No. 19-5535

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS OMAR ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Whether the courts below correctly treated petitioner's motion invoking Federal Rule of Civil Procedure 60(b)(6) as a second or successive collateral attack requiring authorization under 28 U.S.C. 2255(h).

2. Whether, if petitioner's motion was a proper Rule 60(b)(6) motion, petitioner is entitled to relief on his claim that the omission from a federal indictment of statutory aggravating factors that rendered him eligible for the death penalty is a structural error.

3. Whether, if petitioner's motion was a proper Rule 60(b)(6) motion, petitioner is entitled to relief on his claim that the district court erred in denying his motion, filed more than four years after his trial, for leave to interview jurors to develop a claim that the jury was racially biased.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Robinson, No. 00-cr-260 (June 5, 2002)

Robinson v. United States, No. 05-cv-756 (Nov. 7, 2008)

United States Court of Appeals (5th Cir.):

United States v. Robinson, No. 02-10717 (Apr. 14, 2004)

Robinson v. United States, No. 09-70020 (June 8, 2010)

United States v. Robinson, Nos. 18-10732, 18-70022 (Mar. 8, 2019)

United States Supreme Court

Robinson v. United States, No. 04-5930 (Nov. 29, 2004)

Robinson v. United States, No. 10-8146 (Oct. 3, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 917 F.3d 856. The opinion of the district court (Pet. App. 23-33) is not reported in the Federal Supplement but is available at 2018 WL 3046255. A prior opinion of the court of appeals is reported at 367 F.3d 278.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2019. On August 9, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

August 5, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of engaging in a continuing criminal enterprise that included the murder of three persons, in violation of 21 U.S.C. 848(e) (2000) (Count 3); three counts of using and discharging a firearm during and in relation to a drug trafficking crime, causing the death of another person, in violation of 18 U.S.C. 924(j) (Counts 7, 11, 15); two counts of conspiracy to distribute drugs, in violation of 21 U.S.C. 841(b)(1)(B) (1998) and 21 U.S.C. 846 (Count 1), 841(b)(1)(A) (1998) and 21 U.S.C. 846 (Count 2); nine counts of possessing a firearm in furtherance of, or using and brandishing a firearm during and in relation to, a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i) and (C)(i) (Counts 4, 8, 17), 18 U.S.C. 924(c)(1)(A)(ii) (Counts 5, 9, 13), and 18 U.S.C. 924(c)(1)(C)(iii) (1998) (Counts 6, 10, 14); and one count of possessing cocaine with the intent to distribute it, in the course of which a person was murdered, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (1998), and 21 U.S.C. 848(e) (2000) (Count 12). Pet. App. 275. Following a penalty hearing, the jury unanimously recommended that petitioner be sentenced to death on Counts 3, 7, and 11, and to life imprisonment on Counts 12 and 15. See 00-cr-260 D. Ct. Docs. 2454 (Nov. 7, 2008), 2473 (July 10, 2009). The district court sentenced petitioner accordingly. Pet. App. 276-

277. The court of appeals affirmed, 367 F.3d 278, and this Court denied a petition for a writ of certiorari, 543 U.S. 1005 (2004).

In 2007, petitioner moved under 28 U.S.C. 2255 to vacate his conviction and sentence. 00-cr-260 D. Ct. Doc. 2422 (July 2, 2007). The district court denied relief, and declined to issue a certificate of appealability (COA). The court of appeals denied petitioner's application for a COA, and this Court denied a petition for a writ of certiorari, 565 U.S. 827 (2011).

In 2018, petitioner filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). Pet. App. 34-62. The district court found that the motion qualified as a second or successive motion for relief under 28 U.S.C. 2255 and transferred the motion to the court of appeals for consideration as a request for authorization under 28 U.S.C. 2255(h) to file such a motion. Pet. App. 24-33. The court of appeals denied authorization and dismissed petitioner's appeal for lack of jurisdiction. Id. at 1-21.

1. From 1996 to 2000, petitioner was a wholesale drug dealer operating in five States. 367 F.3d at 282. During the course of his drug enterprise, petitioner personally murdered at least two people and was part of a conspiracy to murder a third. Id. at 282-283.

On December 2, 1998, two of petitioner's associates spotted Johnny Lee Shelton at a Dallas night club. 367 F.3d at 282. They mistook Shelton for another man, whom petitioner believed was

responsible for a carjacking that had cost petitioner $30,000. Ibid. Petitioner arrived at the club as Shelton was leaving; petitioner and his associates followed Shelton onto a local highway. As they approached Shelton's car, petitioner yelled "that's him," leaned out the window, and opened fire on Shelton with an AK-47 assault rifle. Ibid. A large number of bullets ricocheted off the road and adjoining concrete walls. Id. at 282, 289 n.17. Shelton was struck in the stomach and later died. Id. at 282.

In May 1999, petitioner purchased a brick of what he thought was cocaine but was actually a block of wood covered in sheetrock. 367 F.3d at 282. The next day, petitioner and an associate went to the home of Juan Reyes, whose only connection to the fraudulent drug transaction was that he was the brother-in-law of the seller. Ibid. Petitioner and his associate opened fire with automatic weapons on Reyes and his two companions, Isaac Rodriguez and Nicholas Marques. Id. at 282-283. Reyes fell to the ground, and petitioner and his associate then shot him at least nine times from a distance of less than five feet, killing him. Ibid. Rodriguez attempted to flee and was shot in the back and leg. Ibid. Petitioner and his associate also fired at Marques as he drove away, riddling his car with bullets. Ibid.

