> The statute [FDPA] is a "weighing" statute. Once the evidence of all the aggravating and mitigating factors is in, the jury is to consider whether all of the former factors "outweigh" the latter. § 3593(e). To carefully define the statutory aggravating factors, but then allow wholesale introduction of non-statutory aggravating information would defeat the goal of guided and measurable jury discretion and return us to an unconstitutional system where the death penalty is "wantonly" and "freakishly" imposed. It cannot be presumed that Congress intended to create a statute that is so self-defeating, much less one that would be unconstitutional. Additionally, as noted in Gregg, juries have little, if any, experience with sentencing and "are unlikely to be skilled in dealing with the information they are given." *96 S.Ct. at 2934.* Any guidance that can be provided – particularly in a decision so fundamental and profound as that made in a capital case – must be provided. All of the above mandates that judicial discretion be exercised and the non-statutory factors be carefully screened. In doing so, this court must seek to fulfill the intent of Congress ands at the same time construe the statute in a manner that maintains its constitutionality.

Davis, 912 F.Supp. at 943 (footnote omitted).

Non-statutory aggravating factors play a specialized role in the jury's decision-making process at the penalty trial of a federal death penalty case. The first decision a jury must make as it moves toward a death verdict is whether any of the intent elements set out at § 3591(a)(2) are present in the case. Without belaboring the point, the (a)(2) elements involve state-of-mind determinations that require the government to prove that the killing at issue

was intentional. If the government fails to prove to the jury's unanimous satisfaction beyond a reasonable doubt that one (and only one) of the (a)(2) elements is present, the jury goes no further and the death penalty may not be imposed. If, however, the government does succeed in establishing an (a)(2) element, the jury proceeds to its second decision-point, namely whether one or more of the specific aggravating factors set out at § 3592(c)(1) through (16) has been established to the jury's unanimous satisfaction beyond a reasonable doubt.

It is only if the government establishes, in sequence, both the existence of an (a)(2) element and one or more of the (c)(2) through (16) factors that the jury may consider so-called non-statutory aggravating factors.[37] At that point in the process, the statute permits the jury to return a special finding identifying "any other aggravating factor for which notice has been provided under subsection (a) which is found to exist." 18 U.S.C. § 3593(d). In this case, the government has put the defendant on notice that it will seek to prove, as the basis for the death penalty, both statutory and non-statutory aggravating factors. For the reasons which follow, the non-statutory aggravating factors in this case must be dismissed.

B. THE FDPA DOES NOT AUTHORIZE UTILIZATION OF NON-STATUTORY AGGRAVATING FACTORS?

As interpreted by the government in this case, the FDPA allows the government, at virtual whim, to utilize non-statutory aggravating factors in pursuit of a death sentence. In this case, as discussed at length *infra*, the government has set forth several such factors.

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[37]The government's failure to establish either category of aggravating factor means that the sentence may not be death and the jury, therefore, need not reach the issue of mitigating circumstances and does not engage in weighing.

The FDPA statutory scheme requires the government, as part of its notice obligations, to file with the Court, and serve upon the defendant, a document that, *inter alia*, sets forth:

> [T]he aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.
>
> The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim, and the victim's family, and any other relevant information.

18 U.S.C. § 3593(a). The statute then goes on to list 16 separate aggravating factors as relevant to this kind of case. 18 U.S.C. § 3592(c).[38]

The use of non-statutory aggravating factors – with the possible exception of victim-impact evidence[39] – is simply not authorized by the statute. This is because § 3592(c) of the statute contradicts § 3591(a) of the statute. The former provides that the jury "may consider whether any other aggravating factor for which notice has been given exists." 18 U.S.C.. § 3592(c). But § 3591(a) provides that a defendant may be sentenced to death only after a consideration by the jury of "the factors set forth in § 3592 . . . ." Section 3592 contains, as

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[38]See also list of statutory aggravating factors in 21 U.S.C. §848 (n).

[39]Section 3593 seems to allow for victim-impact evidence as a factor for which notice may be given. 18 U.S.C. § 3593(a)(2).

noted above, a listing of 16 factors and 16 factors only. Therefore, non-statutory factors may not be considered by a jury since they are not – and could not be – set out in § 3592.[40]

In *United States v. Nguyen,* 928 F.Supp. 1525, 1535 (D.Kans. 1996), the trial judge described, and rejected, the above-stated statutory argument as "hyper-literal." Yet, if Congress is going to go into the business of authorizing death sentences and executions, it has a concomitant responsibility to speak in language which is clear and unambiguous. Whatever political capital there is to be made on pursuit of the death penalty must be earned by clear legislative direction. Because the statute does not authorize non-statutory aggravating factors – except in the case of victim-impact – the non-statutory aggravating factors in this case must be dismissed.

POINT SIX

CONGRESS MAY NOT DELEGATE TO THE EXECUTIVE BRANCH OF THE GOVERNMENT THE LEGISLATIVE TASK OF DETERMINING WHAT SHOULD, AND SHOULD NOT, CONSTITUTE AGGRAVATING FACTORS IN A COMPREHENSIVE DEATH-PENALTY SCHEME.

In reviewing the various forms of death-penalty schemes enacted by the states in response to *Furman v. Georgia,* the Supreme Court has made it clear that the states have been free to experiment with a variety of approaches to capital-punishment schemes so long as that experiment does not violate the federal constitution. *See, e.g. Harris v. Alabama,*

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[40]This view of the requirements of the FDPA is reinforced by the fact that the section of the Act concerning appellate review, § 3595, makes reference only to aggravating factors considered by the jury under § 3592.

supra, 115 S.Ct. 1031 (1995); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) (The "Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.") It is an unsettled issue, however, whether the United States Supreme Court would approve a death-penalty scheme that allowed non-statutory aggravating circumstances to be weighed by a penalty jury and, if so, whether such a scheme could be constitutional absent a provision for strict proportionality review. In this case, it is not necessary to reach that question, since a federal death-penalty scheme presents constitutional considerations that are not present in a state scheme.

In this case, the attempt by Congress to allow utilization of non-statutory aggravating factors in the FDPA death penalty scheme violates Article 1, §1 of the United States Constitution which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." From this basic provision of our constitution, the Supreme Court has derived the doctrine that Congress may not constitutionally delegate its legislative power to another branch of government. Thus, in *Mistretta v. United States*, 488 U.S. 36 (1989), the Court observed that, "the non-delegation doctrine originated in the principle of separation of powers that underlies our tripartite system of Government." *Id.* at 371. In *Touby v. United States*, 500 U.S. 160 (1991), the issue was whether Congress could delegate to the Attorney General the authority to temporarily classify as a drug a controlled substance in order to bring its use and/or distribution within reach of criminal prosecution. *Id.* at 164.

The statutory provision under review had been added by Congress in 1984 to combat the problem of so-called "designer drugs" whose chemical properties differed only slightly from those on existing controlled substance schedules. Since the process of adding a drug to the list of controlled substances typically took six to twelve months, the 1984 amendment allowed the Attorney General to bypass, for a strictly limited period of time, several of the stringent requirements for permanently scheduling a drug as a controlled substance. *Id.* Summarizing its prior views of the non-delegation doctrine, the Court in *Touby* stated:

> We have long recognized that the non-delegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches. *Mistretta [v. United States*, 448 U.S.] at 372. Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

Touby, 500 U.S. at 165.

In *Touby*, Petitioners conceded that Congress had set forth an "intelligible principle" which acted to constrain the Attorney General's discretion in temporarily scheduling designer drugs.[41] The Court summarized the arguments which proceeded from that concession as follows:

> Petitioners suggest, however, that something more than an "intelligible principle" is required when Congress authorizes

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[41]Defendant in this case makes no such concession.

> another Branch to promulgate regulations that contemplate criminal sanctions. They contend that regulations of this sort pose a heightened risk to individual liberty and that Congress must therefore provide more specific guidance. Our cases are not entirely clear as to whether or not more specific guidance is in fact required. We need not resolve the issue today. We conclude that § 201(h) passes muster even if greater congressional specificity is required in the criminal context.

Touby, 500 U.S. at 165-66 (citations omitted). Thus, for the purposes of its decision, the Court assumed that Petitioners were correct in their assertion that greater congressional specificity – something more than an "intelligible principle" – is required in a criminal context. The *Touby* Court went on, however, to hold that the intelligible congressional principle at issue not only meaningfully constrained the Attorney General's discretion to define criminal conduct but that, in addition, "Congress ha[d] placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct. These restrictions satisfy the constitutional requirements of the non-delegation doctrine." *Id.* at 167.

In the present case, however, the extraordinary authority delegated by Congress to the Attorney General – literally the power over who lives or dies – does not even meet this "intelligible principle" threshold. Instead, Congress has provided nothing whatsoever to guide the Attorney General in the selection of "any other aggravating factors" the government, virtually at its whim, believes will provide a basis for the death penalty. The language of the statute literally provides no guidance, but cedes wholly to the Attorney General the authority to seek a death penalty, in part, on the basis of "any other aggravating factors" which the government seeks to prove as the basis for the death penalty.

In *United States v. Davis*, *supra*, the district court tracked this non-delegation doctrine argument, and found it troubling:

> The defendants, however, raise an additional concern which makes the analysis less simple. In Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), the United States Supreme Court upheld a death sentence even though one of the aggravating factors found by the jury to apply was held by the court to be unconstitutionally vague. Significant to the decision was that the state statute at issue used aggravating factors only to narrow the class eligible for the death penalty. The jury was not additionally instructed to weigh aggravating factors against mitigating factors. The federal statute at issue here likewise uses the statutory aggravating factors as the threshold to find an offender death eligible. However, the federal procedure also calls on the jury to consider any non-statutory aggravating factors and mitigating factors and ultimately decide whether the aggravating factors "sufficiently outweigh" the mitigating factors to justify a death sentence. 18 U.S.C. § 3593(e). Thus, while the statutory factors provide the threshold for death penalty consideration, they ultimately become indistinguishable from non-statutory factors in the final weighing by the jury. In the same pot with the carefully crafted factors enunciated by Congress go the potential hodge-podge of other factors drawn up by the individual government prosecutors. Since this is a weighing statute and since non-statutory and statutory aggravating factors are to be equally considered in that balancing, this Court does conclude that allowing the prosecutors to designate additional factors is in fact a delegation of legislative authority. See also *United States v. Pretlow*, 779 F. Supp. 758 (D.N.J. 1991).

Davis, 904 F.Supp. at 559. Ultimately, however, the Court concluded that the delegation was proper.[42]

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[42]As of yet, no court has accepted this delegation argument in the context of the role played by non-statutory aggravating factors in the federal death penalty. *See, United States v. Jones,* 132 F.3d 232, 239-40 (5th Cir. 1998) and *Davis II*, collecting the cases, 904 F.Supp.

Defendant asserts that allowing the Attorney General to engage in standardless resort to non-statutory aggravating factors is unconstitutional as violative of the non-delegation doctrine. The dangers are all the more present because the FDPA is a weighing statute. The non-statutory factors must all be dismissed.

POINT SEVEN

A WEIGHING STATUTE MAY NOT CONSTITUTIONALLY ALLOW RESORT TO NON-STATUTORY AGGRAVATING FACTORS WITHOUT ALSO PROVIDING FOR MANDATORY CAPITAL PROPORTIONALITY REVIEW AND, THEREFORE, THE FDPA IS NOT CONSTITUTIONAL.

The term "proportionality review," as used in death penalty jurisprudence, was defined in *Pulley v. Harris,* 465 U.S. 37 (1984), as follows:

> This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.

Pulley, 465 U.S. at 43. In *Pulley*, the Court ultimately concluded that the Eighth Amendment, applicable to the states through the Fourteenth Amendment, did not require state appellate courts, in all cases, "to compare the [death] sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." *Id.* at 44. *Pulley*, however, does not define the universe when it comes to the role of proportionality

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at 559.

review in examining the constitutionality of any particular capital punishment scheme.

In order to comprehend fully the place of non-statutory aggravating factors in a capital punishment scheme, it is critical to understand the Supreme Court's decision in *Zant v. Stephens,* 462 U.S. 862 (1983). In that case, a Georgia sentencing jury, *guided by a "non-weighing" capital punishment scheme*, imposed the death penalty after finding three statutory aggravating circumstances. On direct appeal, the Georgia Supreme Court invalidated, on vagueness grounds, one of the three statutory aggravating circumstances but, nonetheless, upheld the sentence of death, reasoning that, in light of the particular structure of Georgia's "guided discretion" statute, the fact that one of the statutory aggravating factors found by the sentencing jury was later declared invalid by Georgia's Supreme Court did not require that the death sentence be vacated since the statutory factor was one which the jury could have considered anyway as a *non*-statutory factor. *Zant v. Stephens*, 456 U.S. at 866.

The particular statutory aggravating factor found by the Georgia Supreme Court to be unconstitutional was that the individual had "a substantial history of serious assaultive criminal convictions." *Id.* at 868. In support of that factor, the penalty jury had heard extensive testimony regarding the defendant's prior criminal record. His primary argument on appeal was that the information about his record had been improperly placed before the jury in support of the subsequently invalidated statutory aggravating factor. Responding to this argument, the Court in *Zant* noted that Georgia's capital-punishment scheme was not of

the "weighing" genre of death penalty schemes.[43] In order to impose the death penalty, the penalty jury had to find the existence of at least one of ten specific *statutory* aggravating factors. However, the penalty jury was also authorized to consider any other *non-statutory* aggravating factors present as well as all mitigating circumstances. As a check on complete arbitrariness, a death sentence could not be imposed unless at least one of the statutory aggravating factors was found. Additionally, as is the case with the federal statute, a Georgia jury was never required to impose a death sentence and could decline to do so without specifying its reasoning. *Zant*, 462 U.S. at 871 n.13.

In reviewing the above-described scheme, the United States Supreme Court concluded that evidence of the defendant's prior criminal record could have been placed properly before the sentencing jury in any event under a theory that the jury was allowed to consider non-statutory aggravating factors in reaching its decision, including the nature and extent of defendant's prior criminal record. 462 U.S. at 886-888. The Court's conclusion was reached on the basis of the Georgia Supreme Court's own interpretation of its death penalty scheme coupled with the United States Supreme Court's views, expressed in *Gregg v. Georgia,* 428 U.S. 153 (1976), that nothing in the constitution prohibits a state from allowing a wide variety of evidence and argument at penalty-phase hearings.[44] *Id.* at 203-04.

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[43]This is an extremely important distinction between the statute reviewed in *Zant* and the statute at issue in this case. The FDPA is very clearly of the weighing genre.

[44]This is a second critical distinction between the Georgia statute and the FDPA scheme. The federal death-penalty statute, by its terms, limits the government's penalty-phase evidence to specified statutory aggravating factors and such other non-statutory

Thus, while *Zant* seems superficially to stand for the proposition that non-statutory aggravating factors may be considered by a penalty jury, the opinion must be confined to the statutory scheme in which it arose. The Court's reasoning, was, in essence: (1) the presence of two valid statutory aggravating factors sufficiently narrowed the class of murderers eligible for the death penalty; and (2), the invalid statutory factor found by the jury cold not be viewed as constitutionally prejudicial since the evidence underlying the factor was properly before the jury in any event. There was also a third critical factor:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness *and to assure proportionality.*

Zant, 462 U.S. 890 (emphasis added). The Court also expressly reserved judgment concerning the significance it would attach to a finding that a particular statutory aggravating circumstance was invalid in the context of a sentencing scheme where the judge or jury "is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty."[45] *Id.*

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aggravating factors as the government puts a defendant on notice it will attempt to prove at the penalty phase. Juries are not free, in effect, to make up aggravating factors as they go along.

[45]Obviously, very different considerations are present if the statutory scheme requires a jury to weigh the significance of aggravating factors. Under those circumstances, it is the weighing and balancing which performs the narrowing function. Thus, in a 1990 decision involving Mississippi's weighing scheme, the Court answered the open question in *Zant* and concluded that a jury's finding of an invalid aggravating factor *always* requires reversal of the death sentence and a new sentencing hearing where the jury was required to weigh aggravating and mitigating circumstances. *Clemons v. Mississippi*, 494 U.S. 738 (1990).

The FDPA scheme is of the weighing variety and does not provide for capital proportionality review. In *Zant*, the Court was clearly concerned about the potential for arbitrary death sentences in a jurisdiction which permitted a jury to consider non-statutory aggravating factors. An important constitutional check on that potential for arbitrariness was mandatory proportionality review.

One year after *Zant*, the Court decided *Pulley v. Harris* where, as noted, the Court concluded that proportionality review was not required in every state court death sentence review. *Pulley* did not involve, however, a system which permitted the use of non-statutory aggravating factors. The statute at issue in *Pulley* was California's. Under that state's system, if the jury which heard the guilt-phase portion of the trial returned a guilty verdict on a capital count, it was also required to report with its verdict whether "special circumstances" identified in the statute had also been proved beyond a reasonable doubt. 465 U.S. at 51. In the event that one or more special circumstances were fond, the trial proceeded to a separate penalty trial at which the jury received additional evidence and ultimately was required to deliberate anew on a list of relevant factors set forth in the statute. A jury's life verdict is not reviewable. However, a death verdict required the trial judge to review that

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This doctrine has been followed consistently since *Clemons*. *See, e.g., Stringer v. Black,* 503 U.S. 222 (1992)*; Espinosa v. Florida,* 505 U.S. 1079 (1992); *Richmond v. Lewis*, 506 U.S. 40 (1992). These are not always easy issues to resolve. In *Flamer v. Delaware*, 68 F.3d 736 (3d Cir. 1995) (*en banc*), the Court divided badly over the seemingly straight-forward question of whether Delaware was or was not a weighing state.

finding and permitted him or her to set it aside after independently determining whether the evidence in fact supported the jury's findings. *Id.* at 52.

While *Pulley* stands for the proposition that proportionality review is not constitutionally required in every case, *Zant* stands just as clearly for the proposition that in a system – such as Georgia's and the federal death-penalty scheme – which permits a jury to consider non-statutory aggravating factors, proportionality review is a necessary check on the arbitrary imposition of a death verdict. Thus, the federal statute's failure to provide for proportionality review, while simultaneously permitting the use of non-statutory aggravating factors, renders it unconstitutional.[46]

POINT EIGHT

THE RELAXED EVIDENTIARY STANDARD AVAILABLE TO THE GOVERNMENT AT THE PENALTY TRIAL RENDERS ANY FINDINGS UNRELIABLE AND, THEREFORE, IS UNCONSTITUTIONAL.

In his introduction to these arguments, Defendant discussed the Supreme Court's prior rulings that the results of any capital proceeding be informed by a heightened sense of reliability. This requirement is an offshoot of the Court's recognition of the truth that death, as a form of punishment, is different in kind and severity from all others known to our society. *See, e.g., Woodson v. North Carolina*, 428 U.S. at 305.

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[46]These arguments have not been accepted in other federal death penalty cases. Those cases are collected in *United States v. Nguyen*, 928 F.Supp. 1525, 1536 (D.Kans. 1996). The issue remains one of first impression in the Second Circuit.

The constitutionally-based requirement of heightened levels of reliability governing death verdicts does not mean, however, that evidentiary standards and rules governing admissibility are a two-way street. A state's rules of evidence, for example, may not be employed to bar the admission of otherwise relevant evidence presented by a defendant in mitigation of sentence at a penalty trial. *Green v. Georgia*, 442 U.S. 95 (1979);[47] *see also, Lowenfield v. Phelps* 484 U.S. 231, 238-39 (the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," quoting *Lockett v. Ohio*, *supra*, 438 U.S. at 604); *cf., Murray v. Giarrantano*, 492 U.S. 1 (1989) (Since heightened procedural safeguards are built into the penalty phase of a capital case, the constitution does not entitle a death-sentenced defendant to appointed counsel when seeking collateral review of that conviction and/or sentence.) In *Spaziano v. Florida*, 468 U.S. 447 (1984), Justice Stevens observed that every member of the Supreme Court since *Furman* had either authored or joined an opinion observing the qualitative difference of a death sentence and the concomitant need for the heightened reliability of the procedures

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[47]Different states resolve differently this apparent tension between the need for heightened reliability in penalty proceedings on the one hand, and the fact, on the other hand, that a defendant may not be restricted, even by rules of evidence, from presenting mitigating information to the penalty jury. *See, e.g.* N.J.Stat.Ann. § 2C:11-3(c)(2-)(b), which requires that evidence presented by the prosecution at a New Jersey penalty trial meet evidence-rules standards, but allows the defendant to produce evidence in mitigation that not meet such standards so long as the prosecution is permitted to rebut such evidence (and only such evidence) "without regard to the rules governing the admission of evidence at criminal trials." *Id.* This approach strikes a more appropriate balance.

which yield a death sentence. *Id.* at 468-69 (Stevens, J., concurring in part and dissenting in part.)

With this background in mind, it becomes clear that the FDPA scheme features evidentiary standards that, in essence, *diminish* the degree of reliability of any penalty trial. The statute provides:

> Information is admissible regardless of its admissibility under the rules governing admission at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.

18 U.S.C. § 3593(c). The statute, thus, contemplates an a virtual evidentiary free-for-all at the penalty trial subject only to standard of exclusion similar to that embodied in *F.R.Evid.* 403.[48] It is apparent, on its face, that the statute would not recognize Confrontation Clause questions and would allow a jury to sentence a defendant to death without permitting him to confront the witnesses against him and without even the presence of circumstantial guarantees of accuracy embodied in the hearsay rules of the Federal Rules of Evidence. See, e.g., *Bourjailly v. United States*, 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986); cf., *Coy v. Iowa*, 487 U.S. 1012 (1988).

Defendant recognizes that more routine sentencing hearings and proceedings do not require standards of evidentiary reliability equal to those of a trial on the merits. *See, e.g., Williams v. New York*, 337 U.S. 241 (1949). A penalty trial is not, however, a routine event.

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[48]Unlike Rule 403, however, there is no requirement that the probative value of the questioned information "substantially" outweigh its probative value.

Accordingly, in *Gardner v. Florida*, 430 U.S. 349 (1977), a plurality of the Court distinguished capital-sentencing proceedings and stated that the special considerations attendant to such called for substantially more stringent procedural safeguards than in routine sentencing hearings. *Id.* at 358 (Opinion of Stevens, Stewart and Powell, J.J.). *See also, Gregg v. Georgia*, 428 U.S. 153 (1976), noting that jurors have little experience – if any – with sentencing and are, "unlikely to be skilled in dealing with the information they are given." *Gregg*, 96 S.Ct. at 2934.

The differences are between a capital sentencing hearing and an "ordinary" sentencing hearing are qualitative, and not simply of degree. As noted earlier, the Third Circuit in *Lesko v. Lehman*, has observed that, "The sentencing phase of a death-penalty trial is one of the most critical proceedings in our criminal justice system." 925 F.2d at 1541. Thus, the failure of the federal statute to provide for a reliable penalty proceeding, let alone a proceeding whose reliability is heightened, renders the statute unconstitutional.

In *United States v. Pitera,* 795 F.Supp. 546 (E.D.N.Y. 1992), the trial court agreed that the constitution indeed requires higher levels of reliability at capital-sentencing hearings and concluded that, in many cases, such heightened scrutiny might bar evidence that would be otherwise admissible even pursuant to the Federal Rules of Evidence. 795 F.Supp. at 565-66. The *Pitera* court's final resolution of this was as follows:

> The constitutional mandate is for a sentencing proceeding that ensures heightened reliability. The court is convinced that such a standard can adequately be factored into a consideration of whether proffered evidence is more probative than

> prejudicial. The court accordingly rejects defendant's challenge to the statute's evidentiary standard.

Pitera, 795 F.Supp. at 566; *see also, United States v. Nguyen*, 928 F.Supp. 1525, 1546 (D.Kans. 1996), collecting cases on this topic.

Unless this Court is prepared to adopt a view of the evidentiary standard that comports with the heightened levels of reliability constitutionally required and expected in death penalty cases, the statute is unconstitutional and the government's death-notice must be dismissed.

POINT NINE

BY REMOVING "PLAIN-ERROR" FROM THE SCOPE OF APPELLATE REVIEW OF FDPA DEATH SENTENCES, CONGRESS HAS FAILED TO PROVIDE FOR MEANINGFUL APPELLATE REVIEW AND THE STATUTE IS, THEREFORE, UNCONSTITUTIONAL.