The drug conspiracy also led to the murder of a third person, Rudolfo Resendez, at the hands of two of petitioner's associates. 367 F.3d at 283.

2. Petitioner was indicted on and found guilty by a jury of the counts described above. See p. 2, supra. He was sentenced to death on three of those counts. His conviction and sentence were affirmed on direct review.

a. The penalty phase of petitioner's trial was conducted pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq. With respect to the Shelton and Reyes murders, the jurors unanimously found beyond a reasonable doubt that petitioner acted intentionally (18 U.S.C. 3591(a)(2)) and that several statutory aggravating factors existed, including that petitioner knowingly created a grave risk of death to persons in addition to the victim (18 U.S.C. 3592(c)(5)); committed the murders after substantial planning and premeditation (18 U.S.C. 3592(c)(9)); murdered Reyes in an especially heinous, cruel, or depraved manner in that the murder involved torture or serious physical abuse (18 U.S.C. 3592(c)(6)); and attempted to kill others as part of the episode involving the murder of Reyes (18 U.S.C. 3592(c)(16)). See 00-cr-260 D. Ct. Doc. 2432-2, at 2-3, 10-11, 26-27, 33-34. The jury also found, unanimously and beyond a reasonable doubt, that petitioner presented a future danger to the lives and safety of others. Id. at 4, 12, 28, 35.

Weighing those aggravating factors against mitigating factors that petitioner raised during the sentencing phase (see 18 U.S.C. 3593(e)), the jury unanimously determined that, as to Counts 3, 7, and 11, the aggravating factors "sufficiently outweigh[ed]" the

mitigating factors to warrant a sentence of death. 00-cr-260 D. Ct. Doc. 2432-2, at 9, 17, 32, 39. The jury recommended a sentence of death on those counts, and the district court imposed such a sentence under 18 U.S.C. 3594.

b. On direct appeal, petitioner argued in pertinent part that, in light of this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), his death sentence was constitutionally invalid because the indictment did not allege the statutory aggravating factors that rendered him eligible for a sentence of death. The government acknowledged that the indictment should have alleged the aggravating factors submitted to the jury, but argued that the error was harmless. The court of appeals agreed and affirmed petitioner's conviction and sentence. 367 F.3d at 283-289.

The court of appeals explained that "the absence of an indictment on the aggravating factors used to justify a death sentence is not structural error and is susceptible to harmless error review." 367 F.3d at 286. The court observed that this Court in Neder v. United States, 527 U.S. 1, 8 (1999), had not included the failure of the grand jury to find a sentence-enhancing fact among the limited class of cases involving "structural errors." 367 F.3d at 285 (citation omitted). The court of appeals also noted the "difficult[y]" of distinguishing the error that Neder found to be subject to harmless-error review -- failure to instruct the jury on an element of the crime -- from the failure to allege a statutory aggravating factor in the indictment. Id.

at 286. And the court additionally observed that petitioner's claim that the error in his case was structural was difficult to reconcile with this Court's holding in United States v. Cotton, 535 U.S. 625 (2002), that the omission of a sentence-enhancing fact from the indictment in that case did not "seriously affect the fairness, integrity, or public reputation of the judicial proceedings." 367 F.3d at 286. The court of appeals explained that "it is difficult to accept that the same error simultaneously could be the sort of 'structural error' discussed in Neder" and one that does not fundamentally affect the fairness of proceedings. Ibid. (citation omitted).

The court of appeals then determined that the error was harmless on the facts of this case. The court explained that the death penalty notice filed by the government pursuant to 18 U.S.C. 3593(a) gave petitioner adequate pretrial notice of all the aggravating factors relied on by the petit jury in recommending a death sentence. 367 F.3d at 287. The court observed that petitioner was not harmed by the absence of a determination by the grand jury that any aggravating factor was supported by probable cause because, "[i]n addition to the petit jury's unanimous findings," the evidence supporting the existence of probable cause was "overwhelming." Id. at 289. Accordingly, the court found that "beyond a reasonable doubt, the failure to charge those factors in an indictment did not contribute to [petitioner's] conviction or death sentence." Ibid.

c. This Court denied a petition for a writ of certiorari seeking review of the harmless-error determination. 543 U.S. 1005.

3. In 2006, petitioner moved under 28 U.S.C. 2255(a) to vacate his sentence, principally asserting that (1) he received ineffective assistance of counsel at trial and on direct appeal and (2) that his conviction violated the Equal Protection Clause on the theory, inter alia, that the prosecution struck jurors based on race in violation of Batson v. Kentucky, 476 U.S. 79 (1986). 00-cr-260 D. Ct. Doc. 2279 (Nov. 29, 2005). While the Section 2255 motion was pending in the district court, petitioner filed two motions that are relevant here.

a. First, petitioner moved for permission under the district court's local rules to interview jurors. Pet. App. 359-368; see N.D. Tex. Local Crim. R. 24.1. Petitioner acknowledged that courts in the Fifth Circuit "[o]rdinarily" do not permit post-trial access to jurors without "'a showing of illegal or prejudicial intrusion into the jury process,'" and that he could not "make the requisite showing at th[at] time." Pet. App. 360 (quoting United States v. Riley, 544 F.2d 237, 242 (5th Cir. 1976), cert. denied, 430 U.S. 932 (1977)). Petitioner argued, however, that the court should exercise its discretion to permit juror interviews "given the importance of the constitutional right" to an impartial jury and the capital nature of his case. Ibid.

The district court denied petitioner's motion. Pet. App. 369-372. The court observed that petitioner had not "state[d]

that he has any reason to suspect that his jury was actually partial." Id. at 369. And it found that under the circumstances, petitioner's "request appear[ed] to be nothing more than a fishing expedition," id. at 370, and granting it would allow him unnecessarily to "'ransack[] the jurors in search of some ground * * * for a new trial,'" id. at 371 (quoting Riley, 544 F.2d at 242).

b. In 2007, petitioner moved to amend his Section 2255 motion to add a claim renewing his contention that the omission of statutory aggravating factors from his indictment was a structural error that required reversal of his death sentences. Pet. App. 392-394. Petitioner acknowledged that this "ground" for relief did not "relate back" to his original Section 2255 motion under this Court's decision in Mayle v. Felix, 545 U.S. 644 (2005), but he argued that leave to amend should be granted because decisions of this Court "issued after the original habeas motion was filed cast serious doubt on the viability of the" court of appeals' decision on his direct appeal. Pet. App. 392-393.

The district court denied the motion in relevant part. Pet. App. 396-400. The court noted at the outset the principle that a habeas "petitioner may not raise an issue in his motion to vacate that has already been decided adversely to him on direct appeal," and observed that petitioner sought to avoid that rule by invoking two decisions that had been released after his direct appeal: United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), and United

States v. Resendiz-Ponce, 549 U.S. 102 (2007). Pet. App. 397. The court explained that neither decision afforded petitioner a basis for relief. The court observed that the decision in Gonzalez-Lopez had addressed structural error but did not involve "any type of indictment error" and that, although the Court in Resendiz-Ponce had granted review to consider whether the omission of an element of a criminal offense from an indictment can be harmless, the Court ultimately resolved the case on other grounds. Id. at 398. The court further explained that the decisions would not support petitioner's collateral attack even if they "were on point," because neither decision would be retroactively applicable to cases on collateral review. Id. at 398-399 (citing Schriro v. Summerlin, 542 U.S. 348, 355 (2004)).

c. The district court later denied petitioner's Section 2255 motion. 00-cr-260 D. Ct. Doc. 2454. The court also denied petitioner's request for a COA, which did not raise either the juror-interview issue or the defective-indictment claim as grounds for appellate review. 00-cr-260 D. Ct. Doc. 2473. The court of appeals likewise denied a COA, and this Court denied a petition for a writ of certiorari, 565 U.S. 827.

4. In 2018, petitioner filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6). Pet. App. 49-51. Petitioner argued in relevant part that this Court's decision Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), supported his earlier request for permission to interview jurors

and that two other decisions of this Court constituted an intervening change in the law governing "structural error" that warranted revisiting the denial of his motion to amend his Section 2255 motion.[1]

The district court determined that petitioner's Rule 60(b) motion constituted a second or successive motion under Section 2255 and transferred the motion to the court of appeals for consideration as a request for authorization under 28 U.S.C. 2255(h) to file such a motion. Pet. App. 24-33. The court explained that, under Gonzalez v. Crosby, 545 U.S. 524 (2005), "[d]istrict courts have jurisdiction to consider Rule 60(b) motions in * * * 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." Pet. App. 26. The court determined, however, that the juror-interview and structural-error arguments in petitioner's motion fell outside the bounds of a proper Rule 60(b) motion because, "[al]though couched in terms of procedural error," those arguments "are, at bottom, merits-based challenges to his conviction." Id. at 32. Because the court understood petitioner to be attempting "the type of end-run around the successive

[1] Petitioner also argued that the district court and court of appeals had applied an erroneously demanding standard in denying him a COA following the denial of his Section 2255 motion. Pet. App. 44-49. Both courts below concluded that this argument constituted a successive claim, id. at 9-11, 27-28, and petitioner does not challenge that conclusion in this Court.

[Section 2255] petition rules that Gonzalez prohibits," the court transferred the motion to the court of appeals to consider whether to authorize the filing under Section 2255(h). Ibid.

5. The court of appeals agreed with the district court that petitioner's Rule 60(b) motion should be treated as a second or successive Section 2255 motion, denied authorization under Section 2255(h), and dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 2-21.

The court of appeals first addressed petitioner's argument concerning the denial of leave to interview jurors. Pet. App. 12-14. The court observed that the argument was best understood as a request "'to re-open the proceedings for the purpose of adding'" a new "claim related to jury impartiality," which made it "'the definition of a successive claim.'" Id. at A13 (quoting In re Edwards, 865 F.3d 197, 204-205 (5th Cir.) (per curiam), cert. denied, 137 S. Ct. 909 (2017)). The court reasoned in the alternative that, even if petitioner's "impartial-jury claim did not constitute a second or successive habeas petition, [the court] would undoubtedly conclude that he fails to show" the kind of "'extraordinary circumstances'" needed "'to justify the reopening of the final judgment under Rule 60(b)(6).'" Id. at 14 n.18 (brackets and citation omitted).

The court of appeals next determined that, while petitioner framed his renewed claim of structural error in the indictment in procedural terms, that claim was also a "merits-based" challenge

properly treated as successive. Pet. App. 15-18. The court again reasoned in the alternative that, even if petitioner's motion did not qualify as second or successive, his reliance on "changes in decisional law" did not present the kind of "extraordinary circumstance" that would support reopening an earlier decision under Rule 60(b)(6). Id. at 17 n.22.