As noted earlier,[49] it is an indispensable component of a constitutional death penalty scheme that it provide for meaningful appellate review. Such review provides a necessary check on the arbitrary and capricious infliction of the death penalty. Indeed, as the United States Supreme Court stated:

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.

Parker v. Dugger, supra, 498 U.S. at 321; *see also, Clemons v. Mississippi*, 110 S.Ct. 1441, 108 L.Ed.2d 725, 738 (1990) ("[T]his Court has repeatedly emphasized that meaningful

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[49] *See* discussion at pp. 10-13.

appellate review of death sentences promotes reliability and consistency.")

In enacting the FDPA, Congress in fact curtailed the scope of appellate review and, thereby, rendered the statute unconstitutional.[50] The relevant section reads as follows:

> **(b) Review.** – The court of appeals shall review the entire record on the case, including –
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> (1) the evidence submitted during the trial;
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> (2) the information submitted during the sentencing hearing;
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> (3) the procedures employed in the sentencing hearing; and
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> (4) the special findings required under section 3593(d).
>
> **(c) Decision and disposition.** –
>
> (1) The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death, and shall consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports an aggravating factor required to be considered under section 3592.
>
> (2) Whenever the court of appeals finds that –

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[50]This issue is properly before this Court for decision since if, in fact, the FDPA does not provide for meaningful appellate review, it is unconstitutional, a determination which must be made at this stage of the litigation.

(A) The sentence of death was imposed under the influence passion, prejudice, or any other arbitrary factor;

(B) the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor; or

(C) the proceedings involved any other legal error requiring reversal of the sentence *that was properly preserved for appeal under the rules of criminal procedure*,

the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death.

18 U.S.C. § 3595 (emphasis added).

What the above-quoted section of the statute does is to preclude in death-penalty cases any plain-error analysis by a court of appeals. *See, F.R.App.P.* 52(b). The doctrine of plain error is available in all criminal appeals, and gives an appellate court the option of noticing obvious errors that were not brought to the attention of the district court. *See, e.g., United States v. Frady,* 456 U.S. 152, 163 n.13 (1982); *Silber v. United States*, 370 U.S. 717 (!962) In *United States v. Olano*, 113 S.Ct. 1770 (1993), the Court held that an appellate court may reverse under plain error where: (1) there is an error; (2) the error is "obvious;" (3) the error affects substantial rights; and (4), the error "seriously affects the fairness, integrity or public reputation of the judicial proceedings." *Id.* at 1777.

By failing to allow for plain-error review, the FDPA ignores the line of Supreme Court cases requiring meaningful appellate view as a pre-condition to a finding that a death-

penalty scheme is constitutional, it also ignores the fact that the Supreme Court has repeatedly recognized that "death is different" and, in recognition of that difference, has required heightened standards of reliability to justify death verdicts. A death-verdict cannot be considered reliable if it was brought abut by an error that was obvious, affected substantial rights and seriously affected the fairness, integrity or public's view of the judicial proceedings, even if that error was nowhere raised before the district court.

By limiting the scope of appellate review to two areas, evidentiary sufficiency and the absence of wholly arbitrary factors, Congress accomplished its political agenda of facilitating executions, but failed in the process to comply with the commands of the Supreme Court. Additionally, for Congress to have singled out death-sentenced federal prisoners for diminished appellate review violates equal protection since Congress may not single out one class of inmates for such diminished review while leaving open existing remedies to all other federal prisoners. *Cf. Lindsey v. Normet*, 405 U.S. 56, 77 (1972). An individual's interest in his or her own life is fundamental. Thus, in the absence of some compelling governmental interest, this distinction may not stand.

A statute that requires an appellate court to affirm a death verdict which was returned as a result of plain error in the proceedings below is antithetical to concepts of heightened reliability, meaningful appellate review, and equal protection. Thus, an order should be entered declaring the statute unconstitutional.

POINT TEN

THIS COURT SHOULD ORDER A BILL OF PARTICULARS AS TO CERTAIN OF THE AGGRAVATING FACTORS IN ORDER TO ALLOW MR. ROBINSON THE OPPORTUNITY TO INVESTIGATE AND DEFEND THE FACTUAL ALLEGATIONS OF THE AGGRAVATING FACTORS.

The purposes of a bill of particulars are well-settled. Essentially, a bill of particulars should issue to enable a defendant "to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987), quoted with approval in *United States v. Davidoff*, 845 F.2d 1151, 1154 (2d Cir. 1988). The rule governing issuance of a bill of particulars, F.R.Crim.P. 7(f), was amended in 1966 to eliminate any "for cause" element of a request for a bill and "to encourage a more liberal attitude by the courts toward bills of particulars." *See* Advisory Committee Note to 1966 Amendment to Rule 7(f); *United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir. 1989).

As stated in a leading treatise, there are few generalized propositions concerning a bill of particulars that hold true for all cases:

> It is repeated over and over in the cases that a bill of particulars may not call for evidentiary matter. Other cases say that the government will not be required to disclose its legal theory on a bill of particulars, though on this point there is disagreement with some courts saying that the government's theory is the only thing that can be compelled. Any generalized propositions of this sort must necessarily be unsatisfactory. The bill of particulars, as was said before, is intended to give the defendant enough information about the charge so that he or she

> may adequately prepare a defense and so that surprise will be avoided. It is not intended, as such, as a means of learning the government's evidence and theories. But to the extent that information is needed for the proper purposes of the bill, it will be required even if the effect is disclosure of evidence or theories.
>
> It is probably true that defendant can be sufficiently advised of the nature of the charge without requiring the government to go into matters of detail or to lay out its entire case or to state its legal conclusions. But these should not be regarded as rules themselves, and the sole question should be whether adequate notice of the charge has been given the defendant. Thus, in order for the defendant to know against what he must defend it will frequently be necessary to require the government to disclose the time and place of the alleged offense, and the names of the persons present when the offense took place.

1 Wright, *Federal Practice and Procedure* (Criminal 3d 1999), § 129 at pp. 658-664 (footnotes omitted).

Mr. Robinson seeks a limited bill addressed to the issue of trial preparation, particularly preparation for a penalty stage. Without a limited bill, it may be necessary to seek a lengthy interregnum[51] between guilt- and penalty-states.

1. The factual components of the victim-impact evidence

The death-notice alleges victim-impact as a reason justifying the imposition of a sentence of death. While the defense, through the indictment, is aware of the names of the victims, the defense seeks an order from this Court requiring the government to particularize

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[51]It is not uncommon for there to be a relatively brief hiatus between guilt- and penalty-phases in capital prosecution, a week to 10 days being unremarkable.

"the victims' personal characteristics sever and detrimental effects of the instant offense on the victims' families."

POINT ELEVEN

THE DEATH PENALTY IS, UNDER ALL CIRCUMSTANCES, CRUEL AND UNUSUAL PUNISHMENT AND, THEREFORE, THE GOVERNMENT SHOULD BE PRECLUDED FROM SEEKING THE EXECUTION OF JULIUS OMAR ROBINSON.

Defendant recognizes, as he must, that every present member of the United States Supreme Court accepts the proposition that the death penalty, under some circumstances, is constitutional.[52] This may remain the rule of law in this nation for many years. Nevertheless, Defendant argues that the death penalty is unconstitutional in all cases, and as applied to him, for the following reasons: (1) the death penalty is racist to its very core and represents an intellectually dishonest congressional response to the public's frustration over the inability of elected officials to do anything meaningful about crime; (2) the death penalty has in the past, and inevitably will in the future, lead to the execution of innocent people; (3) the process by which individuals are selected for capital prosecution vests an unacceptable level

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[52]In *Schiro v. Farley,* 510 U.S. 222 (1994), Justice Ginsburg, the newest member of the Court, voted with the majority in upholding a sentence of death. Justice Stevens, however, continues to express grave doubts regarding the constitutionality of the death penalty. In *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853 (1993), he joined with former Justice Blackmun to voice "disappointment over this Court's obvious eagerness to do away with any restriction on the State's power to execute whomever and however they please," and expressed "doubt about whether, in the absence of such restrictions, capital punishment remains constitutional at all," describing the execution sanctioned by the Court in *Herrera* as "perilously close to simple murder." 506 U.S. at 446

of unreviewable discretion in prosecuting authorities; and (4), evolving standards of decency will eventually convince the American public that it is, wrong and immoral to kill people in an effort to teach people it is wrong and immoral to kill people.

In *Callins v. Collins*, 510 U.S. 1141, 114 S.Ct. 1127 (1994) Justice Blackmun, four months prior to his retirement from the Supreme Court, dissented from the denial of *certiorari* in a Texas death-penalty case and expressed at great length why 20 years of experience on the Supreme Court had convinced him that this nation's death penalty schemes – even if theoretically permissible and constitutional – are, in practice and reality, incapable of fair and even-handed application and therefore retain many of the arbitrary and capricious features, including race, ostensibly struck down in *Furman* and "corrected" by *Gregg* and its progeny. Justice Blackmun stated:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved, I feel morally and intellectually obligated simply to conclude that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants "deserve" to die? – cannot be answered in the affirmative. It is not simply that the Court has allowed vague aggravating circumstances to be employed [citation omitted], relevant mitigating evidence to be disregarded citation omitted], and vital judicial review to be blocked [citation omitted]. The

> problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

127 L.Ed.2d at 438.

In a 1995 *in banc* opinion from the Third Circuit, reviewing sentences of death imposed in Delaware, Circuit Judge Lewis, joined by Circuit Judges Mansmann and McKee, expressed their agreement with Justice Blackmun's conclusions:

> Although I have concluded that the errors in both trials were not harmless and would, accordingly, reverse the death sentences as to both Bailey and Flamer and remand for reweighing, the tortuous analytical route it has taken both the majority and me to set out our respective views in these cases compels me to add that I believe they perfectly illustrate - perhaps epitomize - why, in the words of Justice Blackmun, we should "no longer tinker with the machinery of death." See Calkins v. Collins, 127 L. Ed. 2d 435, 114 S. Ct. 1127 (Blackmun, J., dissenting).
>
> To be sure, Justice Blackmun was correct. I realize that I sit on a court charged with the responsibility of applying the law as it is interpreted by the Supreme Court, and in circumstances such as these, by the highest court of a state. That is precisely what the majority and I have sought to do, despite our disagreement. But there are times when it becomes appropriate for a judge to reflect upon the law that he or she is called upon to apply, and to express views, genuine and unfeigned, that reveal a sincere and earnest belief. And in doing so here, I can only say that more than any I have seen, these cases exemplify the extent to which death penalty jurisprudence has become so complex and theoretically abstract that the only way to try to understand the reasons for and impact of its many subtle distinctions is to resort to carefully crafted hypotheticals. Something is terribly wrong when a body of law upon which we rely to determine who lives and who dies can no longer, in

> reality, reasonably and logically be comprehended and applied; when, in examining a statutory scheme and analyzing instructions and interrogatories, we are left to reach conclusions by piling nuance upon nuance; when we cannot even agree upon the appropriate standard of review in cases in which lives hang in the balance. Yet this is how cluttered and confusing our nation's effort to exact the ultimate punishment has become. This cannot be what certain fundamental principles of liberty and due process embodied in our Constitution, principles upon which I need not elaborate here, are all about.
>
> It does not dilute my profound respect for the highest court in the land, an admiration and honor that knows no bounds, to voice an apprehension, sincerely felt, that much more guidance in this serious moral dilemma must be forthcoming. Elusive and complicated distinctions, replete with incomprehensible subtleties of the highest order, must not be the talisman that decides whether one should live or die. Until this guidance is forthcoming, the plaintive voice of Justice Blackmun, truly crying in the wilderness, should continue to haunt and remind us that "the desired level of fairness has [not] been achieved."

Flamer v. Delaware, 68 F.3d 736, 772 (3d Cir. 1995) (*In banc*) (Lewis, Cir. J., dissenting).

This Court should declare the Federal Death Penalty Act of 1994 unconstitutional.

CONCLUSION

For the reasons set forth above, Mr. Robinson's death-penalty motions should be granted in all respects and the Notice of Intent to Seek the Death Penalty dismissed.

Respectfully submitted,

WES BALL
Attorney for Defendant
State Bar No. 01643100
4025 Woodland Park Blvd.
Suite 100
Arlington, TX 76013
Tel.: (817) 860-5000
Fax: (817) 860-6645

JACK V. STRICKLAND
Attorney for Defendant
State Bar No. 19397000
909 Throckmorton Street
Fort Worth, Texas 76102
Tel.: (817) 338-1000
Fax: (817) 338-1020

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served upon Fred Schattman/Reed O'Conner, Assistant U.S. Attorney, on this the 7th day of January, 2002 via hand-delivery.

WES BALL

CERTIFICATE OF CONFERENCE

This is to certify that I contacted/~~attempted~~ to contact Fred Schattman/~~Reed O'Conner~~, Assistant U.S. Attorney, on this the 7th day of January, 2002, regarding the foregoing and:

( ) counsel has no objection to same,

(X) counsel objects to same,

or

( ) was unable to reach counsel

WES BALL

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A1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA Plaintiff	§	
VS.	§	CRIMINAL NO. 4:00-CR-260-Y
JULIUS OMAR ROBINSON (2) Defendant	§	

APPENDIX 1

[A1]

NOTICE OF INTENT TO SEEK THE DEATH PENALTY

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	Criminal No.4:00-CR-0260-Y (2)
	§	
JULIUS OMAR ROBINSON	§	

NOTICE OF INTENT TO SEEK THE DEATH PENALTY

COMES NOW the United States of America, by and through the United States Attorney for the Northern District of Texas, and files, pursuant to Title 18, United States Code, Sections 3591 through 3593, and Title 21, United States Code, Section 848, this notice of its intent to seek the death penalty against the defendant, **JULIUS OMAR ROBINSON**, in the event **ROBINSON** is convicted of Count Three, Seven, Eleven, Twelve, or Fifteen of the superseding indictment, which charges defendant with using, carrying, and discharging firearms during and in relation to a drug trafficking crime and in the course of such violation did cause death, in violation of Title 18, United States Code, Section 924(j), Establishing a Continuing Criminal Enterprise in violation of Title 21, United States Code, Section 848, and Possession With Intent to Distribute a Controlled Substance and while engaging in such offense intentionally caused the death of another in violation of Title 21, United States Code, Section 841 (a)(1) and 848 (E)(1)(A).

I.

TITLE 18 OFFENSES

The United States of America believes that the circumstances of the offenses of using/carrying/discharging a firearm and causing the death of Johnny Lee Shelton, Juan Reyes, and Rudolfo Resendez are such that if the defendant, **JULIUS OMAR ROBINSON**, is convicted a sentence of death is justified for each offense under Title 18, United States Code, Sections 3591(a), 3592(a), and 3592(c).

The United States of America will prove, at a hearing held pursuant to Title 18, United States Code, Section 3593, that:

Count Seven

a. On or about December 3, 1998, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, did intentionally kill Johnny Lee Shelton by shooting and killing him with a firearm (18 U.S.C. § 3591 (a)(2)(A));

b. On or about December 3, 1998, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally inflicted serious bodily injury that resulted in the death of Johnny Lee Shelton (18 U.S.C. § 3591 (a)(2)(B));

c. On or about December 3, 1998, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, did intentionally participate 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, other than one of the participants in the offense, and Johnny Lee Shelton died as a direct result of the act (18 U.S.C. § 3591 (a)(2)(C));

d. On or about December 3, 1998, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally and specifically engaged in an act of violence,

knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life, and Johnny Lee Shelton died as a direct result of the act (18 U.S.C. § 3591 (a)(2)(D));

e. the defendant, **JULIUS OMAR ROBINSON**, in the commission of the offense knowingly created a grave risk of death to one or more persons in addition to Johnny Lee Shelton, the victim of the offense (18 U.S.C. § 3592(c)(5));

f. the defendant, **JULIUS OMAR ROBINSON**, committed the offense after substantial planning and premeditation to cause the death of a person (18 U.S.C. § 3592(c)(9));

g. Johnny Shelton's personal characteristics and the severe and detrimental effect of the instant offense on Johnny Shelton's family. See 18 U.S.C. § 3593(a) and Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991);

h. future dangerousness to the lives and safety of other persons, as evidenced by a lack of remorse, poor rehabilitative potential, and specific threats and acts of violence. See Jurek v. Texas, 428 U.S. 262, 272-273, 96 S. Ct. 2950, 2956- 2957 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society");

i. Defendant engaged in a prior act of violence: he pleaded guilty to Deadly Conduct by Discharging Firearm at an Individual on March 11, 1996. **ROBINSON** received deferred adjudication on this crime.

Count Eleven

a. On or about May 9, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, did intentionally kill Juan Reyes by shooting and killing him with a firearm (18, U.S.C. § 3591 (a)(2)(A));

b. On or about May 9, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally inflicted serious bodily injury that resulted in the death of Juan Reyes (18, U.S.C. § 3591 (a)(2)(B));

c. On or about May 9, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, did intentionally participate in an act, contemplating that the life of Juan Reyes would be taken, or intending that lethal force would be used in connection with Juan Reyes, a person other than one of the participants in the offense, and Juan Reyes, the victim, died as a direct result of the act (18 U.S.C. § 3591 (a)(2)(C));

d. On or about May 9, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, did intentionally engage in an act of violence, namely, shoot Juan Reyes, knowing that the act created a grave risk of death to a person other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim, Juan Reyes, died as a direct result of the act (18 U.S.C. § 3591 (a)(2)(D));

e. the defendant, **JULIUS OMAR ROBINSON**, in the commission of the offense knowingly created a grave risk of death to one or more persons in addition to Juan Reyes, the victim of the offense (18 U.S.C. § 3592(c)(5));

f. the defendant, **JULIUS OMAR ROBINSON**, committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to the victim (18 U.S.C. § 3592(c)(6));

g. the defendant, **JULIUS OMAR ROBINSON**, committed the offense after substantial planning and premeditation to cause the death of Juan Reyes (18 U.S.C. § 3592(c)(9));

h. the defendant, **JULIUS OMAR ROBINSON**, intentionally killed or attempted to kill more than one person in a single criminal episode (18 U.S.C. § 3592(c)(16));

i. future dangerousness to the lives and safety of other persons, as evidenced by a lack of remorse, poor rehabilitative potential, and specific threats and acts of violence. See Jurek v. Texas, 428 U.S. 262, 272-273, 96 S. Ct. 2950, 2956- 2957 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society");

j. Defendant engaged in a prior act of violence: he pleaded guilty to Deadly Conduct by Discharging Firearm at an Individual on March 11, 1996. **ROBINSON** received deferred adjudication on this crime.

Count Fifteen

a. On or about July 12, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, did intentionally participate in an act, namely, the luring of Rudolfo Resendez into Fort Worth, Texas, the plan to take Rudolfo Resendez to some remote location, and the plan to ultimately kill Rudolfo Resendez, all the while contemplating that the life of Rudolfo Resendez would be taken or intending that lethal force would be used in connection with Rudolfo Resendez, and Rudolfo Resendez, the victim, died as a direct result of the act (18 U.S.C. 3591 (a)(2)(C));

b. the defendant, **JULIUS OMAR ROBINSON**, committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value (18 U.S.C. § 3592(c)(8));

c. the defendant, **JULIUS OMAR ROBINSON**, committed the offense after substantial planning and premeditation to cause the death of Rudolfo Resendez (18 U.S.C. § 3592(c)(9));

d. future dangerousness to the lives and safety of other persons, as evidenced by a lack of remorse, poor rehabilitative potential, and specific threats and acts of violence. See Jurek v.

Texas, 428 U.S. 262, 272-273, 96 S. Ct. 2950, 2956- 2957 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society");

c. Defendant engaged in a prior act of violence: he pleaded guilty to Deadly Conduct by Discharging Firearm at an Individual on March 11, 1996. **ROBINSON** received deferred adjudication on this crime.

II.

TITLE 21 OFFENSES

The United States of America believes that the circumstances of the instant offenses of Continuing Criminal Enterprise and Possession With Intent to Distribute a Controlled Substance and while engaging in such offenses defendant intentionally killed Johnny Lee Shelton and Juan Reyes and Rudolfo Resendez are such that, if the defendant, **JULIUS OMAR ROBINSON**, is convicted, a sentence of death is justified for each offense under Title 21, United States Code, Section 848 (e)(1)(A).

The United States of America will prove, at a hearing held pursuant to Title 21, United States Code, Section 848, that:

Count Three

a. On or about December 3, 1998, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, did intentionally kill Johnny Lee Shelton by shooting and killing him with a firearm (21 U.S.C. § 848 (n)(1)(A));

b. On or about December 3, 1998, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally inflicted serious bodily injury which resulted in the

death of Johnny Lee Shelton (21 U.S.C. § 848 (n)(1)(B));

c. On or about December 3, 1998, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally engaged in conduct intending that Johnny Lee Shelton be killed or that lethal force be employed against Johnny Lee Shelton, which resulted in the death of Johnny Lee Shelton (21 U.S.C. § 848 (n)(1)(C));

d. On or about December 3, 1998, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally engaged in conduct, namely, shoot at Johnny Lee Shelton, which the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense, and resulted in the death of Johnny Lee Shelton (21 U.S.C. § 848 (n)(1)(D));

e. On or about December 3, 1998, the defendant, **JULIUS OMAR ROBINSON**, in the commission of an offense in violation of Title 21, United States Code, Section 841 (a) and 848, knowingly created a grave risk of death to one or more persons in addition to the victims of the offense (21 U.S.C., § 848(n)(5));

f. the defendant, **JULIUS OMAR ROBINSON**, committed the offense after substantial planning and premeditation to cause the death Johnny Lee Shelton (21 U.S.C. § 848(n)(8));

g. On or about May 9, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, did intentionally kill Juan Reyes by shooting and killing him with a firearm (21 U.S.C. § 848 (n)(1)(A));

h. On or about May 9, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally inflicted serious bodily injury which resulted in the death of Juan Reyes (21 U.S.C. § 848 (n)(1)(B));

i. On or about May 9, 1999, in the Northern District of Texas, the defendant, **JULIUS**

OMAR ROBINSON, intentionally engaged in conduct intending that Juan Reyes be killed or that lethal force be employed against Juan Reyes, which resulted in the death of Juan Reyes (21 U.S.C. § 848 (n)(1)(C));

j. On or about May 9, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally engaged in conduct, namely, shoot at Juan Reyes, which the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense, and resulted in the death of Juan Reyes (21 U.S.C. § 848 (n)(1)(D));

k. On or about May 9, 1999, the defendant, **JULIUS OMAR ROBINSON**, in the commission of an offense in violation of Title 21, United States Code, Section 841 (a) and 848, knowingly created a grave risk of death to one or more persons in addition to the victims of the offense (21 U.S.C., § 848(n)(5));

l. the defendant, **JULIUS OMAR ROBINSON**, committed the offense after substantial planning and premeditation to cause the death of Juan Reyes (21 U.S.C. § 848(n)(8));

m. the defendant, **JULIUS OMAR ROBINSON**, committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim (21 U.S.C. § 848(n)(12));

n. On or about July 12, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally engaged in conduct intending that Rudolfo Resendez be killed or that lethal force be employed against Rudolfo Resendez, which resulted in the death of Rudolfo Resendez (21 U.S.C. § 848 (n)(1)(C));

o. On or about July 12, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally engaged in conduct which the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense, and resulted in

the death of Rudolfo Resendez (21 U.S.C. § 848 (n)(1)(D));

p. the defendant, **JULIUS OMAR ROBINSON**, committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value (21 U.S.C. § 848(n)(7));

q. the defendant, **JULIUS OMAR ROBINSON**, committed the offense after substantial planning and premeditation to cause the death of Rudolfo Resendez (21 U.S.C. § 848(n)(8)).

r. future dangerousness to the lives and safety of other persons, as evidenced by a lack of remorse, poor rehabilitative potential, and specific threats and acts of violence. See Jurek v. Texas, 428 U.S. 262, 272-273, 96 S. Ct. 2950, 2956- 2957 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society");

s. Defendant engaged in a prior act of violence: he pleaded guilty to Deadly Conduct by Discharging Firearm at an Individual on March 11, 1996. **ROBINSON** received deferred adjudication on this crime.

Count Twelve

a. On or about July 12, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally engaged in conduct intending that Rudolfo Resendez be killed or that lethal force be employed against Rudolfo Resendez, which resulted in the death of Rudolfo Resendez (21 U.S.C. § 848 (n)(1)(C));

b. On or about July 12, 1999, in the Northern District of Texas, the defendant, **JULIUS OMAR ROBINSON**, intentionally engaged in conduct which the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense, and resulted in the death of Rudolfo Resendez (21 U.S.C. § 848 (n)(1)(D));

c. the defendant, **JULIUS OMAR ROBINSON,** committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value (21 U.S.C. § 848(n)(7));

d. the defendant, **JULIUS OMAR ROBINSON**, committed the offense after substantial planning and premeditation to cause the death of Rudolfo Resendez (21 U.S.C. § 848(n)(8)).

e. future dangerousness to the lives and safety of other persons, as evidenced by a lack of remorse, poor rehabilitative potential, and specific threats and acts of violence. See Jurek v. Texas, 428 U.S. 262, 272-273, 96 S. Ct. 2950, 2956- 2957 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society");

f. Defendant engaged in a prior act of violence: he pleaded guilty to Deadly Conduct by Discharging Firearm at an Individual on March 11, 1996. **ROBINSON** received deferred adjudication on this crime.

Respectfully submitted,

RICHARD H. STEPHENS
United States Attorney

by: _____
FREDERICK M. SCHATTMAN
Assistant United States Attorney
State Bar of Texas No. 17728400
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
Telephone: (817) 252-5200
Facsimile: (817) 978-3094

by: _____
REED C. O'CONNOR
Assistant United States Attorney
State Bar of Texas No. 15187980
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
Telephone: (817) 252-5200
Facsimile: (817) 978-3094

CERTIFICATE OF SERVICE

I certify that on this the 19th day of October, 2001, a true and correct copy of the Government's Notice of Intent to Seek the Death Penalty was served by United States First Class mail on the attorney for defendant.

_____
FREDERICK M. SCHATTMAN
Assistant United States Attorney

A2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA Plaintiff	§ § §	
VS.	§	CRIMINAL NO. 4:00-CR-260-Y
JULIUS OMAR ROBINSON (2) Defendant	§ § §	

APPENDIX 2

[A2]

FEDERAL DEATH ROW PRISONERS

FEDERAL DEATH ROW PRISONERS

Updated June 19, 2001

List of prisoners
Synopsis of cases:

- Sentenced under the Anti-Drug Abuse Act of 1988
- Sentenced Since the Federal Death Penalty Act of 1994
- Jury recommended death sentence but not imposed by judge
- Resentenced after clemency or reversal on appeal
- Sentence to death and executed

List of federal capital offenses
List of federal executions since 1927

List of Prisoners
Total =19 (+ 4 four waiting final disposition)

B = 14 W = 3 L = 2 N = 0 A = 0 U = 0

1. ALLEN, BILLIE JEROME (B)
2. BATTLE, ANTHONY (B)
3. BERNARD, BRANDON (B)
4. HALL, ORLANDO (B)
5. HAMMER, DAVID PAUL (W)
6. HIGGS, DUSTIN (B)
7. HOLDER, NORRIS (B)
8. JACKSON, RICHARD ALLEN
9. JOHNSON, CORY (B)
10. JOHNSON, DARRYL A. (B)
11. JONES, LOUIS (B)
12. ORTIZ, ARBOLEDA (L)
13. PAUL, JEFFREY WILLIAMS
14. ROANE JR., JAMES H. (B)
15. SINISTERRA, GERMAN (L)
16. STITT, RICHARD (B)
17. TIPTON, RICHARD (B)
18. VIALVA, CHRISTOPHER (B)
19. WEBSTER, BRUCE (B)

Inmates with death sentences reversed, but are awaiting final disposition:
BARNETTE, MARCIVICCI AQUILA (B)
CHANTHADARA, BOUNTAEM (A)
DAVIS, LEN (B)
HARDY, PAUL (B)

(Source: NAACP Legal Defense & Education Fund, "Death Row USA" with updates by DPIC)

Synopsis of Cases*

Inmates Sentenced Under the Anti-Drug Abuse Act of 1988:

Richard Tipton, Cory Johnson, James H. Roane, Jr. - Members of an inner-city gang in Richmond, VA. These three black defendants were sentenced to death in February 1993 for their participation in a series of drug-related murders.

Sentenced Since the Federal Death Penalty Act of 1994:

(names in brackets had death sentences reversed, but are awaiting final disposition)

Louis Jones - Black; sentenced to death in November 1995 in Texas for the kidnap/murder of a young white female soldier. The United States Supreme Court granted review of the case and heard arguments on February 22, 1999. The Supreme Court affirmed the conviction on June 21, 1999.

Orlando Hall, Bruce Webster - Black; charged in Fort Worth, Texas with the abduction, sexual assault and beating murder of a 16-year-old black female. Hall was sentenced to death in November 1995. In a separate trial, Webster was sentenced to death in June 1996.

[Len Davis, Paul Hardy] - Davis, a black New Orleans police officer who was under investigation in a drug conspiracy case, was sentenced to death on two convictions in April 1996 for ordering the murder of a young black woman who witnessed his beating of a witness in an unrelated incident. Hardy, also black, was the triggerman in the killing. Hardy was also sentenced to death on two convictions in May 1996. The Fifth Circuit reversed the sentences for both defendants and one of the two capital convictions for each defendant. The court ordered a new sentencing hearing for both defendants.

[Boutaem Chanthadara] - Asian; sentenced to death in October 1996 for the armed robbery/murder of the female proprietor of a Chinese restaurant in Wichita, Kansas. In November, 2000, the 10th Circuit of the U.S. Court of Appeals overturned Chanthadara's death sentence and remanded his case for a new sentencing hearing.

Anthony Battle - Black inmate incarcerated in the federal penitentiary in Atlanta, Georgia; history of psychiatric problems; sentenced to death in March 1997 for the murder of a prison guard. An appeal before the Eleventh Circuit is pending.

Jeffrey Paul - White; sentenced to death in June 1997 for the robbery-murder of a retired National Parks employee on federal land in Arkansas. An appeal before the Eighth Circuit is pending.

Darryl Alamont Johnson - Black; convicted of ordering the murder of two informants in Illinois in connection with the Gangster Disciples drug conspiracy cases. Sentenced to death on November 17, 1997. His co-defendant was sentenced to life in prison.

[Aquilia Barnette] - Black; convicted of murdering a man in North Carolina in a carjacking and a woman in Virginia, who was his former girlfriend. Sentenced to death by a jury on 2/10/98. The Fourth Circuit reversed his death sentence on 5/4/00 and he is awaiting re-sentencing.

Billie Jerome Allen - Black; convicted of the fatal shooting of a bank guard during a robbery in St. Louis, Missouri. Sentenced to death by a jury on 3/10/98.

Norris Holder -Black; convicted of fatal shooting of a bank guard during a robbery in St. Louis,

Missouri. Sentenced to death by a jury on April 3, 1998.

David Paul Hammer - White; convicted after killing of federal prison inmate at the federal penitentiary at Allenwood, PA where Hammer was serving a 1200+ year Oklahoma state sentence. Sentenced to death on July 24, 1998. The third Circuit allowed him to waive his appeal and an execution date of Nov. 15, 2000 was set. Hammer then filed a clemency petition and a request to appeal. The judge stayed his execution date, giving him until Jan. 31. 2001 to file an appeal.

Richard Thomas Stitt -Black; convicted of ordering the murder of three people in Norfolk Virginia. He was sentenced to death by a jury in November 1998 after a joint trial with three of the non-capital codefendants, who did not face the death penalty but rather life in prison. An appeal in the Fourth Circuit is currently pending.

German Sinistera and **Arboleda Ortiz** - Hispanic; in May, 2000, a federal jury in Kansas City, Missouri, recommended a death sentence for Sinistera of Houston, Texas, for his role as triggerman in the murder of a drug dealer. Sinistera is a citizen of Colombia. He was convicted along with two co-defendants, Arboleda Ortiz and Plutarco Tello, who are also Colombian nationals. The jury also recommended a death sentence for Ortiz, but not for Tello. The judge sentenced them to death.

Christopher Andre Vialya and **Brandon Am Bernard** - Black; a federal jury in Waco, TX, convicted the two in June, 2000, for the kidnapping and murder of an Iowa couple visiting central Texas. Although a sentence has not been formally entered, the jury has recommended a death sentence for both defendants. Attorneys for Vialya, 20, and Bernard, 19, said they would appeal the sentences to the 5th Circuit Court of Appeals in New Orleans. Four teen-agers have also plead guilty to federal charges relating to the crime, but have not yet been sentenced.

Dustin John Higgs - Black; Higgs was convicted in October 2000 of ordering the 1996 murder of three Maryland women after arguing with one of them in his apartment. The triggerman, Willis Mark Haynes, was convicted in May 2000 and sentenced to life plus 45 years in prison. Higgs's case is the third death penalty prosecution in Maryland since the federal death penalty was reinstated in 1988, but marks the first time a jury has imposed the death penalty. Under federal law, the judge is obligated to follow the jury's sentencing determination. (Washington Post, 10/27/00)

Richard Allen Jackson - White; Jackson was convicted in federal court on May 7, 2001 for use of a firearm on federal property (Bend Creek Recreation Area) during a felony resulting in the death of the victim. He was subsequently sentenced to death. Jackson had earlier been convicted in North Carolina state court for offenses arising from the same actions. He was convicted of the kidnapping and murder of Karen Lynn Styles in 1994. That conviction was overturned and Jackson later pleaded guilty to second degree murder.

Jury recommended death sentence but not imposed by judge:

Danny Lee - White; convicted in May, 1999 of a triple murder of a gun dealer and his family. Lee was convicted along with Chevie Kehoe in a plot to set up a whites-only nation in the Pacific Northwest. Kehoe was considered by prosecutors to be the mastermind of the plot, but he was given a life sentence by the same jury. The jury in Lee's case recommended a sentence of death. Lee was not formally sentenced to death, however, because a District Court judge granted Lee a new sentencing hearing.

Resentenced after clemency or reversal on appeal:

John McCullah - White; sentenced to death for a drug-related kidnap/murder of a Muskogee, Oklahoma auto dealership employee. The 10th Circuit granted McCullah a new penalty hearing in 1996, and in February, 2000, McCullah was resentenced to life in prison.

David Ronald Chandler- White, marijuana grower in Alabama; sentenced to death in 1991 for the murder for hire of a white male under the drug kingpin statute. Most of the government's witnesses, including the triggerman in the killing, have now recanted their testimony. The Eleventh Circuit overturned his death sentence in October, 1999 because of ineffectiveness of counsel. In December, 1999, the Court voted to rehear the case en banc, and by a 6-5 vote re-affirmed his death sentence. An appeal to the U.S. Supreme Court was filed. **Sentence commuted to life by President Clinton on January 20, 2001.**

Sentence to death and executed

Timothy McVeigh - White; sentenced to death in June 1997 for the bombing of the Oklahoma City federal building in 1995. The United States Supreme Court denied review on March 8, 1999. McVeigh was scheduled for execution on May 16, 2001 but was granted a 30 day stay by Attorney General John Ashcroft after it was discovered that the FBI did not disclose over 3,000 pages of document to McVeigh's defense team. McVeigh was executed on June 11, 2001.

Juan Raul Garza - Hispanic; marijuana distributor. Garza was sentenced to death in August 1993 in Texas for the murders of three other drug traffickers. Garza was denied review by the U.S. Supreme Court in late 1999 and was facing an execution date of August 5, 2000. The date was postponed until the Justice Department finished drafting guidelines for federal death row inmates seeking presidential clemency, which were issued in early August. Garza was offered the opportunity to apply for clemency under the new guidelines and a new execution date of Dec. 12, 2000 was set. In December, 2000, President Clinton again delayed Garza's execution for at least six months to allow further study of the fairness of the federal death penalty. **Garza was executed on June 19, 2001**.

- See also, DPIC's list of prisoners executed since 1927

A3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA Plaintiff	§	
VS.	§	CRIMINAL NO. 4:00-CR-260-Y
JULIUS OMAR ROBINSON (2) Defendant	§	

APPENDIX 3

[A3]

EXCERPTED TRANSCRIPT, PRESS CONFERENCE OF PRESIDENT BILL CLINTON JUNE 28, 2000

[Full transcript at www.usembassy-israel.org.il/publish/peace/archives/2000/june/me0628c.html]

Go ahead, Paul.

Q: A death penalty question, sir. Do you believe that Governor Bush made the wrong decision by allowing Mr. Graham to go to his death last week? And secondly, do you believe it's time for the American people to stop and reassess where we stand on implementation of the death penalty in this country?

THE PRESIDENT: Well, on the Texas case, I didn't read the file, all I know about it is what I've read about it in the press. But let me say generally what I think. I think that those of us who support the death penalty have an extra heavy responsibility to assure both that the result is accurate and that the process was fair and constitutional. And that means, to me, at least in modern terms, the broadest possible use of DNA evidence and the strongest possible effort to guarantee adequate assistance of counsel. That's a big issue. And I think those were two of the reasons that motivated Governor Ryan in Illinois to do what he did, and have driven a lot of other things in this debate. So that's where I think it is.

Now, I don't know that the American people have changed their position that it's still an appropriate penalty under certain severe

circumstances, and I haven't. But I am concerned also, at the federal level, with the -- I don't believe that adequate assistance of counsel is an issue in the federal cases. And as far as I know, there are no cases in which the question of DNA is an issue. There may be, I don't know if there are some.

The issues at the federal level relate more to the disturbing racial composition of those who have been convicted and the apparent fact that almost all the convictions are coming out of just a handful of states, which raises the question of whether, even though there is a uniform law across the country, what your prosecution is may turn solely on where you committed the crime. I've got a review underway of both those issues at this time.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	ACTION NO. 4:00-CR-260-Y
	§	
JULIUS OMAR ROBINSON (2)	§	

ORDER DENYING MOTION REGARDING INTENT TO SEEK DEATH PENALTY

Pending before the Court is Defendant's voluminous Motion and Brief Regarding Government's Intent to Seek the Death Penalty, which was filed in this cause on January 10, 2002 [document number 1443-1]. In the motion, Defendant raises eleven different points attacking the government's attempt to seek the death penalty against him. The government filed a response to Defendant's motion on January 16. After review of the foregoing documents, the evidence submitted in support, and the applicable law, the Court concludes that Defendant's motion should be and is hereby DENIED, for the reasons urged in the government's thorough response. Specifically, with respect to each of Defendant's points, the Court concludes as follows:

(1) Point One is denied because Defendant has wholly failed to present any evidence tending to demonstrate that the government has engaged in purposeful racial or geographical discrimination in deciding to seek the death penalty in this particular case. *See McCleskey v. Kemp*, 481 U.S. 279 (1987). The DOJ study Defendant relies upon is exactly the type of statistical evidence that was rejected in *McCleskey*. Furthermore, that study rebuts, rather than supports, Defendant's claims of racial discrimination, inasmuch as

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it demonstrates that since the implementation of the Attorney General's Protocol in 1995, the death-penalty has been sought against more white defendants than black defendants.

(2) Point Two is denied because Defendant has failed to demonstrate that, before he may be subjected to capital proceedings, he is entitled to grand-jury findings in the indictment that particular aggravating factors exist or that he acted with a particular mental state that would justify the imposition of the death penalty. As noted in *Jones v. United States*, 526 U.S. 227, 251 (1999), the Supreme Court has "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and lesser penalty, not as a process of raising the ceiling of the sentencing range available." Here, the grand jury's indictment charges Robinson with all of the elements of each capital offense, including the fact that death resulted from Robinson's actions. The death penalty is thus a punishment authorized by the charges in the grand jury's indictment, and the intent and aggravating factors about which Defendant complains are merely sentencing factors, rather than facts that would enhance his punishment beyond that contemplated by the grand jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 494 & n. 19 (2000) (discussing difference between a sentencing factor and a sentencing enhancement that increases the sentence beyond the maximum authorized statutory sentence). As a result, the Court concludes that the indictment in this cause is constitutionally sufficient.

(3) Point Three is denied for the reasons articulated in *United*

States v. Frank, 8 F. Supp. 253, 278 (S.D.N.Y. 1998).

(4) Point Four is denied because Defendant has failed to demonstrate that any one of the four allegedly duplicative aggravating factors "'necessarily subsumes' [any of] the other[s]." *Jones v. United States*, 527 U.S. 373, 398 n.13 (quoting *Cooks v. Ward*, 162 F.3d 1283, 1289 (10th Cir. 1998)). Indeed, it appears clear to the Court that they do not. Furthermore, Defendant's complaints about the "future dangerousness" aggravating factor and the government's intent to present evidence of Defendant's alleged low rehabilitative potential and lack of remorse to demonstrate the existence of this factor also lack merit. *See United States v. Davis*, 912 F. Supp. 938, 945-46 (E.D. La. 1996).

(5) Point Five is denied because a complete reading of the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.* ("FDPA") makes clear that Congress not only contemplated but actually authorized the use of non-statutory aggravating factors. *See* 18 U.S.C. § 3592(c); *see also* 18 U.S.C. § 3593(d).

(6) Point Six is denied for the reasons articulated in *United States v. Jones*, 132 F.3d 232, 239-40 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999).

(7) Point Seven is denied for the reasons articulated in *United States v. Jones*, 132 F.3d at 240.

(8) Point Eight is denied for the reasons articulated in *United States v. Jones*, 132 F.3d at 241-42.

(9) Point Nine is denied for the reasons articulated in *United States v. Nguyen*, 928 F. Supp. 1525, 1548 (1996). *See also Jones*

v. United States, 527 U.S. at 388-89 (applying plain-error review in an appeal under the FDPA).

(10) Point Ten is denied because Defendant has received, by way of the Indictment and the government's Notice of Intent to Seek the Death Penalty, sufficient information from which he can prepare his defense, avoid prejudicial surprise at trial, and bar the risk of double jeopardy. *See United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980). The government is not required to provide "a detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial." *Id.* Defendant's request for a bill of particulars regarding "[t]he factual components of the victim-impact evidence," (Def.'s Mot. at 93), seeks exactly that--evidentiary detail regarding the government's case.

(11) Point Eleven is denied for the reasons stated in *United States v. Jones*, 132 F.3d at 242.

SIGNED February 19, 2002.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

ORIGINAL

United States District Court

NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

JULIUS OMAR ROBINSON (02)
also known as "Scarface"
also known as "Scar"
also known as "Face"

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:00-CR-0260-Y (02)
Fred Schattman, Assistant U.S. Attorney
Reed C. O'Connor, Assistant U.S. Attorney
Wes Ball, Attorney for Defendant
Jack V. Strickland, Attorney for Defendant

On March 11, 2002, the defendant, JULIUS OMAR ROBINSON, was found guilty on each of counts one through fifteen and count 17 of the Second Superseding Indictment filed on June 19, 2001. Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 846 and 841(b)(1)(B)	Conspiracy to Distribute More than 100 Kilograms of Marijuana, a Class B Felony	November 8, 2000	1
21 U.S.C. §§ 846 and 841(b)(1)(A)	Conspiracy to Distribute More than 5 Kilograms of Cocaine, a Class A Felony	November 8, 2000	2
21 U.S.C. § 848(e)	Murder While Engaging in a Continuing Criminal Enterprise, a Class A Felony	November 8, 2000	3
18 U.S.C. § 924(c)(1)(A)(i) and 924(c)(1)(C)(i)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime, a Class A Felony	December 3, 1998 May 9, 1999 November 8, 2000	4, 8, and17
18 U.S.C. § 924(c)(1)(A)(ii)	Carry/Use a Firearm During a Drug Trafficking Crime, a Class A Felony	December 3, 1998 May 9, 1999 July 12, 1999	5, 9, and 13
18 U.S.C. § 924(c)(1)(C)(iii)	Carry/Use and Discharge a Firearm During a Drug Trafficking Crime, a Class A Felony	December 3, 1998 May 9, 1999 July 12, 1999	6, 10, and 14
18 U.S.C. § 924(j)	Murder in Course of Carrying/Using a Firearm During a Drug Trafficking Crime, a Class A Felony	December 3, 1998 May 9, 1999 July 12, 1999	7, 11, and 15
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) and 848(e)	Murder while Engaged in Possession of More than 5 Kilograms of Cocaine with Intent to Distribute, a Class A Felony	July 12, 1999	12

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Defendant's Mailing Address: Federal Medical Center-Jail Unit
3150 Horton Road
Fort Worth, Texas 76119

Defendant's Residence Address: same

June 5, 2002
Date of Imposition of Sentence

Terry R. Means

TERRY R. MEANS
U.S. DISTRICT JUDGE

SIGNED June 5, 2002

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It is ordered that the defendant pay a special assessment of $100.00 on each of counts 3, 7, 11, 12, 15, and 17 of the Second Superseding Indictment, for a total assessment of $600.00 which shall be due immediately.

EXECUTION

It is the judgment of the Court that the defendant, JULIUS OMAR ROBINSON, is sentenced to death on each of counts 3, 7, and 11 of the Second Superseding Indictment. The sentence of death on these counts shall be executed by a United States Marshal designated by the Director of the United States Marshals Service. The sentence of death on each of these counts shall be executed by intravenous injection of a lethal substance or substances in a quantity sufficient to cause the death of JULIUS OMAR ROBINSON. The defendant, JULIUS OMAR ROBINSON, pending execution of the sentences of death, is committed to the custody of the Attorney General or his authorized representative for appropriate detention until exhaustion of the procedures for appeal of the judgment of conviction and review of the sentences.

IMPRISONMENT

The defendant, JULIUS OMAR ROBINSON, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of LIFE on each of counts 12 and 15 of the Second Superseding Indictment, each such sentence of imprisonment to run concurrently with the other. The defendant, JULIUS OMAR ROBINSON, is hereby committed to the custody of the United States Bureau of Prisons for a term of three hundred (300) months on count 17 of the Second Superseding Indictment. The sentence on count 17 shall run consecutively to the sentences imposed on counts 12 and 15.

SUPERVISED RELEASE

Should the defendant ever be released from imprisonment, he shall be placed on supervised release for a term of five (5) years on each of counts 12, 15, and 17 of the Second Superseding Indictment, which terms shall run concurrently each with the other.

While on supervised release, in compliance with the standard conditions of supervision adopted by this Court, the defendant shall:

(1) not leave the judicial district without the permission of the Court or probation officer;
(2) report to the probation officer as directed by the Court or probation officer and submit a truthful and complete written report within the first five (5) days of each month;
(3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
(4) support the defendant's dependents and meet other family responsibilities;
(5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
(6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;
(7) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
(8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;
(9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
(10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;
(11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
(12) not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and

(13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon; and

report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration and make restitution.

The defendant is ordered to make restitution in the amount of $22,768. Of that sum, $22,220 shall be made jointly and severally with Angelo Harris. The remaining $548 in restitution shall be made jointly and severally with Nathan Deshawn Henderson, Jason Gehring, and L.J. Britt. All restitution shall be paid to the U.S. District Clerk, 501 West 10th Street, Room 310, Fort Worth, Texas 76102, for disbursement to Maria Reyes in the amount of $11,220; to Isaac Rodriguez in the amount of $11,000; and to Sheila Shelton in the amount of $548. If, upon commencement of the term of supervised release, any part of the $22,768 restitution ordered by this judgment remains unpaid, the defendant shall make payments on such unpaid balance at the rate of at least $200 per month, the first such payment to be made no later than 60 days after the defendant's release from confinement and another payment to be made on the same day of each month thereafter until the restitution is paid in full.

No restitution is ordered in relation to the death of Rudolfo Resendez because after reasonable effort no family members of Mr. Resendez could be located.

DISPOSITION OF OTHER COUNTS OF CONVICTION

The Court does not impose sentence on counts 1 and 2 because they are lesser included offenses of count 3. The Court does not impose sentence on counts 4, 5, and 6 because they are lesser included offenses of count 7. The Court does not impose sentence on counts 8, 9, and 10 because they are lesser included offenses of count 11. The Court does not impose sentence on counts 13 and 14 because they are lesser included offenses of count 15.