Having determined that petitioner's motion was correctly treated as successive, the court of appeals considered whether to authorize petitioner's juror-interview claim under the criteria in Section 2255(h) and declined to do so. Pet. App. 17-20. The court found it "exceedingly doubtful" that Pena-Rodriguez announced a substantive rule of law "that applies retroactively to cases on collateral review," but declined to decide that issue because petitioner had not otherwise made the "prima facie showing of possible merit necessary * * * to warrant certification of his second or successive habeas motion." Id. at 20. The court stressed in particular that, in the 17 years since his trial, petitioner had "proffered absolutely no evidence of juror misconduct or bias." Id. at 20-21.

ARGUMENT

Petitioner contends (Pet. 24-30) that the courts below erred in treating his Rule 60(b) motion as a successive collateral attack requiring authorization by the court of appeals under 28 U.S.C. 2255(h). Petitioner further contends (Pet. 3-4, 15-23) that review is warranted based on recent decisions of this Court that, in his

view, show he was entitled to interview the jurors from his trial to pursue a claim of racial bias and that omission of statutory aggravating factors from his indictment was a structural error. Those contentions lack merit. The court of appeals correctly determined that petitioner's Rule 60(b) motion challenged merits rulings of the district court during the course of his first Section 2255 motion and was therefore a successive motion requiring certification under 28 U.S.C. 2255(h). That determination does not conflict with any decision of this Court or another court of appeals. And even if that threshold procedural ruling were incorrect, review is unwarranted because neither of petitioner's arguments would support relief under Rule 60(b)(6). The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined (Pet. App. 6-17) that the district court lacked jurisdiction over petitioner's Rule 60(b) motion because it is a second or successive motion that does not satisfy 28 U.S.C. 2255(h)'s requirements for successive collateral attacks.[2]

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[2] Petitioner does not suggest that the petition be held pending the Court's decision in Banister v. Davis, cert. granted, No. 18-6943 (argued Dec. 4, 2019), and any such suggestion would lack merit. Banister concerns the circumstances in which a motion under Federal Rule of Civil Procedure 59(e) -- which is filed during the pendency of a prisoner's initial habeas corpus proceedings -- can be treated as a second or successive petition. And the claims asserted here are unlike those at issue in Banister. Accordingly, no reasonable probability exists that the Court's decision in Banister would affect the proper disposition of petitioner's motion here.

a. Once a federal defendant's conviction becomes final on appeal, he may file a Section 2255 motion to "move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. 2255(a). The motion must "specify all the grounds for relief available to the moving party." Rules Governing Section 2255 Proceedings for the United States District Courts 2(b)(1).

Under provisions enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), any "second or successive motion" for relief under Section 2255 must be certified by a panel of the court of appeals. 18 U.S.C. 2255(h). The court must certify that the motion raises a claim involving "(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." Ibid. A district court lacks jurisdiction to consider a second or successive motion absent such certification. See Burton v. Stewart, 549 U.S. 147, 153 (2007) (per curiam) (finding similar authorization requirement for second or successive collateral attacks on state conviction to be jurisdictional); see also, e.g., United States v. Patton, 309 F.3d 1093, 1094 (8th Cir. 2002) (per curiam). "[T]he * * * denial of an authorization by a court of

appeals to file a second or successive" motion is not subject to further review. 28 U.S.C. 2244(b)(3)(E).

Accordingly, where a defendant has already filed an unsuccessful Section 2255 motion, the district court cannot consider any subsequent motion for Section 2255 relief on new claims or through relitigation of the merits of the previously rejected claims without precertification by the court of appeals. See Gonzalez v. Crosby, 545 U.S. 524, 529-530 (2005).[3] That is true even where the federal prisoner frames his request to the district court as a motion under Rule 60(b) for relief from the court's earlier judgment denying Section 2255 relief, rather than as a new, freestanding Section 2255 motion. See ibid. As this Court has explained, a Rule 60(b) motion that attacks the "substance of the federal court's resolution of a claim on the merits" and "asks for a second chance to have the merits determined favorably" is a second or successive request for relief for purposes of AEDPA's relitigation bar. 545 U.S. at 532 & n.5. Precertification is therefore required for any Rule 60(b) motion that asserts a new ground for relief or "asserts that a previous

[3] In Gonzalez, the Court "consider[ed] only the extent to which Rule 60(b) applies to habeas proceedings under 28 U.S.C. § 2254, which governs federal habeas relief for prisoners convicted in state court." 545 U.S. at 529 n.3. The courts of appeals, however, have concluded that Gonzalez's reasoning applies equally to a federal prisoner's motion for collateral relief under Section 2255, see Gilbert v. United States, 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc) (collecting cases), cert. denied, 565 U.S. 1116 (2012), and petitioner does not dispute that Gonzalez applies in Section 2255 cases.

ruling regarding one of those grounds was in error." Id. at 532 n.4.

By contrast, a Rule 60(b) motion is not treated as a second or successive habeas motion if it attacks "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." Gonzalez, 545 U.S. at 532. A Rule 60(b) motion attacks a defect in the integrity of the proceedings if it asserts error in a "ruling which precluded a merits determination," such as the denial of a habeas motion based on a "procedural default" or a "statute-of-limitations bar." Id. at 532 n.4.

b. The courts below correctly determined that petitioner's Rule 60(b) motion qualified as a second or successive Section 2255 motion under Gonzalez. Pet. App. 11-18, 25-32. The Rule 60(b) motion raised two arguments relevant here: (1) that the district court erred in denying petitioner leave to amend his Section 2255 motion to reassert a claim that the omission of statutory aggravating factors from the indictment was structural error, and (2) that the court erred in denying his motion to interview jurors to investigate potential juror bias or misconduct. Id. at 49-59.