IN THE UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee	§ § §	
vs.	§	No. 02-10717
JULIUS OMAR ROBINSON, also known as Face, also known as Scar, also known as Scarface, Defendant - Appellant	§ § § §	

APPELLANT'S ORIGINAL BRIEF

****

DEATH PENALTY CASE

****

JACK V. STRICKLAND
The Bryce Building
909 Throckmorton Street
Fort Worth, Texas 76102
Telephone: 817-338-1000
Telecopier: 817-338-1020
State Bar No. 19397000

WES BALL
4025 Woodland Park Blvd.
Suite 100
Arlington, Texas 76013
Telephone: 817-860-5000
Telecopier: 817-860-6645
State Bar No. 01643100

CERTIFICATE OF INTERESTED PERSONS
(5th Cir. R. 28.2.1)

JULIUS OMAR ROBINSON, Appellant
vs.
UNITED STATES OF AMERICA
No. 02-10717

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Mr. Julius O. Robinson, appellant
   26190-177
   Post Office Box 33
   Terre Haute, Indiana 47808;

2. The Honorable Terry R. Means, judge presiding
   United States District Judge
   Northern District of Texas
   Fort Worth Division
   501 West 10th Street
   Fort Worth, Texas 76102;

3. Frederick M. Schattman, trial attorney
   Assistant United States Attorney
   801 Cherry Street, Suite 1700
   Fort Worth, Texas 76102;

4. Reed C. O'Connor, trial attorney
   Assistant United States Attorney
   (formerly of the Northern District of Texas)
   c/o801 Cherry Street, Suite 1700
   Fort Worth, Texas 76102;

5. Wes Ball, defense attorney, trial and appeal
Ball & Hase
4025 Woodland Park Boulevard, Suite 100
Arlington, Texas 76013;

6. Jack V. Strickland. defense attorney, trial and appeal
909 Throckmorton Street
Fort Worth, Texas 76102; and

7. Ms. Susan Cowger
Assistant United States Attorney
801 Cherry Street
Fort Worth, Texas 76102.

_____
JACK V. STRICKLAND
Attorney of record for Appellant

STATEMENT REGARDING ORAL ARGUMENT

(5th Cir. R. 28.24)
(Fed.R.App. P. 34(a)(1))

Appellant respectfully requests oral argument in this case.

This is a federal death penalty case, one of only a handful of such cases tried since the Federal Death Penalty Act was enacted in 1994. The principal issue on appeal is whether the government, in lieu of an indictment which alleged none of the intent or statutory aggravating factors, may nonetheless charge a capital offense and obtain a sentence of death.

This question presents significant and far-reaching constitutional issues. In addition, the finality of the punishment to which appellant is sentenced makes this a case worthy of oral argument. Appellant respectfully contends that oral argument would prove helpful as the Court struggles to resolve the serious issues raised by this case.

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JURISDICTIONAL STATEMENT

(Fed.R.App.P. 28(a)(4)(A)-(D))

This case was prosecuted in federal court under the authority of the following:

21 U.S.C. §§846 & 841 (b)(1)(B)
Conspiracy to Distribute More than 100 kilograms of Marijuana

21 U.S.C. §§846 & 841 (b)(1)(A)
Conspiracy to Distribute More than 5 kilograms of Cocaine

21 U.S.C. § 848 (e)
Murder while Engaging in a Continuing Criminal Enterprise

19 U.S.C. § 934 (c)(1)(A)(i) & (c)(1)(C)(i)
Possession Firearm in Furtherance of Drug Trafficking Crime

18 U.S.C. § 924 (c)(1)(A)(ii)
Carry/Use Firearm in Furtherance of Drug Trafficking Crime

18 U.S.C. § 924 (c)(1)(C)(iii)
Carry/Use/Discharge Firearm During Drug Trafficking Crime

18 U.S.C. § 924 (j)
Murder in Court of Carrying/Using Firearm during a Drug Trafficking Crime

21 U.S.C. §§ 841 (a)(1) & 841 (b)(1)(A) & 848 (e)
Murder while Engaged in Possession of More than 5 kilograms of Cocaine with Intent to Distribute

21 U.S.C. § 3581 et seq
Federal Death Penalty Act

ISSUES PRESENTED FOR REVIEW

(Fed.R.App.P. 28(a)(5))

ISSUE NUMBER ONE

THE INDICTMENT DID NOT INCLUDE AGGRAVATING FACTORS AND THUS THE DEATH PENALTY WAS NOT AUTHORIZED UNDER THE INDICTMENT CLAUSE OF THE FIFTH AMENDMENT.

ISSUE NUMBER TWO

THE FEDERAL DEATH PENALTY ACT VIOLATES THE INDICTMENT AND DUE PROCESS CLAUSES OF THE FIFTH AMENDMENT INASMUCH AS THE ACT REQUIRES THAT PROSECUTORS RATHER THAN GRAND JURORS CHARGE THE AGGRAVATING FACTOR ELEMENTS OF A CAPITAL OFFENSE.

ISSUE NUMBER THREE

THE TRIAL COURT ERRED BY ADMITTING HEARSAY STATEMENTS OF A WITNESS UNDER THE ERRONEOUS BELIEF THAT SUCH STATEMENTS WERE ADMISSIBLE AS CO-CONSPIRATORS STATEMENTS.

ISSUE NUMBER FOUR

THE FEDERAL DEATH PENALTY ACT VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE NUMBER FIVE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S COMPLAINT THAT THE GOVERNMENT'S NOTICE OF AGGRAVATING FACTORS WAS DUPLICITOUS, AND THE SUBMISSION OF DUPLICITOUS AGGRAVATING FACTORS RESULTED IN IMPROPER DOUBLE COUNTING.

ISSUE NUMBER SIX

THE TRIAL COURT ERRED IN DENIAL OF APPELLANT'S MOTION TO DISMISS NON-STATUTORY AGGRAVATING FACTORS AS UNAUTHORIZED BY STATUTE.

STATEMENT OF THE CASE

(Fed.R.App.P. 28(a)(6))

This is an appeal from a judgment of conviction and sentence of death, life imprisonment, and imprisonment for 300 months imposed in a federal prosecution. A jury found Robinson guilty of having violated multiple statutes in several counts of a superseding indictment as follows:

Count 1:	21 U.S.C. §§846 & 841 (b)(1)(B) Conspiracy to Distribute More than 100 kilograms of Marijuana
Count 2:	21 U.S.C. §§846 & 841 (b)(1)(A) Conspiracy to Distribute More than 5 kilograms of Cocaine
Count 3:	21 U.S.C. § 848 (e) Murder while Engaging in a Continuing Criminal Enterprise
Counts 4, 8 & 17:	19 U.S.C. § 934 (c)(1)(A)(i) & (c)(1)(C)(i) Possession Firearm in Furtherance of Drug Trafficking Crime
Counts 5, 9, & 13:	18 U.S.C. § 924 (c)(1)(A)(ii) Carry/Use Firearm in Furtherance of Drug Trafficking Crime
Counts 6, 10 & 14:	18 U.S.C. § 924 (c)(1)(C)(iii) Carry/Use/Discharge Firearm During Drug Trafficking Crime
Counts 7, 11, & 15	18 U.S.C. § 924 (j) Murder in Court of Carrying/Using Firearm during a Drug Trafficking Crime

Count 12:	21 U.S.C. §§ 841 (a)(1) & 841 (b)(1)(A) & 848 (e) Murder while Engaged in Possession of More than 5 kilograms of Cocaine with Intent to Distribute

Pursuant to the jury's recommendations, the district court sentenced Robinson to death on Counts 3, 7 and 11, and life imprisonment on Counts 12 and 15. Robinson was also sentenced to 300 months confinement on Count 17, to run consecutively with his sentences on Counts 12 and 15. Though adjudged guilty of the remaining counts, Robinson was not sentenced on those counts, the court concluding that they were lesser included offenses of other counts of conviction. Robinson appeals his judgment of conviction and the various sentences rendered in his case to the United States Court of Appeals for the Fifth Circuit.

FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

(Fed.R.App.P. 28(a)(7))

Appellant JULIUS OMAR ROBINSON is a young African-American man, with only a minor criminal history prior to the events which form the basis of this indictment. In 1998 ROBINSON became associated with a number of persons in a drug trafficking scheme. Those persons included among others, L.J. BRITT, who was likewise indicted for various drug offenses and murders.

In early 1999 the DEA became aware of the drug operation after the interception of a shipment of marijuana going from Arkansas to Arlington, Texas. Ultimately the DEA applied for and was granted authority to conduct wiretaps on the phone of ROBINSON. As a result of those wiretaps, surveillance, and information developed from various other persons, the DEA was able to intercept the drug shipments with which ROBINSON was associated.

During the course of this investigation, evidence was also developed which linked ROBINSON with three murders committed in 1998 and 1999. Based on these murders, ROBINSON, L.J. BRITT, and numerous other confederates were indicted for various drug trafficking offenses. In addition, ROBINSON and BRITT were each indicted for the three murders previously mentioned. The men were tried separately and the government sought the death penalty against each. In his 2002 trial,

ROBINSON received death for two of the murders alleged against him; although at least equally culpable, BRITT received life.

ISSUE NUMBER ONE

THE INDICTMENT DID NOT INCLUDE AGGRAVATING FACTORS AND THUS THE DEATH PENALTY WAS NOT AUTHORIZED UNDER THE INDICTMENT CLAUSE OF THE FIFTH AMENDMENT.

Summary of the Argument

On June 5, 2002, the District Court sentenced appellant Robinson to death under the FDPA for his alleged role in two homicides. Over objection, the prosecution sought the death penalty without having submitted *any* of the statutory aggravating factors to the grand jury. Relying on *Jones v. United States*, 526 U.S. 227 (1999), the trial court denied Appellant's objections concerning the indictment deficiencies, holding that under *Jones* the aggravated factors are not elements of a death penalty offense, but merely "...sentencing factors, rather than facts that would enhance his punishment beyond that contemplated by the grand jury." (*Order Denying Motion Regarding Intent to Seek the Death Penalty*, CR, Vol. 5, 1217). It is now apparent that under *Ring,* this reliance on *Jones* is no longer on sound footing. Appellant's motion and the court's order denying that motion preserve this error for review.

Following Appellant's conviction and sentence, and during the pendency of his appeal, the Supreme Court announced its decision in *Ring v. Arizona,* 122 S.Ct. 2428

(2002). Applying its intervening decision in *Apprendi v. New Jersey*, 530 U.S. 277 (1998) the court held that statutory aggravating factors in a scheme that is in pertinent part analogous to that of the Federal Death Penalty Act of 1994 (FDPA) are "elements" of an aggravated capital offense, and that under the Sixth Amendment's guaranty of trial by jury, that element must be submitted to the trial jury.

The United States Constitution contains a guaranty of grand jury indictment. All elements of a federal felony must be contained in the indictment and submitted to a grand jury. In light of *Ring*, the indictment in this case was fatally insufficient to charge a federal capital offense. The FDPA required the prosecution alone to give notice of the statutory aggravating factor or factors. Robinson's death sentence is unauthorized under *Ring* and therefore null and void.

Argument

I. The district court erred in sentencing Mr. Robinson to death, inasmuch as the indictment contained none of the intent or statutory aggravating factor allegations that are required to charge a federal capital offense.[1]

A. IN A FEDERAL PROSECUTION FOR A CAPITAL OFFENSE, THE INDICTMENT MUST BE SUBMITTED TO AND APPROVED

[1] A challenge to the sufficiency of an indictment is reviewed de novo. *United States v. White*, 241 F.3d 1015, 1020 (8th Cir. 2001) *United States v. Gayton*, 74 F.3d 545,551 (5th Cir. 1996).

BY A GRAND JURY.

The Fifth Amendment guarantees that no individual shall be held to account for a capital offense "unless on a presentment or indictment of a Grand Jury." *U.S. CONST., amend. V*. The common law mandated the use of indictments in all cases warranting serious punishment, and "[t}he Fifth Amendment made the rule mandatory in federal prosecutions in recognition of the fact that the intervention of the grand jury was a substantial safeguard against oppressive and arbitrary proceedings." *Smith v. United States*, 360 U.S. 1, 9 (1959). The Supreme Court has made it clear that a defendant may not be tried "on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

In *United States v. Dionisio*, 410 U.S. 19 (1973), the Court explained that the "most celebrated" purpose of the grand jury "is to stand between the government and the citizen" and protect individuals from the abuse of arbitrary prosecution:

> Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people ... As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep.

Id. at 33, 35. In a decision addressing the definition of "elements" of a federal offense that was announced on the same day as *Ring v. Arizona*, 122 S.Ct. 2428 (2002) the Supreme Court reaffirmed the importance of the grand jury – a group of

lay citizens rather than an elected or politically appointed prosecutor – in a gate-keeping role, noting that "grand and petit juries ... form a 'strong and two-fold barrier ... between the liberties of the people and the prerogative of the [sovereign].'" *Harris v. United States*, 122 S.Ct. 2406, 2418 (2002) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

B. THE INDICTMENT MUST CHARGE EVERY ELEMENT OF THE OFFENSE.

The Court has made it clear that the grand jury's role extends to every element of an offense. *Jones v. United States*, 526 U.S. 227, 232 (1998). As recently as *United States v. Cotton*, 122 S.Ct. 1781 (2002), a case involving the intersection of *Apprendi* and the plain error rule, the Court reaffirmed that any fact increasing the maximum punishment in a federal prosecution "must ... be charged in the indictment." *Id*. at 1783.

C. IN A CAPITAL CASE, THE STATUTORY AGGRAVATING FACTORS THAT RENDER A DEFENDANT ELIGIBLE FOR THE DEATH PENALTY ARE ELEMENTS OF THE OFFENSE.

In *Ring* the Court held that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" 122 S.Ct. at 2443 (quoting *Apprendi*, at 494, n. 19). *Ring* explained that "'the relevant inquiry is one not of form , but of effect,'" and that the effect of a finding of aggravating factors under the Arizona code was to expose a defendant "to a greater punishment than that authorized by the jury's guilty verdict." *Id*. at 2440 (quoting *Apprendi* at 494). The Court reasoned that "[i]f a [sovereign] makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the [sovereign] labels it – must be found by a jury beyond a reasonable doubt." *Id*. at 2439.

Although the context in which *Apprendi* gave the Supreme Court occasion to define "elements" for the purpose of constitutional analysis was the Sixth Amendment guarantee of trial by jury, the *ratio decidendi* of *Apprendi* indicates that the Court had the grand jury as well as the petit jury in mind:

> Just as the circumstances of the crime and the intent of the defendant at the time of the commission were so often essential elements to be alleged in the indictment, so too were the circumstances mandating a

> particular punishment. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment of the offense, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown 170]." Archbold, PLEADING AND EVIDENCE IN CRIMINAL CASES, at 51. If, then, "upon an indictment under the statute, the prosecutor proves the felony to have been committed, but fails in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only." *Id*., at 188.

Apprendi at 480-81. As *Ring* held with respect to submission to the trial jury therefore, facts beyond those defining the generic offense that are necessary to render a defendant liable to a higher degree of punishment are elements of an aggravated felony and must be charged by the grand jury. *Accordingly, Harris, supra,* at 2417 (holding that "[a] crime was not alleged, and a criminal prosecution was not complete, unless the indictment and the jury verdict included all the facts to which t}he legislature had attached the maximum punishment"); *Cotton*, *supra* at 1783 (recognizing that any fact increasing the maximum punishment to which the defendant may be subjected "must also be charged in the indictment").

In these recent instances of defining "element" for constitutional purposes, the Supreme

Court has yoked indictment to verdict and grand jury to trial jury. *Apprendi* and *Ring*

presented no occasion for the Court to hold that the elements of ethnic intimidation, on the one hand, and pecuniary gain and depravity of mind, on the other, had to be included in the indictment: both cases arose from state-court prosecutions and the guarantee of grand jury indictment does not apply to the states. But the Fifth Amendment explicitly protects the right to grand jury review of federal charges. With the restraints of federalism removed – as they are in the present appeal – there is no reason to treat an element differently when it relates to the guarantee of grand jury indictment than when it relates to the guarantee of petit jury trial.

D. IN A FEDERAL CAPITAL CASE, THE PROSECUTION MUST SUBMIT AT LEAST ONE STATUTORY AGGRAVATING FACTOR ELEMENT TO THE GRAND JURY, AND IT IF FAILS TO DO SO THE INDICTMENT DOES NOT CHARGE A CAPITAL OFFENSE.

The Constitution requires that the prosecution charge each element of a federal crime in an indictment. *Jones, supra*, at 232. Before *Ring* there was room to debate whether aggravating factors were elements of a capital offense. *Ring* ended the debate: aggravating factors operate as the "functional equivalent" of elements of a capital prosecution in any constitutional analysis. *Ring, supra* at 2443 quoting *Apprendi*, *supra* at 494.

Cotton recognized that the indictment clause of the Fifth Amendment requires

that any fact increasing the maximum punishment to which a defendant may be subjected "must also be charged in the indictment." *Cotton, supra* at 1783. In *Ring* the Supreme Court rejected the notion that statutory aggravating factors necessary to render a defendant eligible for the death penalty are not "elements" of a capital offense, even if the statute defining the predicate offense provides that death is a possible punishment. *Ring, supra* at 2439-40.

The Justice Department has all but conceded the necessity of alleging aggravating factors

in a capital indictment. [2] In *United States v. Moussaoui*, No. 01-455 (E.D. Va.), _____the prosecution acknowledged "that the [Supreme] Court is likely to find that the indictment clause mandates submission of aggravating factors to the grand jury." Government's Opp'n to Mot. to Dismiss Notice of Intent to Seek a Sentence of Death, *United States v. Moussaoui*, http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/66899/0.pdf. There the prosecution identified the panel majority's decision in *United States v. Allen,* 247 F.3d. 741, (8th Cir. 2001), *certiorari granted,* judgment vacated. 122 S.Ct. 2653 (2002) as the only opinion "to address the application of the indictment clause to the [Federal Death Penalty Act]" and conceded

[2]Appellant's co-defendant, L.J. Britt was tried on a superseding capital indictment which contained grand jury findings on the aggravating factors applicable to him. See Record Excerpt Tab #6.

that the remand of the case "further indicat[es] that the Supreme Court regards the indictment clause as applicable to aggravating factors in the FDPA."

In the *Allen* case, the Court of Appeals on remand will be considering the same issue presented here. As of this writing a decision had not yet been rendered in that case. Undoubtedly, based on the Supreme Court's remand, the Supreme Court of the United States will ultimately decide this issue.

Both the *mens rea* required by §3591 (a)(2) and the statutory aggravating factors required by § 3592 (c) were essential elements of the federal capital murder offenses for which Robinson was sentenced to death. *See also, Enmund v. Florida,* 458 U.S. 782, 797 ((1982) (*mens rea* requirement); *Gregg v. Georgia*, 452 U.S. 153, 187, 196-98 (1976) (plurality opinion) (*mens rea* and aggravation requirements). Each of those averments – never made by the grand jury, only by prosecutors – was one of fact. Taken together, those averments subjected Robinson to a greater punishment than that authorized by the facts alleged in the indictment alone.

Neither this Court nor Robinson has any way of knowing whether the grand jury would have returned an indictment alleging the presence of aggravating factors sufficient to charge a crime punishable by death.

A sovereign may vest authority in elected or appointed prosecuting attorneys to decide whether to seek the death penalty. *See, McCleskey v. Kemp*, 481 U.S. 279,

296-97 (1987). But that discretion hardly overrides – in fact is an archetypical reason for – the constitutional

requirement of neutral review of prosecutorial intentions. The prosecution in this case should have been precluded from seeking Robinson's execution through allegations that the grand jury never charged, and, to the best of our knowledge, never considered.. Now the sentence of death the government achieved should be vacated.

ISSUE NUMBER TWO

THE FEDERAL DEATH PENALTY ACT VIOLATES THE INDICTMENT AND DUE PROCESS CLAUSES OF THE FIFTH AMENDMENT INASMUCH AS THE ACT REQUIRES THAT PROSECUTORS RATHER THAN GRAND JURORS CHARGE THE AGGRAVATING FACTOR ELEMENTS OF A CAPITAL OFFENSE.[3]

Summary of the Argument

The Federal Death Penalty Act of 1994 (FDPA) is unconstitutional for its failure to require that any aggravating factors to be relied upon by the government in seeking a sentence of death, be presented to a grand jury and included in the indictment. The FDPA improperly and unconstitutionally delegates what should be the action of a grand jury in charging aggravating factors used to seek a death penalty. Additionally, only an act of Congress can "fix" the constitutional deficiency of the FDPA on the issue of inclusion of aggravating factors in the indictment.

Argument

The FDPA and the Arizona sentencing scheme found unconstitutional in *Ring* are the same for the purpose of applying the Supreme Court's definition of "element."

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[3] A challenge to the constitutionality of a statute is reviewed *de novo*. *Hamilton v. Schirro*, 74 F.3d 1545, 1552 (8th Cir. 1996).

Each allows death as a theoretical sentence in the statute defining the offense, and in a separate statute each sets forth the aggravating factors and procedural steps necessary to render the accused eligible for capital punishment. Under neither scheme does the fact that a trial jury returns a guilty verdict on the underlying offense authorize the imposition of a death sentence, or even authorize the same jury or judge to consider such a sentence. Both the Arizona statute and the FDPA require additional proceedings and fact-finding with respect to the aggravating factor elements of a capital offense.

A. THE FEDERAL DEATH PENALTY ACT COMMITS THE CHARGING OF THE STATUTORY AGGRAVATING FACTOR ELEMENT OF A CAPITAL CRIME TO PROSECUTING ATTORNEYS RATHER THAN TO GRAND JURORS.

The Federal Death Penalty Act of 1994 authorizes a sentence of death only after the prosecution has charged and proved aggravating factors, including at least one of sixteen listed in § 3592 (c) for homicide-related offenses. 18 *U.S.C.* §§ 3591-3593. The Act provides without ambiguity that the allegation of aggravating factors against a defendant will be made by prosecuting attorneys in a notice of intent to seek a sentence of death, rather than by a grand jury in its indictment. 18 *U.S.C.* § 3593 (a). The Fifth Amendment states that "no person shall be held to answer for a capital,

or otherwise infamous crime, unless on a presentment or indictment of a grand jury." *U.S. CONST.* , amend. V. The FDPA bypasses grand juries in this integral aspect of the capital charging process. By committing the decision to charge one element of a capital offense to politically appointed prosecutors and their employees, rather than to a body of lay citizens, Congress created a death penalty scheme that is unconstitutional.

The FDPA does not contemplate a grand jury having any role at all in deciding who will or will not face a sentence of death. Instead Congress vested the sole authority to make and implement that decision in the executive branch:

> If ... the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice –
>
> > (1) stating that the government believes that the circumstances of the offense are such that ... a sentence of death is justified under this chapter and that the government will seek the sentence of death; and
> >
> > (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

18 *U.S.C.* § 3593 (a). Subsection (b) of the same section provides for a death-sentencing hearing before the jury or before the judge in cases not tried to a jury. The

context of subsection (a) allows no good-faith doubt that the actions it prescribes will occur *after* the accused has been indicted for an offense that, in the abstract, might subject him to the death penalty.

B. ONLY AN ACT OF CONGRESS CAN CURE THE CONSTITUTIONAL DEFICIENCY OF THE FDPA.

Ring holds that aggravating factors which must be charged and proved to make a defendant eligible for execution are elements of a capital offense. *Ring, supra* at 2443. *Ring* thus establishes as well that in enacting the FDPA Congress defined the new crime of federal capital murder. The FDPA needs repair if the federal government intends to continue to use it as the vehicle for sentencing people to death.

Neither prosecutors nor judges can ameliorate the constitutional infirmities of the FDPA by re-routing the process of charging aggravating factors through grand juries. That "fix" would be an unconstitutional exercise of the legislative power by the executive or judicial branch. Federal courts would be required to make numerous judgment calls of a legislative nature. For example, which aggravating factors must be included in the indictment? Must, or *may*, a defendant plead to those factors? Do the diminished evidentiary standards provided by the Act for the penalty trial apply to the proof of some or all aggravating factors? If they apply to the proof of

aggravating factors, do those standards apply as well to the presentation of mitigating evidence?