Petitioner contends that the first of those arguments raised a challenge to the district court's "procedural" ruling on petitioner's motion for leave to amend and thus did not qualify as a "successive" claim subject to Section 2255(h)'s restrictions. Pet. 16 n.4, 24. As the court of appeals observed, however, the

district court "denied amendment in a merits-based decision." Pet. App. 17. The district court not only noted at the outset the "[e]stablished" rule that a habeas "petitioner may not raise an issue in his motion to vacate that has already been decided adversely to him on direct appeal," Id. at 397; see Reed v. Farley, 512 U.S. 339, 358 (1994) (Scalia, J., concurring in part and concurring in the judgment), but also considered the substance of petitioner's claim. It determined that the two recent decisions of this Court he cited "were [not] on point" and that, even if they were, neither decision would afford a ground for relief because they did not apply "retroactively" to cases on collateral review. Pet. App. at 398-399; see id. at 5 n.3. If denial of leave to amend on that ground were deemed "procedural," it would have the anomalous effect of putting prisoners in a better position to file Rule 60(b) motions on claims that they omitted from their original collateral attack. The courts below correctly declined to endorse such an approach by treating petitioner's reliance on additional authority in support of the same claim as subject to the restrictions in Section 2255(h). See Gonzalez, 545 U.S. at 531-532.

Petitioner does not develop in the body of his petition -- and accordingly has relinquished -- any argument that the courts below erred in treating his separate juror-interview claim as a successive claim that also required authorization under Section 2255(h). Any such argument would lack merit in any event. As the

court of appeals explained, petitioner sought reopening of the Section 2255 proceedings so that he could interview jurors in support of a challenge to the impartiality of his jury that he never raised on direct appeal or in his amended Section 2255 motion. Pet. App. 12-13. But Rule 60(b) does not permit petitioner to "circumvent" the requirement in Section 2255 "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; see 28 U.S.C. 2255(h). Petitioner has identified no new retroactive rule, 28 U.S.C. 2255(h)(2), nor any "newly discovered evidence," 28 U.S.C. 2255(h)(1) -- let alone evidence suggesting factual innocence, see ibid. -- that would support his claim. Allowing speculative claims like petitioner's to justify reopening a collateral attack would contradict the statutory scheme and open the door to successive claims in many cases.

Because the courts below correctly treated both of petitioner's arguments as successive claims subject to Section 2255(h)'s strictures, and because petitioner did not obtain precertification to pursue those claims, Section 2255(h) precludes further review. See also 28 U.S.C. 2244(b)(3)(E) (providing that court of appeals' denial of precertification is not subject to certiorari review).

2. Petitioner's contention that the omission from an indictment of "an element of an offense or an aggravating factor rendering the defendant eligible for a death verdict amounts to

structural error warranting reversal," Pet. 18 (emphasis omitted), is accordingly not properly before the Court. In any event, this Court denied review of that same question on petitioner's direct appeal, see 543 U.S. 1005; the Rule 60(b) posture of this case makes it an unsuitable vehicle for addressing the question; the claim lacks merit; and no circuit conflict exists that would warrant further review.

a. As an initial matter, this Court could reach the structural-error question presented in the petition only if it first reversed the court of appeals' jurisdictional determination and then also concluded that petitioner satisfied the criteria for relief from judgment under Rule 60(b). Cf. Buck v. Davis, 137 S. Ct. 773, 779 (2017). But as the court of appeals determined in the alternative (Pet. App. 17 n.22), and as the government argued in the district court (id. at 86-88), petitioner (even if his motion were jurisdictionally proper) cannot satisfy the Rule 60(b) criteria that govern at the post-conviction stage.

Arguing that decisions of this Court that postdate his direct appeal support relief from judgment, petitioner's motion invoked the catchall provision in Rule 60(b)(6) for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6); see Pet. App. 94-97. In Gonzalez, however, this Court explained that its "cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances'" to justify reopening a final

judgment and that "[s]uch circumstances will rarely occur in the habeas context." 545 U.S. at 535 (citation omitted).

Indeed, Gonzalez itself emphasized that one of the Court's decisions construing the federal habeas statutes did not constitute an extraordinary circumstance, even if that decision showed that the district court had erred in dismissing the prisoner's habeas petition on statute-of-limitations grounds. 545 U.S. at 536-537. And while petitioner contends (Pet. 27) that courts of appeals since Gonzalez "have kept open the possibility that a change in law * * * can constitute an extraordinary circumstance," he identifies no court that would deem his claim here to warrant relief under Rule 60(b). See Moses v. Joyner, 815 F.3d 163, 169 (4th Cir. 2016) (noting the "admirable consistency" of the law on this issue since Gonzalez, and explaining that even decisions such as those cited by petitioner "are peppered with cautionary language, underscoring that" a change in decisional law "'without more, does not entitle a habeas petitioner to Rule 60(b)(6) relief'") (quoting Cox v. Horn, 757 F.3d 113, 124 (3d Cir. 2014), cert. denied, 575 U.S. 929 (2015)), cert. denied, 137 S. Ct. 1202 (2017).

Even if a change in decisional law alone could constitute an extraordinary circumstance under Gonzalez, the three decisions cited by petitioner would not rise to that level, because none altered the criteria that the court of appeals considered during petitioner's direct appeal in determining whether the indictment

error was structural. As explained above, the court of appeals reasoned that (1) the indictment's failure to include statutory aggravating factors required to render petitioner eligible for the death penalty was analogous to the omission of an element of the crime in petit jury instructions, which this Court held to be susceptible to harmless-error analysis in Neder v. United States, 527 U.S. 1 (1999); and (2) this Court's determination in United States v. Cotton, 535 U.S. 625 (2002), that the omission of a sentence-enhancing element from an indictment "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings," see id. at 632-633, "suggests strongly that such a defect is not the sort of structural error that necessarily escapes harmless error review," 367 F.3d at 278, 285-286.

Nothing in decisions cited by petitioner calls that analysis into question. The decision in Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), addressed whether an error that the Court had already classified as "structural" when raised on direct appeal -- the closure of a courtroom in violation of the Sixth Amendment's public-trial right -- required a showing of prejudice when presented as part of a claim of ineffective assistance of counsel on collateral review. Id. at 1905, 1907. Petitioner relies not Weaver's actual holding -- that a prisoner in that circumstance is required to show prejudice, see id. at 1911 -- but instead on the Court's description of the "three broad rationales" for holding that certain violations are "not amenable to" harmless-error

analysis. Id. at 1908. None of the examples that the Court listed under the three "categories" of structural errors, however, included the defective-indictment claim that petitioner raises. Ibid. Further, the Court repeatedly cited with approval its prior discussion of structural error in Neder, 527 U.S. at 8, on which the court of appeals relied in considering the amenability of the indictment error here to harmlessness analysis. Weaver, 137 S. Ct. at 1910-1912.[4]

The decisions in Williams v. Pennsylvania, 136 S. Ct. 1899 (2016), and McCoy v. Louisiana, 138 S. Ct. 1500 (2018), also do not demonstrate a change in decisional law that could support relief under Rule 60(b)(6). See Pet. 9-10, 24, 26. Williams involved the longstanding rule that participation of a biased judge is an error that cannot be assessed for prejudice because it affects the "whole adjudicatory framework." 136 S. Ct. at 1910; see Neder, 517 U.S. at 8 (citing Tumey v. Ohio, 273 U.S. 510 (1927)). The only question for the Court was whether that established rule governed the failure of a judge on a multi-member appellate court to recuse, where that "jurist's vote was not

[4] Petitioner emphasizes (Pet. 11-12, 20-21) the distinction drawn in Weaver between claims of structural error preserved and raised on direct review and those presented on collateral review. See 137 S. Ct. at 1910-1911. That analysis does not aid petitioner, however, because it does not speak to whether an indictment error is appropriately classified as structural in the first place -- which is the distinct question that the court of appeals decided in his direct appeal and the district court reaffirmed in the Section 2255 proceedings.

decisive." Williams, 136 S. Ct. at 1909. And in McCoy, the Court simply applied its prior precedents holding that "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as [structural] error" to a lawyer's concession of his client's guilt at the guilt phase of a capital trial. 138 S. Ct. at 1511 (citing, inter alia, McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)). McCoy's holding -- rooted in the Court's dual conclusions that such an error "blocks the defendant's right to make the fundamental choices about his own defense" and has "effects" that are "immeasurable," ibid. -- does not in any way undermine the denial of petitioner's motion to amend his Section 2255 motion, much less constitute an extraordinary circumstance justifying relief under Rule 60(b)(6).

b. Even if petitioner's claim were properly before this Court, that claim would not warrant review because it lacks merit. The omission from an indictment of a sentence-enhancing fact bears no relation to the limited category of pervasive and fundamental errors that are so intrinsically harmful to the framework of a trial that this Court has deemed them structural. This Court has observed that "if the defendant had counsel and was tried by any impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." Rose v. Clark, 478 U.S. 570, 579 (1986). For example, as discussed above, this Court held in Neder that the failure to submit an offense element to the petit jury does not constitute

structural error. 527 U.S. at 8-15. And in Washington v. Recuenco, 548 U.S. 212, 220-222 (2006), this Court reached the same determination with respect to a sentence-enhancing fact not submitted to the jury. The type of omission here is an even weaker candidate for structural error than the omissions in those cases, given this Court's recognition that errors at the charging stage may be rendered harmless by subsequent developments in the prosecution. See United States v. Mechanik, 475 U.S. 66, 70-72 (1986).

c. Petitioner asserts that plenary review of his defective-indictment claim is nevertheless warranted because that claim implicates a circuit conflict on "whether an indictment that omits an element of an offense or an aggravating factor rendering the defendant eligible for a death verdict amounts to structural error warranting reversal." Pet. 18 (emphasis omitted). As petitioner observes (ibid.), this Court in 2006 granted a writ of certiorari in United States v. Resendiz-Ponce, 549 U.S. 102 (2007), to decide "whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error," but this Court ultimately did not reach the issue, finding that the indictment was not defective in that case. Id. at 103-104. In light of subsequent developments, however, no conflict exists on the question presented in the petition.