Ever since 1812 it has been the law that only Congress has the power to define federal crimes. *United States v. Hudson*, 11 U.S. 32 (1812). Prosecutors cannot circumvent the legislative process by re-inventing the charging process mandated by Congress in the FDPA. Neither should this Court accommodate any request by prosecutors for judicial reconstruction of the Act.

Congress has enacted a statute with unambiguous provisions that conflict with the Constitution. It is the duty of the federal courts to recognize that unconstitutionality rather than to engage in legislative efforts designed to "save" the Act:

> Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. *Garcia v. United States*, 469 U.S. 70, 75 (1984); *United States v. Tercet*, 452 U.S. 576, 580 (1981). "[O]nly the most extraordinary showing of contrary intentions" in the legislative history will justify a departure from the language. *Garcia*, 469 U.S. at 75. This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews,* 465 U.S. 728, 741-42 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96 (1985). Proper respect for those powers implies that

> "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N' Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

United States v. Albertini, 472 U.S. 675, 679 (1985); *see also Department of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230, 1235-36 (2002) (stating that the canon of constitutional avoidance "has no application in the absence of statutory ambiguity").

The Supreme Court once before considered whether a federal death penalty provision that violated the Fifth and Sixth Amendments could be remedied by judicial reconstruction. In *United States v. Jackson*, 390 U.S. 570 (1968), the Court found a sentencing provision unconstitutional. *Id*. at 581-82. In an effort to salvage the provision, prosecutors proposed a number of interpretations of the statute and cited *ad hoc* procedures developed by district courts as "cures for the constitutional problems." *Jackson* rejected each approach, holding that the statute required legislative rather than judicial repair. *Id*. at 572-81.

In obvious reliance upon *Walton v. Arizona*, *supra,* Congress has created a scheme in which prosecuting attorneys alone have discretion to determine whether to charge a capital offense and if so, which aggravating factors to seek to prove. The overruling of *Walton* and the recognition that aggravating factors are elements of a

federal capital crime have rendered that scheme constitutionally untenable. Allowing prosecutors to now seek the indictment of congressionally defined factors would give "to the [grand jury] the ultimate duty that Congress deliberately placed in other hands." *See Jackson* at 576; *see also Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (refusing to transfer obscenity determination from Postmaster General to court in order to "save" statute).

The capital sentencing scheme of the FDPA is unconstitutional. Congress created the problem. It is for Congress alone to select an alternative scheme that comports with the Constitution. Neither the executive nor the judicial branch has the power to adopt a constitutional procedure based on the defective FDPA. Congress may or may not choose that procedure. In light of *Ring,* Congress may elect to have a completely different death penalty act – or it may choose to have no death penalty act at all:

> This task is outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than it is for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law.

United States v. Evans, 333 U.S. 483, 495 (1948).

The FDPA provided a system to govern many different aspects of capital punishment in federal courts. Robinson has identified one aspect that clearly is

unconstitutional in light of *Ring*. But many aspects may be subject to amendment in the wake of changes to the statute required by *Ring*. In *Jackson* the Court explained that judicial procedure-crafting in such situations is "fraught with the gravest difficulties" because it generates a proliferation of questions, leaving defendants "without the guidance that [they] ordinarily find in a body of procedural and evidentiary rules spelled out in advance of trial." 390 U.S. at 579-80.

Congress enacted the FDPA before *Walton, supra*, had been overruled by *Ring*. Under *Walton* aggravating factors were not elements of a capital crime. Having ample reason to believe that aggravating factors were sentencing considerations rather than offense elements, Congress surely did not intend to create new offenses in the FDPA. In light of *Ring* it is clear that the Act did create a new federal crime. The substantive and procedural provisions of the FDPA now lie in disarray. A court should not do what Congress never intended by "construing" grand juries into the capital charging process and otherwise configuring the legislation.

A construction of the FDPA allowing for the charging of aggravating factors by grand juries would require turning a blind judicial eye to the ordinary meaning of the language chosen by Congress. *Ring* materially altered the constitutional environment in which Congress had enacted the FDPA. Until Congress corrects the constitutional infirmity in the sentencing scheme that it designed, the Act cannot be

reconciled with the indictment clause of the Fifth Amendment. This Court should declare the FDPA unconstitutional and vacate the death sentence imposed upon Robinson.

ISSUE NUMBER THREE

THE TRIAL COURT ERRED BY ADMITTING HEARSAY STATEMENTS OF A WITNESS UNDER THE ERRONEOUS BELIEF THAT SUCH STATEMENTS WERE ADMISSIBLE AS CO-CONSPIRATORS STATEMENTS.

Summary of the Argument

At the punishment phase of Robinson's trial, the government introduced testimony from Michael Williams, who claimed to have been briefly restrained of his liberty, threatened, and superficially assaulted by unknown persons in Dermott, Arkansas. (RR. 20: 140-142) This offense occurred, if it did, while Robinson was confined awaiting trial. There was no evidence linking Robinson to this incident other than the testimony of Williams, who claimed that his assailants had made some vague hearsay statements during the course of events. (RR. 20: 142). Williams himself is a felon, and was awaiting sentencing at the time of his testimony. Williams admitted his desire to be seen as cooperating with the government. (RR. 20: 138-139). Robinson objected to the testimony.

Argument

The testimony in issue should have been excluded on several grounds. First, the statements about which Williams testified were made by other persons, none of whom were present in court, and were offered for the truth of the matter asserted.

The statements were clearly hearsay, were not admissible under an exception to the evidentiary rule prohibiting the introduction of such uncorroborated hearsay testimony, and should have been excluded. R. 801(d) 2(E), FED.R.EVID. While this rule provides an exception for the introduction of some statements by co-conspirators, the rule also requires a showing that the declarant and Robinson both be members of the conspiracy. Robinson contends that there was no such showing. Accordingly, these hearsay statements should not have been admitted for the jury's consideration.

Secondly, this hearsay evidence should have been excluded as mere character conformity evidence, which is not relevant and therefore not admissible. R. 404(b), Fed.R.Evid. If the evidence is thought be have been relevant, the testimony should nonetheless have been excluded inasmuch as its probative value, if any, was substantially outweighed by the danger of unfair prejudice to Robinson. R. 403, Fed.R.Evid. The consequences of the court having improperly admitted this evidence are obvious and serious. Errors in evidentiary rulings are subject to a harm analysis. R.52, Fed.R.Crim.P.; *United States vs. Phillips*, 664 F.2d 971, 1027 (5th Cir. 1980). Under such an analysis the error will not require reversal if "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The jury in this case was being asked to consider whether Robinson should live or die. One of the factors which bare on that

decision was Robinson's propensity for future violence, an aggravating element which the government was seeking to prove in its quest for death. The uncorroborated and highly suspect "evidence" that Robinson was capable of ordering criminal activity outside his place of confinement would necessarily affect a punishment verdict -- which in this case was death. The harm of the error is direct, obvious, and ultimately life-ending. The judgment and sentence should accordingly be reversed.

ISSUE NUMBER FOUR

THE FEDERAL DEATH PENALTY ACT VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Summary of the Argument

Julius Robinson, who was prosecuted under the Federal Death Penalty Act, (FDPA), was sentenced to death. Prior to his sentencing, Robinson filed a motion questioning the constitutionality of that act.[4] In those motions urged, as he does now, that evolving standards of decency, as well as a growing awareness of wrongful convictions of those sentenced to death, render the death penalty constitutionally unacceptable.

The question before the Court is whether the government may constitutionally continue to employ the death penalty, in light of the fact that by doing so, it will execute innocent defendants on a regular basis. This issue has never been addressed by the Supreme Court. Under governing case law, it must be considered both under the Due Process Clause of the Fifth Amendment and under the Cruel and Unusual Punishments Clause of the Eighth Amendment, considering evolving standards of decency, as well as current knowledge about the operation of the death penalty in

[4]During the pendency of Appellant's trial, a District Court in *United States v. Quinones*, 196 F.Supp.2d 416 (S.D.N.Y. 2002) announced its tentative conclusion that the FDPA was unconstitutional. This potential precedent was not available at the start of Appellant's trial.

practice.

Argument

The district court in *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002) on the basis of an extensive record, found that recent developments – in particular the advent of DNA identification technology, and the extraordinary number of death-row exonerations in the past decade – demonstrate that the number of innocent defendants executed is far greater than was generally suspected just several years ago. It also found, to no one's surprise, that Federal death penalty prosecutions are no less error-prone than state cases; indeed, the record suggests that they may be more so.

Our understanding of the magnitude of this unacceptable miscarriage of justice has changed utterly in a matter of years. Nine years ago, in *Herrera v. Collins*, 506 U.S. 390 (1993) a majority on the Supreme Court stated that the execution of an innocent individual would be "a constitutionally intolerable event," but the Court naively considered such an event "remote and unlikely". *Herrera*, *supra* at 419. The Supreme Court has never addressed the issue as presented here with this emerging evidence of wrongful convictions. Four months ago is perhaps the closest it has come. In *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242 (2002) the Court noted that "in recent years a disturbing number of inmates on death row have been exonerated."

122 S. Ct. 2242 at 2252, n. 25 (2002). In this new context, the district court correctly held that to continue to execute, knowing as we now do that in the process we will kill a substantial number of innocent citizens, is just as constitutionally intolerable as to knowingly execute an innocent person. Accordingly the *Quinones* district court held the Federal Death Penalty Act (FDPA) 18 U.S.C. §§ 3591-3598 unconstitutional due to its violation of substantive and procedural due process rights as guaranteed by the Fifth Amendment.

The government appealed the decision of the district court and its decision was reversed in *United States v. Quinones* 313 F.3d 49 (2nd Cir. 2002). (the Court quickly dispensed with the Eighth Amendment claims by citing *Gregg v. Georgia*, 428 U.S. 153 (1976). [5] In its opinion, the Second Court declined to overturn United States Supreme Court precedent that has rejected the claim that it is constitutionally infirm to deprive individuals of the opportunity for continued exoneration. Oddly, the Court

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[5] Like the Circuit Court, the Government will urge that: "[t]he constitutionality of the death penalty under the Cruel and Unusual Punishments Clause of the Eighth Amendment has been settled at least since *Gregg v. Georgia*, 428 U.S. 153 (1976)." In *Gregg* and its companion cases, the Supreme Court, of course, did hold that the death penalty is not intrinsically unconstitutional, and that three of the five death penalty statutes before the Court contained adequate procedural safeguards to avoid the arbitrary the imposition of death sentences that was condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). But there is another holding in Gregg and Furman that is more important to the case at hand: That the constitutionality of the death penalty under the Cruel and Unusual Punishments Clause turns on "the evolving standards of decency that mark the progress of a maturing society." 428 U.S. at 173, quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1982). *Furman* and *Gregg* provide direct authority for the District Court's decision in *Quinones.*

said that the command of the Due Process Clause is violated "only if it offends some principle of justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'" *Quinones* Id. at 34. In the same breath, the court apparently arrives at the startling conclusion that executing the innocent is not so sufficiently rooted in our traditions and conscience as to be fundamental.

The facts that distinguish earlier precedent include the emerging and increasingly obvious realization that the number of individuals wrongly convicted is much higher than was previously believed. The development of the science of DNA has been the main catalyst to the emerging body of evidence on this point. It may well be that other new technologies will further illuminate the frequency of these wrongful convictions and sentences. Prior to these developments, it was mere speculation in most instances that second-guessed judgments of conviction. We should take no great comfort in the long history of the death penalty in our jurisprudence in light of these developments, nor in the inaction of our legislatures. The Constitution should not silently wait for legislative action. We should not align ourselves with the Second Court's deference when it stated: "...if the well-settled law on this issue is to change, that is a change that only the Supreme Court or Congress is authorized to make". *Quinones, supra* at ____. Appellant contends that all Federal courts possess the inherent power to enforce the provisions of our Constitution.

Robinson has to start somewhere. He raised this issue in the Texas district court prior to his sentencing, and now re-urges his contention before this court.

ISSUE NUMBER FIVE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S COMPLAINT THAT THE GOVERNMENT'S NOTICE OF AGGRAVATING FACTORS WAS DUPLICITOUS, AND THE SUBMISSION OF DUPLICITOUS AGGRAVATING FACTORS RESULTED IN IMPROPER DOUBLE COUNTING

Summary of the Argument

Appellant filed a pretrial motion which complained that the government's notice of its intent to seek the death penalty setting out aggravating factors it intended to prove was duplicitous. Appellant argued that the notice allowed the government to seek the death penalty by double counting the same acts or conduct in more than one aggravating factor, or to create as an aggravating factor based on conduct that was already included in the underlying conviction. (CR. 3: 570, 642) The trial court entered an order denying Appellant's motion. (CR. 5: 1216, 1218) The complained of aggravating factors were submitted to the trial jury at the punishment phase of Appellant's trial which resulted in the sentence of death. Appellant continues his complaint in his appeal.

Argument

It is clear that the Federal Death Penalty Act is a weighing scheme for assessing a death penalty. Jurors determine whether aggravating factors exist and weigh them against mitigation factors in reaching a punishment verdict. 18 U.S.C. § 3593 (e)(1). Appellant sets out the offending factors pertaining to count 11 as follows:

> e. the defendant, Julius Omar Robinson, in the commission of the offense knowingly created a grave risk of death to one or more persons in addition to Juan Reyes, the victim of the offense. (18 U.S.C. § 3592 (c)(5);
>
> ...
> h. the defendant, Julius Omar Robinson, intentionally killed or attempted to kill more than one person in a single criminal episode. (18 U.S.C. § 3592(c)(16).

These two assertions are listed as statutory aggravating factors in the referenced statutory sections. These two assertions essentially allege the same conduct.

Aggravating factors – especially where utilized in a weighing jurisdiction – may not be alleged in duplicative fashion. This is to avoid the effect of having the same conduct or circumstance found repeatedly and weighed repeatedly. Duplicative aggravating factors – like invalid aggravating factors – have the undeniable tendency to undermine the integrity of the weighing process, since the same factor is weighed more than once by the jury. *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996) (Reversing a sentence of death). The effect of duplicative factors – like invalid

factors – is to place "the thumb [on] ... death's side of the scale." *Stringer v. Black*, 503 222, 232 (1992). In *McCullah,* the court stated:

> [D]ouble counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally. [citation omitted] As the Supreme Court of Utah pointed out, when the same aggravating factor is counted twice, the "defendant is essentially condemned 'twice for the same culpable act,'" which is inherently unfair. *Parsons v. Barnes*, 871 P.2d 516, 519 (Utah).

McCullah, 76 F.3d at 1111-12. The *McCullah* court also noted that "the mere finding of an aggravating factor cannot but imply a qualitative value to that factor." *Id*. at 1112. In essence, the more aggravating factors there are, and a scheme which allows prosecutors to allege non-statutory factors guarantees numerosity, the further the death-side of the balance will tip, even if the same conduct has been subtly, or not so subtly, recast and reborn as an ostensibly new and separate aggravating factor.

As summarized in the *McCullah* opinion, duplicative utilization of the same conduct to support more than one aggravating factor has a prejudicial tendency to produce arbitrary and capricious death verdicts. In this case, the government chose to utilize the same conduct in a repetitive manner by taking a single course of conduct to create three separate aggravating factors: (1) grave risk of death to others[6] that

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[6] This factor in the government's notice is in paragraph "d" for count 11 and is presumably alleged pursuant to 18 U.S.C. § 3591 (a)(2)(D). This provision is one of the

caused the death of Juan Reyes; (2) grave risk of death to persons other than Juan Reyes; (3) multiple killings or attempted killings.

The government's multiple use of overlapping and indistinguishable elements of the offense creates precisely the danger discussed in *McCullah* and *Stringer, supra*. The jury, passing on a single course of conduct would find three separate factors from that conduct and load them all in the death-side of the balance. This duplicity permitted by the trial court was error.

Once the court has determined that the aggravating factor or factors are invalid as duplicitous, the court must then apply some standard of harmless error review. This court in *United States v. Jones*, 132 F.3d 232, 252 (5th Cir. 1998) applied a "second" standard of harmless error review and inquired whether beyond a reasonable doubt, a death sentence would have been imposed absent the invalid aggravating factors. This court redacted the invalid aggravating factors and reconsidered the entire mix of aggravating and mitigating factors presented to the jury. Appellant urges that he was harmed by the duplicative aggravating factors and that it cannot be concluded "beyond a reasonable doubt" that his death sentence would have been imposed in any event.

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predicates required before consideration of the § 3592 factors that concentrates on the culpable mental state of the actor.

ISSUE NUMBER SIX

THE TRIAL COURT ERRED IN DENIAL OF APPELLANT'S MOTION TO DISMISS NON-STATUTORY AGGRAVATING FACTORS AS UNAUTHORIZED BY STATUTE.

Summary of the Argument

Prior to the commencement of trial, Appellant filed his Motion and Brief Regarding Government's Intent To Seek The Death Penalty. (CR. 3: 570, 645-50) This motion raised eleven points challenging various aspects of the government's notice and intent to seek the death penalty. Among those points raised was a complaint that the Federal Death Penalty Act did not authorize the use of aggravating factors that were not listed in the statute, otherwise referred to herein as non-statutory aggravating factors. This motion was denied by the trial court. (CR. 5: 1216, 1218) Appellant urges that this motion should have been granted on this issue and raises the same complaint in his appeal.

Argument

Aggravating factors serve a vital function in death-penalty jurisprudence. In *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), the Court stated that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether

a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." In the case of the FDPA, it is obvious that the aggravating factors (statutory and non-statutory) are intended to perform the necessary narrowing function. The choice of schemes reflects a conscious legislative decision that not all murderers deserve the death penalty. Instead, the class of such murderers is to be narrowed by reference to particular facts and circumstances about the crime or the criminal. Moreover, in a weighing jurisdiction, the sheer number of aggravating factors becomes of particular concern leading prosecutors to believe they are permitted to make aggravating factors up as they go along. The combination of a weighing jurisdiction which permits non-statutory factors can yield, with deadly effect, the placement of a "thumb on death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 230 (1992).

In *United States v. Davis*, 912 F.Supp. 938 (E.D. La. 1996), the trial court also had occasion to discuss utilization of non-statutory aggravating factors in a case brought pursuant to the FDPA, concluding as follows:

> The statute [FDPA] is a "weighing" statute. Once the evidence of all the aggravating and mitigation factors is in, the jury is to consider whether all of the former factors "outweigh" the latter. § 3593 (e). To carefully define the statutory aggravating factors, but then allow wholesale introduction of non-statutory aggravating information would defeat the goal of guided and measurable jury discretion and return us to an unconstitutional system where the death penalty is "wantonly" and

> "freakishly" imposed. It cannot be presumed that Congress intended to create a statute that is so self-defeating, much less one that would be unconstitutional. Additionally, as noted in *Gregg,* juries have little, if any, experience with sentencing and "are unlikely to be skilled in dealing with the information they are given." 96 S.Ct. at 2934. Any guidance that can be provided – particularly in a decision so fundamental and profound as that made in a capital case – must be provided. All of the above mandates that judicial discretion be exercised and the non-statutory aggravating factors be carefully screened. In doing so, this court must seek to fulfill the intent of Congress and at the same time construe the statute in a manner that maintains its constitutionality. *Davis* at 943.

The government takes the position that the FDPA allows the government at virtual whim, to utilize non-statutory aggravating factors in pursuit of a death sentence. In this case, the government set forth non-statutory factors in its notice that were submitted to the jury in Appellant's case, specifically, the future dangerousness factor and the assertion that Appellant had engaged in a previous act of violence and received deferred adjudication for his crime. (CR. 2: 301; 5; 1335)

The FDPA statutory scheme requires the government, as part of its notice obligations, to file with the Court, and serve upon the defendant, a document that, *inter alia*, sets forth:

> [T]he aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.
>
> The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, victim impact

> statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim, and the victim's family, and any other relevant information.

18 U.S.C. § 3593 (a). The statute then goes on to list 16 separate aggravating factors as relevant to this kind of case. 18 U.S.C. § 3592 (c).[7]

The use of non-statutory aggravating factors – with the possible exception of victim-impact evidence[8] – is simply not authorized by the statute. This is because § 3592 (c) of the statute contradicts § 3591 (a) of the statute. The former provides that the jury "may consider whether any other aggravating factor for which notice has been given exists." 18 U.S.C. § 3592 (c). But § 3591 (a) provides that a defendant may be sentence to death only after a consideration by the jury of "the factors set forth in § 3592 ...." Section 3592 contains, as noted above, a listing of 16 factors and 16 factors only. Therefore, non-statutory factors may not be considered by a jury since they are not – and could not be – set out in § 3592.[9] This same infirmity is present between 18 U.S.C. § 3591 (b) and § 3592 (d) which sets out 8 aggravating factors rather than 16.

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[7] See also list of statutory aggravating factors in 21 U.S.C. § 848 (n).

[8] Section 3593 seems to allow for victim-impact evidence as a factor for which notice may be given. 18 U.S.C. 3593 (a)(2).

[9] This view of the requirements of the FDPA is reinforced by the fact that the section of the Act concerning appellate review, § 3595, makes reference only to aggravating factors considered by the jury under § 3592.

In *United States v. Nguyen*, 928 F. Supp. 1525, 1535 (D. Kans. 1996), the trial judge described, and rejected, the above-stated statutory argument as "hyper-literal." Yet, if Congress is going to go into the business of authorizing death sentences and executions, it has a concomitant responsibility to speak in a language which is clear and unambiguous. Whatever political capital there is to be made on pursuit of the death penalty must be earned by clear legislative direction. Because the statute does not authorize non-statutory aggravating factors – except in the case of victim -impact – the non-statutory aggravating factors in this case should have been dismissed and not submitted to Appellant's jury.

CONCLUSION
(Fed.R.App.P. 28(a)(10))

Appellant Robinson prays that this Honorable Court reverse and remand his case for a new trial, or in the alternative for a new punishment hearing based on the errors raised in his brief. Appellant Robinson further prays that upon reversal and remand, that this Court find that due to the constitutional infirmities raised herein, that he is not subject to the death penalty under the Federal Death Penalty Act of 1994 for the conduct that is the subject of this cause. Appellant also prays for any other and further relief to which he may be entitled.

Respectfully submitted,

BALL & HASE
4025 Woodland Park Boulevard, Suite 100
Arlington, Texas 76013
Telephone: 817-860-5000
Telecopier: 817-860-6645

_____
WES BALL
State Bar No. 01643100

LAW OFFICES OF JACK V. STRICKLAND
The Bryce Building
909 Throckmorton Street
Fort Worth, Texas 76102
Telephone: 817-338-1000
Telecopier: 817-338-1020

_____
JACK V. STRICKLAND
State Bar No. 19397000

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE
(Fed.R.App.P. 32 (a)(7)(B)

Certificate of Compliance with Type-Volume Litigation,
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_____
JACK V. STRICKLAND

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On this the _____ day of June, 2003, I hereby certify that a true and correct copy of the foregoing Appellant's Original Brief was forwarded to the following by placing same in the United States Mail, proper postage affixed:

1) Frederick M. Schattman
Assistant United States Attorney
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
Facsimile No. 817-978-3094; and

2) Ms. Susan Cowger
Assistant United States Attorney
801 Cherry Street
Fort Worth, Texas 76102
Facsimile No. 817-978-3094; and

3) Mr. Julius O. Robinson
26190-177
Post Office Box 33
Terre Haute, Indiana 47808.

_____

02-10717

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JULIUS OMAR ROBINSON,
aka Face, aka Scar, aka Scarface,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Texas
Fort Worth Division
No. 4:00-CR-260

BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES

STATEMENT OF THE ISSUE ADDRESSED IN REPLY BRIEF

Is the erroneous omission of aggravating factors from the indictment that was preserved by timely objection in the trial court, harmless error? This reply brief will restrict itself to discussion of this harmless error issue and not address other issues

raised in this appeal. Appellant still complains of the other errors raised in his initial brief.