Many courts of appeals have recognized that an indictment's failure to allege an element of an offense, even when the defendant

makes a timely objection, is subject to harmless-error review. See, e.g., United States v. Dentler, 492 F.3d 306, 310-312 (5th Cir. 2007); United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); United States v. Prentiss, 256 F.3d 971, 981-985 (10th Cir. 2001) (en banc) (per curiam), overruled in part on other grounds by Cotton, supra; United States v. Corporan-Cuevas, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001). Although the Third and Ninth Circuits had previously concluded that omissions of (non-sentencing) offense elements constitute structural error, see United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999); United States v. Spinner, 180 F.3d 514, 515-516 (3d Cir. 1999), more recent decisions from those courts issued after Resendiz-Ponce cast doubt on the extent of any current division of authority.

Specifically, in 2007, the Ninth Circuit refused to extend Du Bo to indictment errors in the "sentencing context." United States v. Salazar-Lopez, 506 F.3d 748, 750, 752-755 (2007), cert. denied, 553 U.S. 1074 (2008). It also observed that Du Bo's rationale "ha[d] been overruled by" this Court's decision in Cotton, supra. 506 F.3d at 754 n.5. And in 2016, the Third Circuit overruled Spinner, explaining that the rationale of that decision was "inconsistent with the Supreme Court's treatment of defective indictments and jury instructions in Cotton and Neder." United States v. Stevenson, 832 F.3d 412, 427 n.11 (2016), cert. denied, 137 S. Ct. 674 (2017).

But even if a meaningful division of authority continued to exist, it would not extend to the circumstances presented here. The courts of appeals uniformly agree that harmless-error review does apply to omissions of sentencing-enhancing factors from indictments, including in capital cases under the FDPA. See, e.g., United States v. Confredo, 528 F.3d 143, 155-156 (2d Cir. 2008) (enhancement under 18 U.S.C. 3147), cert. denied, 556 U.S. 1144 (2009); Salazar-Lopez, 506 F.3d at 750, 753 (9th Cir.); United States v. Brown, 441 F.3d 1330, 1367-1368 n.16 (11th Cir. 2006) (FDPA sentencing factor), cert. denied, 549 U.S. 1182 (2007); United States v. Cordoba-Murgas, 422 F.3d 65, 69, 72 (2d Cir. 2005) (drug-quantity enhancement); United States v. Allen, 406 F.3d 940, 945, 949 (8th Cir. 2005) (FDPA element), cert. denied, 549 U.S. 1095 (2006); 367 F.3d at 285-286 & n.7 (5th Cir.) (same, in petitioner's direct appeal); United States v. Trennell, 290 F.3d 881, 889-890 (7th Cir.) (drug quantity), cert. denied, 537 U.S. 1014 (2002).

This Court has denied petitions for writs of certiorari in at least three capital cases presenting the same question of whether the omission of statutory factors for death-eligibility under the FDPA from an indictment can be harmless error. See Davis v. United States, 562 U.S. 1290 (2011) (No. 10-7564); Battle v. United States, 549 U.S. 1343 (2007) (No. 06-8356); Allen v. United States, 549 U.S. 1095 (2006) (No. 05-6764). The Court has similarly denied petitions for writs of certiorari in several non-capital cases

raising the issue. See, e.g., Lee v. United States, 137 S. Ct. 2212 (2017) (No. 16-7317); Barton v. United States, 135 S. Ct. 753 (2014) (No. 14-5354); Gomez v. United States, 571 U.S. 1096 (2013) (No. 13-5625); Lucatero-Campos v. United States, 552 U.S. 1145 (2008) (No. 07-6575). The same result is warranted here.

3. Petitioner contends that review is also warranted "to establish that barring criminal defendants from access to their trial jurors, particularly in death penalty cases, contradicts" the Court's decision in Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017). Pet. 15 (emphasis omitted). Petitioner identifies no decision holding that Pena-Rodriguez overrides local rules on juror contacts like the one the district court applied here, Pet. App. 370, and the successive-collateral review and Rule 60(b) context of this case makes it an unsuitable vehicle for addressing petitioner's contention in any event.

a. As an initial matter, and as is true of petitioner's defective-indictment claim, this Court could reach petitioner's contention under Pena-Rodriguez only if it disagreed with both the lower courts' jurisdictional determination and the court of appeals' alternative determination that petitioner did not demonstrate "extraordinary circumstances" warranting relief under Rule 60(b)(6). Pet. App. 14 n.18 (citation omitted). But petitioner's sole argument in support of an extraordinary-circumstances showing is this Court's decision in Pena-Rodriguez. And as explained above, pp. 20-21, supra, intervening decisions of

this Court do not inherently qualify as "extraordinary circumstances" that warrant reopening a district court's decision rejecting a collateral attack on a conviction or sentence. Gonzalez, 545 U.S. at 536-537.

b. Even assuming that a change in decisional law regarding post-conviction procedures could in some scenario amount to an extraordinary circumstance, see pp. 20-21, supra, this Court's decision in Pena-Rodriguez would not satisfy that standard here, for two reasons.