ARGUMENT AND AUTHORITIES

The Failure to Allege Statutory Aggravating Factors was Not Harmless Error

Conceding that the failure to allege statutory aggravating factors in the indictment was constitutional error, the government nevertheless argues that the error was harmless. Brief for the United States at 25-31. Although the government understandably does not choose to put the matter in quite these terms, its argument boils down to the claim that an American citizen may be put to death for a federal crime with which he was never formally charged by a grand jury. The government makes this claim even though

(1) the Fifth Amendment specifically requires that all capital crimes be prosecuted by indictment,

(2) this requirement is one of the very few procedural rights so important that it may not be waived, *see Smith v. United States*, 360 U.S. 1, 9 (1959); Fed.R.Crim.P. 7(b) (omitting capital crimes from waiver provision), and

(3) far from attempting to waive this right, Mr. Robinson specifically objected below to the government's failure to honor his right to grand jury indictment as to those elements that elevated the charges against him to capital crimes.

In any event, however characterized, the government's claim fails, because harmless error analysis has no application where an indictment fails to allege an "essential element" of the capital crime ultimately proved against the defendant at trial.

Although the Supreme Court has not spoken to the applicability of harmless error doctrine to an *Apprendi* or *Ring* Indictment Clause violation, *compare e.g. United States v. Cotton*, 535 U.S. 625 (2002) (applying plain error doctrine to noncapital *Apprendi* Indictment Clause error), in the closely related area of "constructive amendments," a long line of decisions by this Court has established the "settled rule" that where a trial court permits the amendment of an indictment at trial, that error "is reversible *per se*." *United States v. Parkhill*, 775 F.2d 612, 615 (5th Cir. 1985) (Edith H. Jones, J.). That is, in such cases, "reversal is automatic," *id*. (*quoting United States v. Young*, 730 F.2d 221, 223 (5th Cir. 1984)), at least where, as here, the

error has been preserved for appellate review.[1] *United States v. Young*, 730 F.2d 221, 223 (5th Cir. 1984) ("*Stirone* requires that courts distinguish between constructive amendments of the indictment, which are reversible *per se,* and variances between indictment and proof, which are evaluated under the harmless error doctrine"); *United States v. Arlen*, 778 F.2d 1117, 1123 (5th Cir. 1985) (in the case of constructive indictment, "reversal is automatic, because the defendant may have been convicted on a ground not charged in the indictment"); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606 (5th Cir. 1991) (*quoting Young*, *supra*); *United States v. Millet*, 123 F.3d 268, 272 (5th Cir. 1997) (distinguishing between constructive amendments and "mere factual variations between the indictment and proof at trial," the latter of which only are "examined under the harmless error doctrine"); *United States v. Robles-Vertiz*, 155 F.3d 725, 727-8 (5th Cir. 1998) (similarly distinguishing between constructive amendment and variance, and noting only in the case of variance that "[w]e still must determine whether the variance, if any, was harmless"). This

[1] At one time this Court applied the automatic reversal rule even where the constructive amendment claim had been forfeited, *see e.g. United States v. Mize,* 756 F.2d 353, 355-57 (5th Cir. 1985), but in the wake of *United States v. Olano*, 507 U.S. 725 (1993), it has since determined that plain error analysis applies to forfeited claims of this type. *United States v. Daniel*, 252 F.3d 411, 414 n.8 (5th Cir. 2001); *United States v. Dixon*, 273 F.3d 636, 639 n.1 (5th Cir. 2001); *United States v. Fletcher*, 121 F.3d 187, 192-3 (5th Cir. 1997). Here, as the government concedes, the claim was preserved, and so the rule of automatic reversal applies. As we discuss further below, the government erroneously relies on cases that were decided on the basis of plain error review, and that are therefore inapposite to the harmless error issue presented here.

exception to the harmless error doctrine is based on the Supreme Court's statement in the leading case on constructive amendment that "[d]eprivation 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, 217 (1960), and has been the consistent position of every other Court of Appeals as well. *See United States v. Floresca*, 38 F.3d 706, 711 & n.12 (4th Cir. 1994) (collecting cases).

The logic of this rule is manifest. To hold otherwise would be, in effect, to write the Indictment Clause out of the Constitution, because in all pure Indictment Clause violation situations – that is, situations in which the violation occurs only in the difference between the crime charged in the indictment and the proof and jury instructions at trial, without independent errors in that proof or those instructions – the petit jury's guilty verdict would "wipe clean" the Indictment Clause violation in each instance, by virtue of the higher standard of proof at trial. That is, a showing that the petit jury was properly instructed on the omitted element, and then found it to have been proven beyond a reasonable doubt, would automatically lead to the conclusion, in every case, that the grand jury *would have* found the missing (or otherwise inconsistent with the trial proof) element under the probable cause standard. *See United States v. Mechanic*, 475 U.S. 66, 67 (1986); Brief for the United States at 30. Indeed, under this mode of appellate review, a defendant

indicted for bank robbery would not be heard to complain if he was ultimately convicted and sentenced for an unrelated murder on the same indictment (at least if he received sufficient informal notice before trial that the government had changed its mind about the charges so that he could not complain about prejudicial lack of notice). Under the logic advanced by the government here, in such a case "the reviewing court can confidently conclude that the grand jury would have found those same [elements of murder, rather than or in addition to robbery] under its less rigorous burden to find mere probable cause" (Brief for the United States at 30), since the petit jury eventually found those elements of murder established beyond a reasonable doubt at trial.

The fault in the government's logic is that, whatever the merits of its harmless error argument with respect to issues that solely concern the sufficiency of the evidence before the grand jury or collateral matters that do not go to the nature of the charges ultimately leveled in the indictment (*see Mechanic*, *supra*), such speculation about what the grand jury "would have found" has no application to the grand jury's role in *selecting* the particular charge to bring against the defendant. As the Supreme Court has recognized, "[i]n the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense – all on the basis of

the same facts." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986); *see also Louisiana v. Sullivan*, 523 U.S. 392, 399 (1998). Given the grand jury's power to select widely varying charges "all on the basis of the same facts," this is indeed a decision that on one hand plainly affects the defendant's "substantial rights" (by determining the level of punishment to which he will be exposed at trial), Fed. R. Crim. P. 52(a), and yet on the other "def[ies] analysis by 'harmless-error' standards . . . [while] affecting the framework within which the trial proceeds" (because the indictment determines the entire structure of the subsequent proceedings and trial, the legal issues that become pertinent, and the nature of the admissible evidence). *See Arizona v. Fulminante*, 499 U.S. 279, 309, 310 (1991) (discussing standards for when a constitutional violation is not subject to harmless error review). This is the reason that every Court of Appeals to have considered the issue has concluded that a constructive amendment of the indictment is subject to "*per se*," "automatic" reversal without even addressing the harmless error issue. *Parkhill*, 775 F.2d at 615.

The conceded *Ring* Indictment Clause violation at issue here is best understood as a constructive amendment of the indictment that affects the validity of the death sentencing decision, by virtue of the failure to obtain the grand jury's finding on an essential element of the capital crime: the required statutory aggravator. "[W]here a defendant is convicted of a crime and where a grand jury never charges the defendant

with an essential element of that crime, a constructive amendment of the indictment has occurred, and reversal is warranted." *Jones v. Smith*, 231 F.3d 1227, 1233 (9th Cir. 2001); *see also e.g. Millet*, *supra*, 123 F.3d at 272 ("A constructive amendment to the indictment occurs when the jury is permitted to convict the defendant on a factual basis that effectively modifies an essential element of the offense charged in the indictment.").

That the statutory aggravator is in fact an "essential element" of the capital crime in this case is no longer open to doubt. *Ring* characterized statutory aggravators as "'the functional equivalent of an element of a greater offense,'" 536 U.S. at 609 (*quoting Apprendi*, 530 U.S. at 494 n.19), and the Supreme Court has since amplified that characterization in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), by describing the required statutory aggravator as an element *simpliciter* of a distinct capital crime. *Id*., at 111 ("for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances'"); *id*., at 126 (Ginsburg, J., dissenting) ("capital sentencing proceedings involving proof of one or more aggravating factors are to be treated as trials of separate *offenses*, not mere sentencing proceedings;" emphasis in original).

The conceded *Ring* Indictment Clause violation accordingly constitutes a constructive amendment of Mr. Robinson's indictment. As the Ninth Circuit concluded in *Jones*, *supra*, "*Apprendi* . . . expands the range of discrepancies that, under *Stirone*, will amount to constructive amendments and narrows the list of discrepancies that will be treated as mere variances." 231 F.3d at 1235 (discussing the relationship between *Apprendi* and *Stirone*, but holding the defendant-petitioner's claim *Teague*-barred regardless of its merits under current law). *Ring*, amplified by *Sattazahn*, extends *Apprendi* element treatment to statutory aggravating circumstances in capital cases. Here, Mr. Robinson was indicted on a "distinct, lesser included offense," *Sattazahn*, 537 U.S. at 111 – which, under *Ring*, by itself carried no potential capital sentence – but was thereafter sentenced to death upon conviction of the separate, greater offense of "murder plus one or more aggravating circumstances," *id*., circumstance-elements that were nowhere alleged in the indictment.

This case is thus on all fours with *United States v. Fletcher*, 121 F.3d 187 (5th Cir. 1997). In *Fletcher*, the defendant was charged in the indictment, *inter alia*, with bank robbery under 18 U.S.C. § 2113(a). Nevertheless, at trial, the district court instructed the jury on this count under § 2113(d), the aggravated bank robbery provision that enhances the punishment where the defendant uses a "dangerous

weapon or device" in the course of the robbery. *Id*., at 191-2. The defendant was convicted under this count and sentenced to 262 months, a sentence consistent with a conviction under § 2113(d) but beyond the statutory maximum of § 2113(a). *Id*., at 193-4. In analyzing the case, this Court held that the additional instruction on the uncharged § 2113(d) crime constructively amended the indictment. *Id*., at 192. It nevertheless declined to overturn the conviction, because the defendant had failed to object below – resulting in plain error review – and because, in the Court's view, the error could not have resulted in any prejudice with respect to the defendant's *conviction*: Under the district court's instructions on the count, the government had to prove both the elements of the § 2113(a) crime *plus* the additional § 2113(d) requirement of use of a "dangerous weapon or device." Since the addition of this element increased the burden on the prosecution to obtain a conviction under that count rather than lightening it or changing it, the conviction on the § 2113(a) count was allowed to stand. *Id*., at 193.

With respect to the defendant's *sentence*, however, the situation was otherwise. The 262 month sentence on this count, although within § 2113(d)'s 25 year maximum term, was beyond the 20 year statutory maximum under § 2113(a). Accordingly, the Court reversed as to the sentence, even though the defendant had failed to preserve any objection to the error below:

> Finally, we recognize that the district court sentenced James Watts to 262 months of imprisonment as to count two – a punishment commensurate with conviction under § 2113(d). But although the court instructed the jury as to the elements of § 2113(d), it is undisputed that Watts was indicted – and can only be convicted – for violating § 2113(a). Indeed, the court's judgment reflects this fact. Section 2113(a) carries a statutory maximum penalty of 20 years (240 months) imprisonment. Because Watts's sentence exceeds the statutory maximum, we must vacate his sentence and remand for resentencing. *Id*. at 193-4.

The problem with Mr. Robinson's death sentence here is precisely the same as the problem with Watts's 262 month sentence in *Fletcher*: although it falls within the permissible sentencing range of the greater offense proved at trial (capital murder, including the statutory aggravator element proved at the penalty hearing in this case; § 2113(d) in *Fletcher*), it exceeds the maximum allowable sentence under the lesser included crime charged in the indictment (noncapital murder in this case; § 2113(a) in *Fletcher*). *See Sattazahn*, *supra* (describing the crime charged in a typical murder indictment as a lesser included offense of the capital murder crime whose elements after *Ring* include the statutory aggravating factors). In *Fletcher*, of course, the defendant failed to make or preserve this claim at trial; here, by contrast, Mr. Robinson did preserve his claim of error, and the illegality of his sentence is thus all the more manifest. Accordingly, as in *Fletcher*, Mr. Robinson's sentence must be reversed even if his conviction is affirmed.

In its discussion of this issue, the government's discussion simplistically and erroneously conflates the plain error issue addressed by *Cotton* (or rather partially addressed, since *Cotton* was not a capital case) with the distinct question of whether a *preserved* Indictment Clause error is subject to harmless error review. Indeed, the cases cited by the government in support of its harmless error argument are actually plain error cases involving forfeited Indictment Clause claims. *See* Brief for the United States at 30-31; *United States v. Jackson*, 327 F.3d 273, 304 (4th Cir. 2003); *United States v. Patterson*, 241 F.3d 912, 913 (7th Cir. 2001); *United States v. Bernard*, 299 F.3d 467, 488-9 (5th Cir. 2002). The two standards are entirely different, however; a preserved error found to be "harmful" requires reversal, whereas a forfeited error, no matter how "plain," does not. *See e.g. Patterson*, 241 F.3d at 913 ("When the appellate standard is plain error (as opposed to harmless error), even the clearest of blunders never *requires* reversal; it just *permits* reversal."). In any event, as we have explained above, harmless error has no application here because, as this Court has held, constructive amendments are automatically and "*per se* reversible." *Parkhill*, *supra*, 775 F.2d at 615.

The government does cite one case from this Circuit suggesting that the failure to allege narcotics quantity under 21 U.S.C. § 841 – a factual finding previously held to be the "functional equivalent of an element" of the narcotics crime under *Apprendi*

– may constitute harmless error. *United States v. Baptiste*, 309 F.3d 274, 277-8 (5th Cir. 2002). But the holding of *Baptiste* cannot be stretched to the point that the government attempts here, that is, as supporting the notion that a defendant may be sentenced to death on the basis of an indictment that does not allege a capital crime.

By any measure of significance or "harmlessness," the failure to allege drug quantity in a narcotics indictment is a far cry from the failure to allege the key element that permits imposition of the death penalty under the Federal Death Penalty Act.[2] *Baptiste* did not in fact involve a capital crime; moreover, its discussion of the harmless error issue is summary, addressing it as part of its plain error analysis of the identical error that had been forfeited by some of the other defendants. *Id*. Nevertheless, assuming *arguendo* that harmless error analysis is appropriate in narcotics cases under § 841 and will ordinarily result in a finding that the failure to allege drug quantity was harmless, it simply does not follow that this analysis can be extended to capital cases.

If one begins with the basic proposition, reflected in decisions of this Circuit like *Fletcher*, *supra*, that "where a defendant is convicted of a crime and where a

[2]Although this case involves the capital sentencing provisions of both the Federal Death Penalty and the Anti-Drug Abuse Act of 1988, 21 U.S.C. §§ 848(e) *et seq.*, there is no material difference between Mr. Robinson's *Ring* Indictment Clause claim under each statute, and so for brevity's sake this brief refers simply to the FDPA.

grand jury never charges the defendant with an essential element of that crime, a constructive amendment of the indictment has occurred, and reversal is warranted," *Jones*, *supra*, 231 F.3d at 1233, one might still recognize the appropriateness of harmless error analysis in the unusual situation where the elements omitted from the indictment are themselves *necessarily* proved by the same evidence that proved the elements that were in fact alleged. This is so, for example, in the case of the narcotics quantity *Apprendi* element discussed in *Baptiste*.

A jury that convicts (or a grand jury that indicts) under § 841 necessarily finds that the defendant was in possession of *some* quantity of narcotics. The harmless error issue in such cases is thus not the failure to allege a factual finding distinct from the other elements of the offense, but, so to speak, the failure to allege a "lesser included fact" – the *specific* quantity of narcotics – that is necessarily included in the proof of one of the elements actually alleged (possession of some quantity of narcotics). Accordingly, it is plausible to reason that the failure to allege such a "lesser included element" may be treated as harmless error where the only evidence on the greater element actually alleged and proved (i.e., the possession of "some quantity of narcotics") necessarily compels the conclusion that the lesser included element of specific quantity must also have been proved. This in fact is the logic of the test for harmless error in these cases. *See e.g. United States v. Anderson*, 289 F.3d

1321, 1327 (11th Cir. 2002) (applying harmless error where grand jury failed to indict on narcotics quantity; "if no reasonable juror could have found the defendant guilty [of the charged crime] without also finding that the specific quantity of drugs was involved, then the defendant is not entitled to a resentencing").

But this logic manifestly does not apply here. Unlike drug quantity, statutory aggravating factors are *distinct and additional* factual elements that must be found, beyond the elements of the underlying crime of conviction, in order to expose the defendant to the death sentence. *See* 18 U.S.C. § 3593(e). Moreover, as the government has candidly admitted, the indictment in this case cannot be construed to have alleged in any form the statutory aggravating factors that provided the necessary prerequisite of Mr. Robinson's death sentence. But that means that there is no basis for inferring, as *Anderson* suggests can be done in the § 841 drug quantity context, that the grand jury in Mr. Robinson's case necessarily found or "would have found" anything at all with respect to these aggravating factors. There is accordingly no basis whatsoever for speculating away Mr. Robinson's Indictment Clause right to be sentenced to death only after a grand jury finds probable cause that he committed a capital crime – which, significantly, is more than just his personal right, since Congress has decreed that it is one of the few rights that a criminal defendant may not

waive, *see Smith v. United States*, 360 U.S. 1, 9 (1959); Fed. R. Crim. P. 7(b), and thus a right that Congress has deemed to belong to society generally.

Finally, the inapplicability of *Baptiste* to the circumstances of this case may also be explained by the fact that the Supreme Court's decision in *Sattazahn*, which is its clearest statement to date that statutory aggravating factors are *de jure* as well as *de facto* elements of a greater capital offense, post-dates *Baptiste*. Neither the Supreme Court nor any Court of Appeals – including this one – has ever held or suggested that the failure to allege *an essential element of a capital crime* in a federal indictment is subject to harmless error analysis (*see Stirone*, *supra*, and the other constructive amendment cases discussed above), and it would be odd to interpret *Baptiste* as overruling such a bedrock principle *sub silentio*. For that reason as well, *Baptiste* does not undermine the conclusion that Mr. Robinson cannot be sentenced to death upon an indictment that failed to allege a capital crime.[3]

The foregoing discussion also reveals why the government's citation of the FDPA's statutory harmless error rule, 18 U.S.C. § 3595(c)(2)(C), is no more availing than its invocation of inapposite harmless error case law. The government's relegation of this citation to a footnote, Brief for the United States at 25 n. 8, may

[3] For the reasons stated *infra*, we do not believe that *Baptiste* governs the outcome of this case. To the extent that the Court feels bound by it, however, Mr. Robinson requests *en banc* argument on this issue.

betray its own recognition that Congress neither intended to nor could abrogate the Fifth Amendment's Indictment Clause by directing federal appellate courts to ignore all violations of the Clause that appear "harmless" when examined in the light of the petit jury's verdict. The harm in all such violations is that the government has prosecuted, convicted and sentenced a citizen for a capital crime that no grand jury ever considered or charged. The FDPA neither authorizes or requires reviewing courts to sanction the government's end-run around the grand jury, that first part of the ""'strong and two-fold barrier ... between the liberties of the people and the prerogative of the [government].'" *Harris v. United States*, 536 U.S. 545, 564 (2002) (citing *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (quoting W. Blackstone, *Commentaries on the Laws of England* 349 (T. Cooley ed. 1899)). The findings of statutory aggravation on which Mr. Robinson's death sentence rests violate the Indictment Clause of the Fifth Amendment, and his sentence may therefore not be carried out.

CONCLUSION

The judgment of the district court imposing a sentence of death should be reversed and this cause remanded for a new trial on punishment, and for such other and further relief to which Appellant may be entitled.

Respectfully submitted,

JACK V. STRICKLAND
The Bryce Building
909 Throckmorton Street
Fort Worth, Texas 76102
Telephone: 817-338-1000
Telecopier: 817-338-1020
State Bar No. 19397000

WES BALL
4025 Woodland Park Blvd.
Suite 100
Arlington, Texas 76013
Telephone: 817-860-5000
Telecopier: 817-860-6645
State Bar No. 01643100

CERTIFICATE OF SERVICE

I certify that on December 9, 2003, two paper copies and one electronic copy of this brief were mailed to Susan Cowger, Assistant United States Attorney, 1100 Commerce Street, Third Floor, Dallas, Texas 75242.

WES BALL
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2, the brief contains 3,176 words.

2. The brief has been prepared in proportionally spaced typeface using Wordperfect 9. Texas is in Times New Roman, 14 pt. type, and footnotes are in Times New Roman, 12 pt. type.

WES BALL
Attorney for Appellant

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THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

JULIUS OMAR ROBINSON,	:	**CAUSE NO. 4:00-CR-00260-2**
aka Face, aka Scar, aka Scarface,	:	**(Civil No. 4:05-CV-756-Y)**
Defendant/Petitioner,	:	
	:	**DEATH PENALTY CASE**
vs.	:	
	:	**Honorable Terry Means**
UNITED STATES OF AMERICA,	:	**United States District Judge**
	:	
Plaintiff/Respondent.	:	

PETITIONER'S MOTION SEEKING PERMISSION TO INTERVIEW JURORS

(Filed Electronically Under the Electronic Filing System Requirements)

MICHAEL B. CHARLTON, No. 04144800
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101
Telephone: (702) 388-5106
Facsimile: (702) 388 5103
E-Mail: mike_charlton@fd.org

Attorney for Petitioner
JULIUS ROBINSON

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

JULIUS OMAR ROBINSON,	:	**CAUSE NO. 4:00-CR-00260-2**
aka Face, aka Scar, aka Scarface,	:	**(Civil No. 4:05-CV-756-Y)**
Defendant/Petitioner,	:	
	:	**DEATH PENALTY CASE**
vs.	:	
	:	**Honorable Terry Means**
UNITED STATES OF AMERICA,	:	**United States District Judge**
	:	
Plaintiff/Respondent.	:	

PETITIONER'S MOTION SEEKING PERMISSION TO INTERVIEW JURORS

Mr. Robinson, a death-sentenced inmate, has filed a motion to vacate his sentence of death under 28 U.S.C. § 2255; the United States has responded. Mr. Robinson seeks this Court's permission to interview the jurors at his trial. This motion is based upon the record and pleadings in this case, as well as the attached brief.

Respectfully submitted,

s/ Michael B. Charlton
Michael B. Charlton, Texas Bar #04144800
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101
Telephone: (702) 388-5106
Facsimile: (702) 388 5103
E-Mail: mike_charlton@fd.org
ATTORNEY FOR PETITIONER

CERTIFICATE OF CONFERENCE

This is to certify that Mr. Robinson's counsel has conferred with opposing counsel, Susan Cowger of the United States Attorney's Office; she is opposed to the relief sought by this motion.

For the foregoing reasons, Petitioner is entitled to interview all jurors that sat in judgment on his case. Alternatively, Petitioner must be granted access to Venireperson Dorothy Debose.

Respectfully submitted,

s/ Michael B. Charlton
Michael B. Charlton
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101
Telephone: (702) 388-5106
Facsimile: (702) 388 5103
E-Mail: mike_charlton@fd.org
State Bar of Texas # 04144800
ATTORNEY FOR PETITIONER

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

JULIUS OMAR ROBINSON,	:	**CAUSE NO. 4:00-CR-00260-2**
aka Face, aka Scar, aka Scarface,	:	**(Civil No. 4:05-CV-756-Y)**
Defendant/Petitioner,	:	
	:	**DEATH PENALTY CASE**
vs.	:	
	:	**Honorable Terry Means**
UNITED STATES OF AMERICA,	:	**United States District Judge**
	:	
Plaintiff/Respondent.	:	

BRIEF IN SUPPORT OF PETITIONER'S MOTION SEEKING PERMISSION TO INTERVIEW JURORS

I. PETITIONER MUST BE GRANTED LIMITED ACCESS TO THE JURORS IN ORDER TO VINDICATE HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY

Rule 24.1 of the Local Criminal Rules for the Northern District of Texas states, in pertinent part: "[a]n attorney . . . shall not, before or after trial, contact any juror. . . unless explicitly permitted to do so by the presiding judge." L. Cr. R. 24.1 (N.D. Tex). Based upon the plain reading of the text, the primary purpose of the rule is to ensure judicial oversight. *See United States v. Yeatts*, 639 F.2d 1186, 1189 (5th Cir. 1981) ("A basic canon of statutory construction is that words should be interpreted as taking their ordinary and plain meaning.").