First, petitioner could not benefit from Pena-Rodriguez in any reopened Section 2255 proceedings because that decision does not apply retroactively to cases on collateral review. See Pet. App. 20 (finding it "exceedingly doubtful" that Pena-Rodriguez "announced a new substantive rule that applies retroactively to cases on collateral review"). The Court in Pena-Rodriguez announced a narrow exception to the general rule precluding impeachment of a jury's verdict, "hold[ing] that where 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." 137 S. Ct. at 869. That rule is procedural in nature, "because it neither 'decriminalizes a class of conduct nor prohibits the imposition of capital punishment on a particular class of

persons.'" Tharpe v. Warden, 898 F.3d 1342, 1345 (11th Cir. 2018) (quoting Lambrix v. Singletary, 520 U.S. 518, 539 (1997)), cert. denied, 139 S. Ct. 911 (2019). And it does not qualify as "a watershed rule of criminal procedure," id. at 1346, a category of rules that this Court has described as "extremely narrow" and "'unlikely'" to include new members, Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (citation omitted). See Tharpe v. Sellers, 138 S. Ct. 545, 551-552 (2018) (per curiam) (Thomas, J., dissenting). Because Pena-Rodriguez would not apply to any claim of juror partiality or bias petitioner raised in a reopened Section 2255 proceeding, that decision cannot constitute an extraordinary circumstance justifying relief from judgment under Rule 60(b)(6).

Second, Pena-Rodriguez does not support the constitutional exception to local "rules barring post-conviction interviews with jurors" (Pet. 18) that petitioner seeks. As petitioner acknowledges (Pet. 15), Pena-Rodriguez by its terms "deferred to the lower courts to resolve whether and when a criminal defendant may pursue evidence of a juror's racial bias." The Court stated that "[t]he practical mechanics of acquiring and presenting" evidence of racial animus "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 869. And the Court expressed no concerns about the lawfulness of such rules. It explained that counsel may still develop the required evidence when jurors "come forward of their

own accord," as jurors had done in Pena-Rodriguez itself, and that "limits on juror contact can be found in other jurisdictions that" had previously "recognize[d] a racial-bias exception" to the no-impeachment rule, id. at 869-870, without suggesting any infirmity in those limits.

The courts of appeals, in turn, have uniformly recognized that Pena-Rodriguez created only a "narrow exception" to the general no-impeachment rule, United States v. Baker, 899 F.3d 123, 133-134 (2d Cir.), cert. denied, 139 S. Ct. 577 (2018), and that the decision is fully compatible with trial courts' application of local rules limiting post-trial access to jurors. See United States v. Birchette, 908 F.3d 50, 57-58 (4th Cir. 2018) (describing the exception as "narrow," and affirming a district court's application of a local rule requiring "good cause" to justify juror interview), cert. denied, 140 S. Ct. 162 (2019); United States v. Robinson, 872 F.3d 760, 764, 770 (6th Cir. 2017) (explaining that Pena-Rodriguez announced an exception that applies "in very limited circumstances" and reaffirmed "the validity of * * * local rules" limiting post-trial contact with jurors), cert. denied, 139 S. Ct. 55, and 139 S. Ct. 56 (2018), and 139 S. Ct. 786 (2019); see also Young v. Davis, 860 F.3d 318, 333 (5th Cir. 2017) (explaining that the exception applies "narrowly"), cert. denied, 138 S. Ct. 656 (2018).

Petitioner here has brought forth no evidence at all suggesting juror bias that might entitle him to invoke the narrow

Pena-Rodriguez exception. "Over the past seventeen years, [petitioner] has proffered absolutely no evidence of juror misconduct or bias." Pet. App. 20-21; id. at 29 (noting that, at the time of his request for leave under the district court's local rules to interview jurors, petitioner "conceded he had no evidence of a Sixth Amendment violation"). And he identifies no decision of any court of appeals adopting a contrary view or suggesting that a defendant cannot be required to proffer at least "some evidence that racial bias infected his jury's deliberations" (Pet. 18) before his lawyers will be permitted to interview jurors years after trial. He accordingly would not qualify for any relief under Pena-Rodriguez.

c. Finally, even if Pena-Rodriguez applied retroactively and supported an exception to local rules limiting juror contact, petitioner would not be able to establish extraordinary circumstances under Rule 60(b) for an additional reason -- namely, "his lack of diligence in pursuing" his juror-interview claim, Gonzalez, 545 U.S. at 537. In Gonzalez, this Court found an intervening decision that (the Court assumed) rendered erroneous the dismissal of a state prisoner's federal habeas petition was "all the less extraordinary," for purposes of the "extraordinary circumstances" requirement of Rule 60(b)(6), because the decision issued at a time when Gonzalez "had abandoned any attempt to seek review of the District Court's decision on th[at] statute-of-limitations issue." Ibid. The Court observed in particular that

Gonzalez had not raised the statute-of-limitations "issue in his application for a COA," nor sought to raise it in a petition for rehearing in the court of appeals or in a petition for certiorari in this Court. Ibid. And the Court explained that Gonzalez's "lack of diligence" confirmed that the decision on which he relied was "not an extraordinary circumstance justifying relief from the judgment in [his] case." Ibid.

Petitioner's juror-interview claim here is analogous in relevant respects. After the district court denied petitioner's request for leave to interview jurors, he did not reassert that request, or the associated claim of juror partiality, in his Section 2255 proceedings. And when the court ultimately denied his Section 2255 motion, petitioner did not raise the denial of his juror-interview request in his application for a COA in the district court or the court of appeals, or in his petition for certiorari asserting that the lower courts had erred in denying him a COA. Cf. Slack v. McDaniel, 529 U.S. 473, 483 (2000) (setting forth general principles for issuing a COA where a habeas petition is denied on procedural grounds). No less than in Gonzalez, petitioner's "lack of diligence in pursuing review of the" juror-interview issue "confirms that" the Court's subsequent decision in Pena-Rodriguez "is not an extraordinary circumstance justifying relief" under Rule 60(b). See 545 U.S. at 537.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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