This interpretation is bolstered by the fact that the rule requires no threshold showing before juror access may be granted. This stands in contrast to similar rules governing access to evidence or witnesses. *See e.g.,* Rule 6(a) of the Rules Governing § 2255 Cases (setting forth a "good cause" standard before discovery may be granted). In mandating judicial notification only, the rule simply provides a mechanism for the Court to control the manner in which juror interviews will be conducted rather than impose any blanket prohibition.

A trial court's decision to deny an attorney's request for post-trial interviews of the jury is reviewed for an abuse of discretion. *United States v. Sotelo*, 97 F.3d 782, 794 (5th Cir. 1996). Ordinarily, a district does not abuse its discretion unless there has been "a showing of illegal or prejudicial intrusion into the jury process." *United States v. Riley*, 544 F.2d 237, 241 (5th Cir. 1976); *accord United States v. Booker*, 334 F.3d 406, 416 (5th Cir. 2003).

Admittedly, Petitioner cannot make the requisite showing at this time. Without 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. Nevertheless, given the importance of the constitutional right at stake, the posture of this case, and the grave sentence that Petitioner faces, this Court should exercise its discretion in granting Petitioner a limited opportunity to interview jurors.

"Our criminal justice system rests firmly on the proposition that before a person's liberty can be deprived, guilt must be found, beyond a reasonable doubt, by an impartial decisionmaker." *Virgil v. Dretke*, 446 F.3d 598, 605 (5th Cir. 2006); U.S. CONST. amend. VI (guaranteeing the right to be tried by an impartial jury). Due to the inherent limitations of criminal proceedings, juror bias is not always exposed during trial. Voir dire, the primary

mechanism for uncovering juror prejudices, is utterly ineffective at exposing dishonesty or deliberate concealment. *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) ("the necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious"); *Williams (Michael) v. Taylor*, 529 U.S. 420, 440-44, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (mandating hearing to address deliberate omission by juror). Even when the court succeeds in empaneling a jury free from bias, the impartiality of the jury may later be subverted by unknown forces. *Remmer v. United States*, 350 U.S. 377, 381, 76 S. Ct. 425, 100 L. Ed. 435 (1956) ("the integrity of jury proceedings must not be jeopardized by unauthorized invasions"); *Parker v. Gladden*, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966) (comments by bailiff to jury about the defendant being "wicked" and "guilty"); *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) (holding extensive media coverage deprived defendant of a fair trial "by an impartial jury free from outside influences"). Because jury impartiality is critical to the defendant's ability to receive a fair trial, the defendant must be afforded a meaningful opportunity to explore issues of juror misconduct. *See Irvin v. Dowd*, 366 U.S. 717, 721, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (recognizing the right to trial by jury as "the most priceless" among constitutional safeguards); *see also Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The right to investigate juror claims is commensurate with the Supreme Court's recognition of the defendant's right to an evidentiary hearing to address such claims. In cases of juror bias, the Supreme Court has consistently held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). The High Court has

afforded the defendant a similar opportunity to prove allegations that extraneous influences affected the jury. *Tanner v. United States*, 483 U.S. 107, 121, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987); *Mattox v. United States*, 146 U.S. 140, 148-49, 13 S. Ct. 50, 36 L. Ed. 917 (1892). These decisions guaranteeing the defendant a right to an evidentiary hearing would be largely hollow if a defendant could be denied any and all avenues for investigating the underlying claim in the first instance.

In addition to contravening well-established Supreme Court precedent, a complete deprivation of the opportunity to investigate juror claims would violate the spirit, if not the letter, of the federal evidentiary rules. *See Carlisle v. United States*, 517 U.S. 416, 426, 116 S. Ct. 1460, 134 L. Ed. 2d 613 (1996) (holding that the district courts may not pass rules that "circumvent or conflict" with the Federal Rules of Criminal Procedure). Rule 606(b), which is entitled, "Inquiry into validity of verdict or indictment," expressly permits inquiry of jurors into "extraneous prejudicial information" or "outside influences" affecting the deliberative process. FED. R. EVID. 606(b). Though circumscribing the type of information that may be elicited from jurors, the rule clearly contemplates questioning of the jurors.

Even if juror access may be withheld in the typical case, the unique circumstances of this case warrant an exception. None of the prior cases dealing with post-verdict juror interviews involve a request by a habeas corpus petitioner. *See Booker*, 334 F.3d at 416 (motion raised at trial and addressed on appeal); *Sotelo*, 97 F.3d at 794 (same); *United States v. Varela-Andujo*, 746 F.2d 1046, 1049 (5th Cir. 1984) (same); *United States v. Davila*, 704 F.2d 749, 753-54 (5th

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Cir. 1983) (same); *Riley*, 544 F.2d at 241 (same). Not only are there greater rights at stake in habeas corpus proceedings, but any perceived threat to the jury's integrity is substantially diminished at the post-conviction stage.

Unlike an ordinary trial motion, the writ of habeas corpus is explicitly recognized in the Constitution.[1] U.S. CONST. Art. I, § 9, cl. 2."[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it"). Dubbed the "Great Writ," this procedural remedy "plays a vital role in protecting constitutional rights." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004); *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Due to the importance of the habeas corpus right, then, it is incumbent on federal habeas counsel to "conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief." *McCleskey v. Zant,* 499 U.S. 467, 498, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). This necessarily entails conducting an appropriate inquiry of the jurors to determine whether a constitutional violation has occurred.

None of the reasons for prohibiting juror interviews are implicated in this case. The purpose behind the proscription against juror communication is "to avoid harassment of jurors, inhibition of deliberation in the jury room, a deluge of post-verdict applications mostly without real merit, and an increase in opportunities for jury tampering." *United States v. Davila*, 704 F.2d 749, 754 (5th Cir. 1983) (quoting *King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978)).

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[1]While federal habeas petitions are now brought under the statutory scheme adopted by Congress, the writ has been in no way diluted. *See* 28 U.S.C. § 2255 (2006); *Davis v. United States*, 417 U.S. 333, 343, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974) (section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus"); *Hill v. United States*, 368 U.S. 424, 427, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962).

Because four years have transpired since the jury concluded its service in Robinson's case, there is no danger that deliberative process will be adversely affected.

Moreover, there was nothing remarkable about Petitioner's trial which would demand heightened protection for the jury at this late stage. Though there was some media coverage in this case, it hardly qualified as a frenzy. *Cf. United States v. Brown*, 250 F.3d 907, 918 (5th Cir. 2001) (discussing the need for juror protection in "sensational" cases); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). At no time did the jurors express fear for their safety. *Cf. United States v. Edwards*, 303 F.3d 606, 613 (5th Cir. 2002). Neither was the district court concerned, as evidenced by the fact that the jury was never sequestered. *United States v. Phillips*, 664 F.2d 971, 997 (5th Cir. 1981). Nor was there ever any order that the jurors' names remain anonymous, either before or after trial. *United States v. Salvatore*, 110 F.3d 1131, 1143-44 (5th Cir. 1997) (upholding anonymous jury in case involving organized crime defendants), *overruled on other grounds*, *Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000).

Any reservations the Court may have about permitting juror interviews can easily be assuaged through the issuance of a limiting order. *Davila*, 704 F.2d at 754 n. 8 ("a valid argument may be made that any post-trial questioning of jurors . . . should be conducted under the strict supervision and control of the court, with inquiry restricted to those matters found by the court as both relevant and proper."). For example, the Court may appropriately restrict the scope of the inquiry to matters pertaining to juror bias and extraneous influences on the deliberative process. *McDonald v. Pless*, 238 U.S. 264, 268, 35 S. Ct. 783, 59 L. Ed. 1300 (1915) (discussing the need to protect the secrecy of the deliberative process). Alternatively, the

Court may require consent of individual jurors before contact may be initiated. *See*, *e.g.*, *Brown*, 250 F.3d at 921 (upholding order requiring juror consent before release of juror information). In sum, there is a variety of measures the Court can take short of complete denial.

Perhaps the strongest reason for granting juror access is that this case involves a death sentence. The Supreme Court has consistently stressed the need for reliability in capital cases. *Lowenfield v. Phelps*, 484 U.S. 231, 238-239, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988) (the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). This imperative is no more important than in the context of juror impartiality. As the Supreme Court stressed more than a century ago:

> It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment.

Mattox, 146 U.S. at 149.[2]

In conclusion, granting Petitioner limited access to jurors strikes the appropriate balance between the vindication of his constitutional rights and the Court's desire to protect the integrity of the jury process.

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[2]Congress has also acknowledged the importance of juror impartiality in capital cases by requiring that the defendant be provided a list of the venire persons three days prior to trial. 18 U.S.C. § 3432 (2006).

II. AT A MINIMUM, PETITIONER MUST BE ALLOWED TO INTERVIEW PROSPECTIVE JUROR DEBOSE

To the extent that Local Criminal Rule 24.1 compels counsel to obtain permission before speaking to persons ultimately struck from the venire,[3] Petitioner must, at a minimum, be allowed to interview Venireperson Dorothy Jean Debose.

Access to Ms. Debose is necessary to resolve a critical factual dispute. In opposing Petitioner's *Batson* claim,[4] the Government provided a declaration from Assistant United States Attorney ("AUSA") Fred Schattman. (See Response of the United States to 28 U.S.C. § 2255 Motion, Exhibit D.) According to AUSA Schattman, he struck Ms. Debose because her husband was allegedly involved in drug trafficking. In contrast to his vague assertions at trial, AUSA Schattman now provides a detailed explanation of his familiarity with the criminal prosecution involving Luster DeBose, whom he claims to have been the husband of Ms. Debose. However, Ms. Debose claimed only that her husband was prosecuted for drug possession. Given the conflict between the two versions, it is important that Petitioner be given an opportunity to probe Ms. Debose further.

This discrepancy is critical because it bears directly on AUSA Schattman's credibility regarding his reasons for striking Ms. Debose. *Hernandez v. New York*, 500 U.S. 352, 367, 111

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[3]Although Rule 24.1 pertains to "prospective jurors," it is unclear whether a struck venire person retains the status of prospective juror once he or she is excused. L. Cr. R. 24.1 (N.D. Tex). Nevertheless, Petitioner makes the instant request out of an abundance of caution.

[4]Motion to Vacate Conviction and Sentence and for New Trial Pursuant to 28 U.S.C. § 2255 and Rule 33 of the Federal Rules of Criminal Procedure ("2255 Motion"), Claim IIC. (relying on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)).

S. Ct. 1859, 114 L. Ed. 2d 395 (1991) ("the credibility of the prosecutor's explanation goes to the heart of the equal protection analysis"). If it is discovered that the AUSA has provided a false post hoc rationalization for the peremptory challenge, this would tend to impugn his denial of racial animus. *Miller-El v. Dretke,* 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (noting that *Batson* is violated when the stated reason is shown to be false in light of the record); *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir. 2000) ("The fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the sufficiency of a valid reason.").

Consequently, Petitioner who bears the burden of proof on this issue, must be granted a limited opportunity to investigate the discrepancy by speaking with Venireperson Debose.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant a limited opportunity to communicate with the jurors or at least grant access to Venireperson Debose.

Respectfully submitted,

s/ Michael B. Charlton
Michael B. Charlton
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101
Telephone: (702) 388-5106
Facsimile: (702) 388 5103
E-Mail: mike_charlton@fd.org
State Bar of Texas # 04144800
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Michael Charlton, hereby certify that on November 1, 2006, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

SUSAN COWGER
Assistant United States Attorney
U.S. Attorney's Office
1100 Commerce Street, 3rd Fl.
Dallas, Texas 75242

s/ Michael B. Charlton
MICHAEL B. CHARLTON
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JULIUS OMAR ROBINSON (02), AKA Face, AKA Scar, AKA Scarface, Defendant-Petitioner	§	CRIMINAL NO. 4:00-CR-260-Y (2)
V.	§	(Civil No. 4:05-CV-756-Y)
	§	**Death-Penalty Case**
UNITED STATES OF AMERICA Plaintiff-Respondent	§	

ORDER DENYING MOTION TO INTERVIEW JURORS

On November 1, 2006, Julius Omar Robinson filed a Motion Seeking Permission to Interview Jurors (doc. #2385). The Government has filed a response in opposition to the motion (doc. #2387).

Having reviewed the motion and pleadings on file, the Court concludes that the request is without merit and should be denied. In requesting permission to interview jurors, Petitioner does not state that he has any reason to suspect that his jury was actually partial, but merely points to the importance of his right to an impartial jury under the Sixth Amendment and argues that he has no other way of discovering whether this right has been violated than to interview his trial jurors. (Motion at 5-10.) In the alternative, Petitioner argues that he should be allowed to interview a prospective juror who was excused upon the exercise of a peremptory strike by the government in order to investigate her testimony during voir dire that her husband had been prosecuted for drug possession so that Petitioner may investigate whether the rule

announced in *Batson v. Kentucky,* 476 U.S. 79 (1986), may have been violated. (Motion at 11-12.) Neither reason justifies subjecting these jurors or prospective jurors to interviews by petitioner.

Local Criminal Rule 24.1 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.

This type of rule protects the jury "from an effort to find grounds for post-verdict charges of misconduct, reduces the 'chances and temptations' for tampering with the jury, increases the certainty of [jury] trials, and spares the district courts time-consuming and futile proceedings." *United States v. Skilling*, No. CRIM H-04-025, 2006 WL 3030662 (S. D. Tex. Oct. 23, 2006)(construing a similar local criminal rule).

In construing this Court's local criminal rule 24.1, both parties have cited to *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976), which observed that "[h]istorically, interrogations of jurors have not been favored by federal courts except where there is some showing of illegal or prejudicial intrusion into the jury process." Clearly, Robinson has not made any such showing, and admits that he cannot. (Motion at 5.) Robinson's request appears to be nothing more than a fishing expedition. To grant it would be to ignore the clear caution stated by the Fifth Circuit Court of Appeals in *Riley* that,

"[c]ourts simply will not denigrate jury trials by afterwards ransacking the jurors in search of some ground, not previously supported by evidence, for a new trial." *Id*.

Although Robinson's alternative request does not come squarely within the caution contained in *Riley*, it also fails. In it, Robinson requests permission to interview an excluded juror in order to investigate whether the race-neutral reasons given by the prosecution for exercising its peremptory challenge were merely pretextual, masking purposeful discrimination against the prospective juror on the basis of her race. The prosecutor provided race-neutral reasons, including reputation information on the juror, that the prospective juror's husband and brother had been involved to some degree with federal drug cases, and that the prospective juror had an apparent reluctance about the death penalty. (*See* Motion to Vacate under 28 U.S.C. § 2255 at 95; Response to 28 U.S.C. § 2255 Motion at 60.)

Robinson seeks to investigate whether a portion of the juror's explanation, that her husband was prosecuted for drug possession, was more accurate and whether her understanding would conflict with that of the prosecution. (*See* Motion at 11.) However, the critical inquiry in *Batson* does not focus on the mind of prospective jurors but, rather, on the intent of prosecutors. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). Since the prosecution has tendered to this court criminal history records to support this reason for

the strike, an interview further examining the prospective juror's understanding of her husband's prosecution would not appear to be helpful. (*See* Exhibit K attached to Response to 28 U.S.C. § 2255 motion.)

Robinson has not provided any examples of post-trial interviews of prospective jurors that have ever been used by the courts in considering *Batson* challenges. Typically, such challenges focus on the record of jury selection in light of the policies and practices of the prosecutors involved. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 240-66 (2005). Therefore, the requested permission for a post-trial interview of this prospective juror would appear neither useful to a *Batson* analysis nor necessary to protect any of Petitioner's rights.

In sum, Robinson has not shown that granting permission for any of the requested interviews would be appropriate or necessary to protect his rights in this proceeding. Accordingly, the motion should be, and it is hereby, DENIED in all respects.

SIGNED November 28, 2006.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

JULIUS OMAR ROBINSON,	:	**CAUSE NO. 4:00-CR-00260-2**
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	:	**Honorable Terry Means**
UNITED STATES OF AMERICA,	:	**United States District Judge**
	:	
Plaintiff/Respondent.	:	

PETITIONER'S AMENDED MOTION FOR LEAVE TO AMEND MOTION TO VACATE CONVICTION AND SENTENCE AND FOR NEW TRIAL PURSUANT TO 28 U.S.C. § 2255 AND RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

(Filed Electronically Under the Electronic Filing System Requirements)

MICHAEL B. CHARLTON, No. 04144800
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, NV 89101
Telephone: (702) 388-5106
Facsimile: (702) 388 5103
E-Mail: mike_charlton@fd.org

Attorney for Petitioner
JULIUS OMAR ROBINSON

SEAN K. KENNEDY, No. 145632
Federal Public Defender
CRAIG A. HARBAUGH, No. 194309
Deputy Federal Public Defender
Federal Public Defender's Office
321 E. 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-7865
Facsimile: (213) 894-7566
E-Mail sean_kennedy@fd.org
E-Mail craig_harbaugh@fd.org

Attorney for Petitioner
JULIUS OMAR ROBINSON

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

JULIUS OMAR ROBINSON,	:	**CAUSE NO. 4:00-CR-00260-2**
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UNITED STATES OF AMERICA,	:	**United States District Judge**
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PETITIONER'S AMENDED MOTION FOR LEAVE TO AMEND MOTION TO VACATE CONVICTION AND SENTENCE AND FOR NEW TRIAL PURSUANT TO 28 U.S.C. § 2255 AND RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

On June 15, 2007, Robinson moved for leave to amend his motion to vacate his conviction and sentence under Section 2255 of Title 28 of the United States Code ("2255 motion"). On June 24, 2007, the Court unfiled the amended 2255 motion pending the Court's resolution of the motion for leave to amend. Because the amended 2255 motion is essential

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to the Court's determination of the issue, Robinson now amends his motion by adding this document along with its supporting exhibits.

Dated: July 2, 2007

Respectfully submitted,

s/ Sean K. Kennedy

SEAN K. KENNEDY
Federal Public Defender
CRAIG A. HARBAUGH
Deputy Federal Public Defender
Federal Public Defender's Office
321 E. 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-7865
Facsimile: (213) 894-7566
E-Mail sean_kennedy@fd.org
E-Mail craig_harbaugh@fd.org

ATTORNEY FOR PETITIONER
JULIUS OMAR ROBINSON

CERTIFICATE OF CONFERENCE

This is to certify that Mr. Robinson's counsel has conferred with opposing counsel, Susan Cowger of the United States Attorney's Office. AUSA Cowger does not oppose the filing of the instant motion to include the amended 2255 motion as an exhibit. However, AUSA Cowger remains opposed to the relief sought by this motion.

For the following reasons, Petitioner is entitled to amend the original motion.

Dated: July 2, 2007

Respectfully submitted,

s/ Sean K. Kennedy
SEAN K. KENNEDY
Federal Public Defender
CRAIG A. HARBAUGH
Deputy Federal Public Defender
Federal Public Defender's Office
321 E. 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-7865
Facsimile: (213) 894-7566
E-Mail sean_kennedy@fd.org
E-Mail craig_harbaugh@fd.org

ATTORNEY FOR PETITIONER
JULIUS OMAR ROBINSON

CERTIFICATE OF SERVICE

I, Jesse Wallis, hereby certify that on July 2, 2007, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

SUSAN COWGER
Assistant United States Attorney
U.S. Attorney's Office
1100 Commerce Street, 3rd Fl.
Dallas, Texas 75242

s/ Jesse Wallis
JESSE WALLIS

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

JULIUS OMAR ROBINSON,	:	**CAUSE NO. 4:00-CR-00260-2**
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Plaintiff/Respondent.	:	

BRIEF IN SUPPORT OF PETITIONER'S AMENDED MOTION FOR LEAVE TO AMEND MOTION TO VACATE CONVICTION AND SENTENCE AND FOR NEW TRIAL PURSUANT TO 28 U.S.C. § 2255 AND RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

PROCEDURAL HISTORY

On November 29, 2004, the one-year statute of limitations period to file Mr. Robinson's habeas petition began to run. One month later, Robinson's trial and appellate counsel, Wessley Ball and Jack Strickland, requested to withdraw from post-conviction proceedings. On January 10, 2005, the court granted the motion and substituted Mike Charlton and Gary Taylor as habeas counsel.

Although Mr. Ball agreed to turn over his trial files, Mr. Strickland refused. Even after the Court authorized the issuance of a subpoena for the records, Mr. Strickland refused for another month. The matter was not resolved until March 11, 2005.

On July 14, 2007, Mr. Taylor sought to withdraw as habeas counsel. On July 20, 2007, the request was granted and the Federal Public Defender Office in the Central District of California was appointed. At that point, habeas counsel had just four months to investigate the case, obtain all documentary evidence, and prepare the habeas petition before the limitations period would expire. On November , 2005, Mr. Robinson's filed a timely petition with more than 43 exhibits attached.

In his amended petition, lodged contemporaneously herewith, Mr. Robinson seeks to add eleven additional documentary exhibits and raise one additional claim based upon an intervening change in Supreme Court precedent.[1]

AMENDMENT STANDARD

A petition for writ of habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a pleading "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). The Fifth Circuit has repeatedly recognized that Rule 15(a) "evinces a bias in favor of granting leave to amend." *Carroll v. Fort James Corp*, 470 F.3d 1171, 1175 (5th Cir. 2006); *Lowrey v. Texas A & M Univ. Sys*., 117 F.3d 242, 245 (5th Cir. 1997) ("Rule 15(a) expresses a strong presumption in favor of liberal pleading"); *Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1180 (5th Cir. 1987) ("Federal Rule 15(a) counsels a liberal amendment policy").

[1]The amended petition also includes stylistic and structural changes.

While the decision whether to grant leave to amend technically falls within the discretion of the court, the concept is "misleading" in that Rule 15(a) "severely restricts the judge's freedom." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597-98 (5th Cir. 1981). Unless there is a "substantial reason" justifying denial, a motion for leave to file amended pleadings must be granted. *Jacobsen v. Osborn,* 133 F.3d 315, 318 (5th Cir. 1998). Five considerations may qualify as a substantial reason: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party, and (5) futility of the amendment. *United States v. Zosimo Reyes Saenz*, 282 F.3d 354, 355-56 (5th Cir. 2002) (citing *Union Planters Nat'l Leasing, Inc. v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982). "Absent any of these factors, the leave sought should be freely given." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (internal citation omitted); *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1464 (5th Cir. 1995); *see also Lowrey,* 117 F.3d at 246 ("[T]he touchstone of the inquiry under rule 15(a) is whether the proposed amendment would unfairly prejudice the defense by denying the defendants notice of the nature of the complaint."). When in doubt, the district court "should err on the side of allowing amendment." *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982).

ARGUMENT

I. DUE TO THE LACK OF ANY SUBSTANTIAL REASON, MR. ROBINSON MUST BE GRANTED LEAVE TO AMEND HIS ORIGINAL MOTION TO ADD FACTUAL ASSERTIONS THAT CLARIFY EXISTING CLAIMS

In this case, none of the five factors pose a substantial reason for denying amendment. Accordingly, Mr. Robinson's motion for leave to amend his original post-conviction motion should be granted in its entirety.

A. Amendment Would Not Result in Undue Delay

Undue delay concerns the delay of the proceedings rather than delay in the amendment. Here, no undue delay would result from allowing the instant amendment. At most, the proceedings would be delayed thirty days to allow the Government to file its response to the petition.

Due to circumstances beyond Robinson's control, Robinson was severely hampered in his ability to file a comprehensive motion before the statute of limitations period expired. 28 U.S.C. § 2244(d) (2007) (imposing a one year statute of limitations from the date the conviction became final on direct review). First, Robinson's trial counsel waited a month after the period began to run to withdraw as habeas counsel and were replaced a month later. Second, associate counsel refused to turn over his files and even ignored a subpoena before delaying the matter for another two months. Third, Robinson's second habeas attorney, Gary Taylor, withdrew from the case early in the process. In reality, Robinson's current habeas counsel had just four months to file retrieve prior counsel's files, review the record, conduct an investigation, and draft and file the motion. Although Robinson included a wealth of documents to support his original petition - 43

exhibits totaling 634 pages - it would not have been possible to address every factual issue. Nevertheless, Robinson diligently pursued all outstanding issues and submitted the motion at the earliest opportunity. Clearly, Mr. Robinson pursued the instant amendment in a reasonable and timely manner.

B. Absence of Bad Faith or Dilatory Motive

There is no bad faith or dilatory motive. Mr. Robinson seeks the amendment to add substantive factual and legal support for his original motion. All supporting documentation were obtained within the past six months. Technically, it would have been possible for Mr. Robinson to file an amended petition as each new document was obtained. However, better practice cautioned in favor of filing a single amendment rather than making a piecemeal presentation. Within three days of receiving the jail visitation logs from the Bureau of Prisons, Mr. Robinson submitted the instant motion.

C. Mr. Robinson Has Not Failing to Cure Defects Through Previous Amendments

This is the only amendment that Mr. Robinson has sought in this case. Where, as here, the moving party seeks an initial amendment, the policy in favor of granting amendment is "strongest." *Thompson v. New York Life Ins. Co.,* 644 F.2d 439, 444 (5th Cir. 1981).

D. The Government Will Not Suffer Undue Prejudice

The nonmoving party does not incur undue prejudice unless the amendment requires the parties to reopen discovery or alter their trial strategies. *Little v. Liquid Air Corp.*, 952 F.2d 841, 845-46 (5th Cir. 1992), aff'd, 37 F.3d 1069 (1994) (en banc); *Dussouy*, 660 F.2d at 599 ("Of course, should the new theory necessitate reiteration of discovery proceedings, Gulf Coast would

be prejudiced."). Although the Court has addressed a few discovery matters, the parties have not pursued full-blown discovery. Accordingly, because the discovery period has not ended (much less begun), the Government cannot allege any harm from the amendment. Moreover, the evidentiary hearing in this case has not been set. Any impact that the instant amendment may have on the Government's strategy can be easily resolved in advance of the hearing, if not, immediately upon the filing of its responsive pleading to the Amended Motion.

E. Amendment Would Not Be Futile

Generally, amendment is futile only if the claims proffered are clearly frivolous or legally insufficient on their face. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) ("[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits") (emphasis added). Amendment can also be considered futile if the revised petition is untimely and does not relate back to the original petition. *See Jacobsen*, 133 F.3d at 319.

In *Mayle v. Felix*, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005), the United States Supreme Court analyzed the relationship between relation-back doctrine and the one-year statute of limitation. Rule 15(c)(2) states that an amended pleading relates back to the date of an earlier timely pleading if the amended and earlier pleading arises out of the same "conduct, transaction, or occurrence." Otherwise untimely new claims added to a petition by means of amendment will "relate back" to the timely original filing and accordingly be deemed timely themselves "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts." *Mayle*, 545 U.S. at 659. On the other hand, relation-back does

not apply where the amended petition asserts a new claim supported by facts that differ in "both time and type" from the original. *Id.*

Providing substance to its interpretation of Rule 15(c)(2), the Court in *Mayle* cited two lower court habeas corpus decisions as exemplifying the type of situation in which "relation back will be in order." For example, the Supreme Court endorsed the Eighth Circuit's decision in *Mandacina v. United States*, 328 F.3d 995, 1000-01 (8th Cir. 2003), which applied the relation back doctrine to an amended petition alleging the prosecution's failure to disclose a particular report because the the original petition alleged *Brady*[2] violations. *Mayle*, 545 U.S. at 2575 n.7. Similarly, the Supreme Court approved the use of the relation back in *Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001), because "the original petition challenged the trial court's admission of recanted statements, while the amended petition challenged the court's refusal to allow the defendant to show that the statements had been recanted." *Mayle*, 545 U.S. at 2575 n.7.

In this case, amendment would not be futile because relation back is appropriate. Petitioner seeks to add documentary evidence and corresponding argument for the following exhibits:

72. Declaration of Dr. Malcolm Klein, dated May 18, 2007

73. Declaration of Margaret O'Donnell, dated June 15, 2007

74. Declaration of Richard Smart, dated September 27, 2006

75. Declaration of Russell Stetler, dated May 21, 2007

76. Declaration of Mandy Welch, dated June 11, 2007

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[2]*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

77. Report by Kate Allen, dated March 14, 2007

78. Arlington Police Department reports re: Sarah Tucker incident (certified copies)

79. Tarrant County Court records re: Sarah Tucker incident, State of Texas v. Julius O. Robinson, Case No. 0574361D (certified copies)

80. Bureau of Prisons Jail Logs re: Attorney Visits with Julius Robinson

81. Invoice of Vince Gonzales dated December 8, 2000 submitted to Jack Strickland in State of Texas v. Carlis Jovonite Russell, Case No. 0676421A

82. Memo to file prepared by Wes Ball re: visit with Julius Robinson, dated December 4, 2001

As set forth below, the additional documentary support merely provide factual support that clarify or amplify existing claims. Consequently, because all supplemental factual assertions relate to a common core of operative facts set forth in the original pleadings, the relation-back doctrine applies.

1. Dr. Klein's Declaration Further Shows How Trial Counsel Failed to Challenge Any of the Aggravating Evidence, Including the Assertion that Robinson Was a Member of a Notorious Street Gang

As set forth generally in the original motion and in the reply brief, trial counsel failed to investigate *any* of the aggravating evidence presented by the prosecution. This included the failure to address the prosecution's assertion that Robinson was a member of the "Crips" gang. (20 RT 47-48.) In support of this contention, Robinson provided factual accounts confirming that the alleged gang was little more than a band of truants. (Ex. 59, Decl. of Jerry Melton, at ¶ 4 (police explaining that "I looked at them as kids trying to imitate what they saw on television. They were little wannabes.").) Dr. Klein, a sociologist specializing in gang research, analyzes

the Dermott "Crips" based upon nationally recognized criteria and reached as a similar conclusion. In his expert opinion, "the Dermott Crip gang during Mr. Robinson's youth did not qualify as a Traditional gang." (Ex. 72, Decl. of Malcolm Klein, at ¶ 7.) Consequently, because Dr. Klein's opinion relates to the same core of operative facts, namely that trial counsel failed to investigate the gang allegation, amendment is proper.

2. Margaret O'Donnell's Declaration Provides Additional Statistical Information Supporting the Original Claim that the Charging Decision Was Racially Motivated

Under Ground Three of the original motion, Robinson provided statistical data which raises an inference of racial discrimination. Ms. O'Donnell's declaration merely provides the racial breakdown of cases addressed by the Department of Justice during the death penalty authorization process. Accordingly, because her declaration provides additional statistical support for the original contention that the death penalty charging decision was racially motivated, the relation back doctrine applies.

3. Richard Smart's Account of the Tucker Shooting Incident and the Police Reports Simply Provide Additional Support for the Original Allegations that Trial Counsel Failed to Investigate the Prosecution's Case in Aggravation

Under Ground One of the original motion, Mr. Robinson alleges that his trial counsel provided "ineffective assistance of counsel for failure to investigate aggravating evidence." (Original Motion, at pp. 16-24.) As one example, Mr. Robinson cites trial counsel's failure to investigate the "hit" Mr. Robinson allegedly orchestrated against "One Love" William, a prosecution witness. In the reply brief, Mr. Robinson points out two additional failings,

including the failure to investigate the gang allegation and the failure to investigate Mr. Robinson's prior conviction for shooting Sara Tucker's truck. (Reply Brief, at pp. 19-23.)

Richard Smart's declaration merely adds corroboration to the contention that Mr. Robinson was unaware that Ms. Tucker was hiding inside the truck when the shots were fired. As set forth in his declaration, Mr. Smart was driving the truck the evening Mr. Robinson tried to collect a debt from Ms. Tucker. The pair was unsuccessful in finding Ms. Tucker and Mr. Robinson fired in exasperation into what he believed to be her abandoned truck. As Mr. Smart confirms, "[they] did not see anyone inside it. [They] both believed the truck was empty." (Ex. 74, Decl. of Richard Smart.) The police reports, which contain Ms. Tucker's original statement to the police, corroborate Mr. Smart's account. (Ex. 78, Arlington Police Department reports re: Sarah Tucker incident (certified copies).) The court records also support the notion that Robinson was not aware of Tucker's presence, given that he was never tried for attempted murder and the court imposed a deferred adjudication with no jail time whatsoever. (Ex. 79, Tarrant County Court records re: Sarah Tucker incident, *State of Texas v. Julius O. Robinson*, Case No. 0574361D (certified copies).) Consequently, because these documents only amplify the original allegations that trial counsel failed to investigate any of the prosecution's aggravating evidence, including the Tucker incident, the information necessarily relates back.

4. Russell Stetler's Declaration Discussing the Role and Importance of Mitigation Specialists and the Mitigation Investigation During a Capital Trial

In his declaration, Mr. Stetler merely expounds upon the discussion regarding mitigation specialists and investigations set forth in the original motion. In painstaking detail, the original petition discusses the professional obligation (and ultimate failure) of trial counsel to retain a

mitigation specialist as part of the standard of care required in a capital case. (Original Motion, at pp. 3-4, 6, 10-11.) Relying extensively on the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, the original motion also discusses the value of the mitigation specialist on the defense team. (*See* Original Motion, at p. 6). In addition, the original motion discusses the obligation of defense counsel to conduct an broad and thorough mitigation investigation. (Original Motion, at pp. 3, 5-7.)

Drawing upon his extensive experience in capital cases serving as a mitigation specialist, Mr. Stetler describes in greater detail the unique purpose of the mitigation specialist, the various functions they perform, and the professional responsibility of trial counsel to employ a mitigation specialist in a capital case. In addition, Mr. Stetler gives substance to the requirement of a complete and thorough mitigation investigation by elucidating the type of tasks that must be completed and the manner in which they should be carried out. For example, Mr. Stetler explains the cyclical nature of the social history interviewing process as well as the pitfalls of conducting an investigation over the telephone. (Ex. 75, Decl. of Russell Stetler, at ¶ 14.)

In sum, Mr. Stetler merely supports the original contention that trial counsel were ineffective for refusing to retain a mitigation specialist. Consequently, his declaration necessarily relates back.

5. Mandy Welch Supplements the Original Motion Alleging Deficient Performance By Trial Counsel By Offering Possible Explanation for Trial Counsel's Omission

Whereas the original motion explains in significant detail *what* trial counsel failed to do regarding the mitigation investigation, Ms. Welch's declaration explains *why* trial counsel may have been derelict. The original motion alleges trial counsel's failure to conduct a complete and

thorough mitigation investigation as well as the information that could have been uncovered but for trial counsel's deficiency. (Original Motion, at pp. 28-51). Ms. Welch, a seasoned capital habeas practitioner in Texas, offers her insight into one possible reason for such a glaring dereliction. (Ex. 76, Decl. of Mandy Welch.) Ms. Welch explains how, despite the existing standard of care requiring a thorough mitigation investigation, many capital habeas practitioners often continued to shirk their responsibility in this area. (*Id.*) In recounting the history of the previous Texas capital sentencing procedure, Ms. Welch describes the general malaise of trial counsel in failing to pursue critical mitigation evidence, long after the state death penalty statute had been revised. Instead of offering an excuse, Ms. Welch offers one possible reason "why otherwise competent attorneys may have failed to satisfy such a fundamental obligation in a capital prosecution." (Ex. 76, Decl. of Mandy Welch, at ¶ 7.)

Because Ms. Welch merely provides a possible explanation for deficiencies previously alleged in the original petition, her declaration is proper under the relation-back doctrine.

6. Dr. Allen's Report Discussing the Impact of Alcohol Related Neurodevelopmental Disorder and Attachment Disorder

Dr. Kate Allen, is a licensed clinical social worker, who specializes in alcohol related neurodevelopmental disorder (ARND) and attachment disorder. Her report discusses the teratogenic effects of alcohol, nicotine, and marijuana on Mr. Robinson while in the womb. In addition, Dr. Allen explains the long-term impact of the neuropsychological deficits resulting from this exposure in *utero*. Her report also contains an explanation of this fetal injury made Mr. Robinson more to susceptible to other psychological and behavioral problems, including attachment disorder.

Dr. Allen's report merely amplifies the factual assertions made in the original Claim One. Documentary support attached to and referenced throughout the original motion chronicles the pervasive drug and alcohol abuse by Mr. Robinson's mother during her pregnancy with Julius. (Original Motion, at pp. 40-41; Ex. 29, Decl. of Jimmie Lee Robinson, at ¶ 17.) In addition, birth records, as well as expert analysis verify the physical and psychological impact of these severe fetal injuries. (Original Post-Conviction Motion, at pp. 58-59 (discussing the implications of prenatal drug and alcohol exposure); Ex. 1, Decl. of Dr. Cunningham, at pp. 11-12.) Specifically, Dr. Cunnigham discusses the neuropsychological deficits Mr. Robinson would have likely suffered including learning disabilities, attention-related problems, and impairment of executive functioning. (Ex. 1, Decl. of Mark Cunningham, at p. 18.). Whereas Dr. Cunningham could only offer this information on a theoretical basis, Dr. Allen is able to provide a specific opinion directly tied to Mr. Robinson because she was able to conduct an in-depth interview of Mr. Robinson, as well as complete an independent review of the social history records. Because Dr. Allen merely elucidates the factual assertions made under Ground One, amendment with her report would not be futile.

7. The Jail Visitation Logs Support Robinson's Original Argument that Trial Counsel Failed to Adequately Interview Their Client

As with the other amendment material, the jail logs merely support Robinson's contention that trial counsel provided deficient performance. Under Ground One of the original motion, Robinson contends that his attorneys failed to conduct an adequate investigation. Repeated interviews with the client is the necessary starting point. Because the records demonstrate that trial counsel met with the client only two times before trial (the investigator

only once), this information clarifies Robinson's claim that trial counsel was deficient. Accordingly, the information relates back.

8. The Invoice Verifying Mr. Strickland Previously Hired a Mitigation Specialist in a Different Capital Case Relates to Robinson's Claim that Trial Counsel Was Deficient For Refusing to Hire One in His Case

In setting forth a number of deficiencies of counsel, Robinson faults the trial attorneys for failing to hire a mitigation specialist. (Original Motion, at pp. 27-28.) In response, trial counsel, particularly Mr. Strickland, disparage mitigation specialists generally. This invoice not only impugns Mr. Strickland's argument but underscores the claim that hiring a mitigation specialist in a capital case was part of the standard of practice at the time of Robinson's trial. Accordingly, this invoice relates back to the original motion.

9. Mr. Ball's File Memorandum Acknowledging That He Only Pursued Robinson's Good Behavior Evidence After He Was Approached By a Jail Guard Underscores Robinson's Contention that Trial Counsel Failed to Conduct An Adequate Mitigation Investigation.

Under Ground One of the Original Motion, Robinson alleges that trial counsel failed to conduct a thorough investigation into his life history and background. In this memorandum, Mr. Ball acknowledges that the decision to investigate Robinson's good behavior while in prison was precipitated by a chance encounter by one of the correctional officers guarding Robinson. But for that fortuitous meeting, it is unlikely Mr. Ball would have ever pursued this matter. This is yet another example of the lackadaisical and haphazard approach taken by trial counsel in approaching Mr. Robinson's mitigation case. Consequently, because this specific conduct is

connect to the deficient performance prong of Ground One, this information relates back to the original motion.

II. ALTHOUGH GROUND SEVEN TECHNICALLY DOES NOT RELATE BACK TO THE ORIGINAL MOTION, AMENDMENT OF THIS CLAIM SHOULD BE PERMITTED BECAUSE IT IS BASED UPON RECENT SUPREME COURT PRECEDENT

At both trial and on appeal, Robinson alleged that the failure to submit the capital charge to the grand jury violated the Indictment Clause of the Fifth Amendment. Even though the Fifth Circuit found the omission rose to constitutional error, the Court held the error was susceptible to harmless error review. *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004). Supreme Court precedent issued after the original habeas motion was filed cast serious doubt on the viability of the Fifth Circuit's decision.

In *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006), the Supreme Court concluded that the erroneous deprivation of the defendant's counsel of choice constituted structural error. For the first time, *Gonzalez-Lopez* delineated two additional categories where structural error may be found: (1) "the difficulty of assessing the effect of the error" and (2) the "irrelevance of harmlessness" 126 S. Ct. at 2564 & n.4. Applying the rationale of *Gonzalez-Lopez*, it is clear that the failure to present the capital charge, including the aggravating circumstances to the jury, amounted to structural error. First, it is difficult - if not impossible - to assess the effect of failing to present the capital charge to the grand jury. Even assuming the grand jury would have found probable cause to support the aggravating

circumstances, there is no way of knowing whether the grand jury would have forwarded the capital charge for prosecution. Second, speculation as to what a hypothetical grand jury might have done is irrelevant. Because the grand jury did not sanction a capital charge against Robinson, a capital prosecution could not proceed.

The Supreme Court's more recent decision in *Resendiz-Ponce* provides further support that the omission of the aggravating circumstance is structural error. *United States v. Resendiz-Ponce*, 127 S. Ct. 782, 787-88, 166 L. Ed. 2d 591 (2007). There, the Supreme Court granted certiorari to consider whether the failure to allege an overt act in an indictment charging attempted illegal reentry was subject to harmless error analysis or constituted structural error. Later, the high court sought supplemental pleading on whether this omission even rose to the level of constitutional error. In the end, Supreme Court never broached the issue of the appropriate treatment of the error. Reasoning that the word "attempt" carries with it an implied allegation of an overt act in furtherance of the charged attempt, the Court concluded that the indictments were proper and did not violate the Indictment Clause. Writing in dissent, Justice Scalia addressed the certified question directly. *Resendiz-Ponce*, 127 S. Ct. at 793. In his view, the omission was not only error, but structural error. *Id*. If structural error arises where the jury has not been provided with an element of the offense, it follows *a fortiori* that structural error results when the defendant is deprived of an opportunity for the grand jury to consider the capital charge in the first instance.

Although Robinson did not raise the indictment claim in his original motion, relation-back should nevertheless be applied. The rationale for the relation back doctrine is to avoid prejudice to the non-moving party by providing notice for the claim at the earliest opportunity.

Here, the Government has had ample notice of the claim since Robinson's trial. Regardless, Robinson had no way of raising this claim earlier. Until the Supreme Court issued its more recent pronouncements on structural error, there was no basis to set aside the Fifth Circuit's decision. To avoid piecemeal litigation and ensure prompt resolution of this case, Robinson should be entitled to amend this claim into his original motion.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant Petitioner's motion for leave to amend his original petition.

Dated: July 2, 2007

Respectfully submitted,

s/ Sean K. Kennedy
SEAN K. KENNEDY
Federal Public Defender
CRAIG A. HARBAUGH
Deputy Federal Public Defender
Federal Public Defender's Office
321 E. 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-7865
Facsimile: (213) 894-7566
E-Mail sean_kennedy@fd.org
E-Mail craig_harbaugh@fd.org

ATTORNEY FOR PETITIONER
JULIUS OMAR ROBINSON

CERTIFICATE OF SERVICE

I, Jesse Wallis, hereby certify that on July 2, 2007, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

SUSAN COWGER
Assistant United States Attorney
U.S. Attorney's Office
1100 Commerce Street, 3rd Fl.
Dallas, Texas 75242

s/ Jesse Wallis
JESSE WALLIS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JULIUS OMAR ROBINSON (2), Petitioner,	§	
VS.	§	CIVIL ACTION NO. 4:00-CR-260-Y
UNITED STATES OF AMERICA, Plaintiff-Respondent.	§	DEATH-PENALTY CASE

ORDER GRANTING IN PART PETITIONER'S MOTION TO FILE FIRST AMENDMENT TO HIS PETITION FOR WRIT OF HABEAS CORPUS

Pending before the Court is Petitioner's Amended Motion for Leave to Amend Motion to Vacate Conviction and Sentence and For New Trial (Doc. 2422), which was filed with the Court on July 2, 2007. Petitioner requests, in part, that he be allowed to file this amendment to add documentary evidence and corresponding argument relating back to his original petition. Additionally, Petitioner seeks to add a new seventh ground to his original petition based on two recent cases handed down by the Supreme Court, *United States v. Gonzalez-Lopez*, 126 S.Ct 2557 (2006) and *United States v. Resendiz-Ponce*, 127 S.Ct 782 (2007). (*Id.* at 15-17). Finally, Petitioner seeks to amend his entire petition stylistically and structurally. (*Id.* at 2, fn. 1).

The original petition in this case was filed on November 29, 2005, over a year and a half prior to the filing of the first motion to amend, and was comprised of over 113 pages, not including

exhibits. (Doc. 2279). The government filed its 91-page response to the original petition on April 28, 2006. (Doc. 2365).

The government does not oppose Petitioner's request to amend his Petition to include additional alleged factual support or argument relating back to his original claims filed in November 2005. (*Id.* at 2). The government does, however, oppose Petitioner's request to add a new seventh ground and further objects to the numerous stylistic and structural changes proposed by Petitioner. (*Id.* at 1-2).

The Court will first address Petitioner's request to amend his petition to add a new seventh ground. Petitioner previously claimed, both at his trial on the merits before this Court and on direct appeal before the Court of Appeals for the Fifth Circuit, that the government's failure to submit the death penalty aggravating factors to the grand jury violated the Indictment Clause of the Fifth Amendment. (Doc. 2422, Motion for Leave at 15). On appeal, the Fifth Circuit held that "the failure to charge those factors in an indictment did not contribute to Robinson's conviction or death sentence" and found that the error was harmless. *United States v. Robinson*, 367 F.3d 278, 289 (5th Cir. (Tex.) 2004). It is well-established that a petitioner may not raise an issue in his motion to vacate that has already been decided adversely to him on direct appeal. *See, e.g.*, *United*

States v. Hoenig, 2006 WL 2993262, *1 (N.D. Tex. Oct. 18, 2006) (citing *Ordonez v. United States,* 588 F.2d 448 at 448-49 (5th Cir. 1979)).

Petitioner claims, however, that two recent United States Supreme Court decisions "cast serious doubt on the viability of the Fifth Circuit's decision." (Doc. 2422, Motion for Leave at 15). In the first case cited by Petitioner, *Gonzalez-Lopez*, the Supreme Court held that the trial court's erroneous deprivation of a Defendant's right to counsel qualified as a structural error not subject to a review for harmlessness. *Id.* at 2563-2564. Petitioner's reliance on *Gonzalez-Lopez* is misplaced, however, as the case did not pertain to any type of indictment error.

In the second case, *Resendiz-Ponce*, the Supreme Court granted certiorari to consider whether the omission of an element of a criminal offense–-specifically omission of an overt act from an indictment charging attempted illegal reentry–-can constitute harmless error. *Id.* at 785. Finding that the indictment was not in fact defective, the Court never reached the harmless-error issue. *Id.* at 785-86.

Finally, even if the cases relied upon by Petitioner were on point, because they speak to procedural error they would not become retroactively applicable to cases that, like Petitioner's, became final on direct review before the decisions were announced. *See,*

e.g., *Schriro v. Summerlin*, 542 U.S. 348, 355 (2004). Petitioner has not addressed this issue in his motion to amend and, for the reasons set forth, Petitioner's motion to amend his Petition to add a new seventh ground is DENIED.

As for the remainder of Petitioner's proposed amendments to his claim, the Court notes that the proposed changes are both substantive, including new evidentiary support and argument, and stylistic. As mentioned previously, the government opposes Petitioner's proposed "stylistic and structural" changes to the petition as a whole, stating that such changes would "impose an undue hardship on the government in terms of the efforts that would become necessary to respond to the amended petition as a unified document." (Doc. 2365, Response at 3). The Court agrees.

The Court recognizes that Petitioner's petition for writ of habeas corpus is his sole opportunity to raise all constitutional challenges to his conviction and sentence. Therefore, Petitioner's motion to file an amended petition is GRANTED in part but DENIED in part. Petitioner's request to amend his Petition to include a new seventh claim is DENIED. As for the remainder of Petitioner's proposed amendment, the Court orders Petitioner to segregate his new material (with the exception of Ground Seven) and file it as a supplement to his original petition with the new exhibits attached, within ten (10) days of this Order. The Government is directed to

file a response to Petitioner's supplementary material within thirty (30) days of Petitioner's filing.

SIGNED January 7, 2008.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE