No. 19-5535

IN THE

Supreme Court of the United States

JULIUS OMAR ROBINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. Certiorari should be granted to establish that the omission of aggravating factors from a federal indictment charging a capital offense is structural error.

A. This is not a second-or-successive claim.

The Government argues that Robinson's challenge is improper under Rule 60(b) because the district court's ruling "considered the substance of the petitioner's [defective indictment] claim." BIO at 18. This Court has not adopted a bright-line rule for distinguishing between a bona fide Rule 60(b) motion and a disguised second-or-successive § 2255 motion. However, as *Gonzalez v. Crosby* made clear, determining whether a Rule 60(b) motion is a second-or-successive habeas petition is "relatively simple." 545 U.S. 524, 532 (2005). Generally speaking, an argument that attacks "some defect in the integrity of the federal habeas proceedings" is properly raised under Rule 60(b). *Id.* In the context of Rule 60 motions, a denial of a claim "on the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief. . . ." *Id.* at 532 n.4. While there are undoubtedly constitutional dimensions to the denial of Robinson's request to amend his petition with a claim alleging a violation of his constitutional rights, his Rule 60(b) challenge is not merits-based because precluding him from amending his petition would not, standing alone, entitle him to habeas relief. *Id.*

According to the Government, the district court's "merits-based" decision denying amendment cannot be compared to those strictly procedural challenges specifically cited by *Gonzalez* as amenable to Rule 60(b) review, "such as the denial of a habeas motion based on a 'procedural default.'" *Id.* at 17 (quoting *Gonzalez*, 545 U.S. at 532 n.4). However, for purposes of Rule 60(b), there is no meaningful distinction between a denial of habeas claim based on procedural default and a denial of a request to amend. When analyzing procedural default, courts must determine whether a habeas petitioner has established cause and prejudice for failing to raise a claim. The prejudice analysis necessarily includes a review of the merits of the defaulted claim. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 289-90 (1999) (discussing the viability of the underlying *Brady* claim when assessing prejudice). Yet a challenge to a procedural-default ruling is permissible in Rule 60(b), because this Court has determined that the end result does not actually attack "the substance of the federal court's resolution of a claim on the merits." *Gonzalez*, 545 U.S. at 532. Similarly, the fact that the district court considered the merits of the underlying claim when denying the request to amend does not transform it into a "resolution of a claim on the merits." *Id.* At the end of the day, both are procedural decisions that preclude merits review. The Government provides no authority to the contrary beyond the incorrect decisions of the lower courts in this case, which conflict with

established rules of civil procedure and this Court's jurisprudence. *See, e.g., Mayle v. Felix*, 545 U.S. 644, 655 (2005) (habeas applications "may be amended . . . as provided in the rules of procedure applicable to civil actions.") (internal citations omitted).

Even if Robinson's challenge to the denial of his motion to amend could somehow be construed as a substantive habeas claim, this Court has recognized that a petitioner can raise a substantive claim, and later challenge the *procedural* aspects of the denial of that claim in a Rule 60(b)(6) motion. For example, in *Buck v. Davis*, petitioner Buck failed to timely raise a *Strickland*[1] ineffective-assistance claim during his state post-conviction proceedings. 137 S. Ct. 759, 770 (2017). On federal habeas, the district court ruled the claim was procedurally defaulted pursuant to *Coleman v. Thompson*, 501 U.S. 722 (1991), which held that an attorney's failure to raise an ineffective-assistance claim during state post-conviction review could not constitute cause for a procedural default. *Id.* Subsequently, this Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013) abrogated the *Coleman* rule by holding that a defaulted *Strickland* claim may be reviewable on the merits, provided the claim had merit and habeas counsel was ineffective for failing to raise it. Buck moved

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

to reopen his federal habeas case under Rule 60(b)(6), arguing, *inter alia*, that the change in law affected by *Martinez* and *Trevino* called into question the procedural denial of his defaulted *Strickland* claim, because if those cases had been decided earlier, they would have established cause for the default and opened the door to federal review. *Buck*, 137 S. Ct. at 772. While the federal district court and the Fifth Circuit denied Buck's 60(b) motion, both courts recognized that Buck's challenge was properly raised in the 60(b) context and was not an impermissible second-or-successive habeas claim. This Court followed suit, ultimately granting Buck Rule 60(b) relief.

Like *Buck*, Robinson filed a valid Rule 60(b) motion challenging a procedural ruling that had ramifications for his substantive habeas petition. *Gonzalez*, 545 U.S. at 532 nn.4-5. And like *Buck*, had the decisions in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) been decided earlier, they would have demonstrated Robinson's right to amend his habeas petition and opened the door to federal review. As Robinson argued in his petition, this evolution in the law satisfies Rule 60(b)'s "extraordinary circumstances" requirement. Petition at 9-13, 27-30.

B. The Fifth Amendment, this Court's established caselaw interpreting the Indictment Clause, and more recent decisions defining structural error demonstrate that defective-indictment errors are structural.

While it is necessary to establish that Rule 60(b)(6) is the proper procedural vehicle for raising Robinson's defective-indictment challenge, the substantive issue is far more critical: Can Robinson be put to death for a federal crime which was never formally charged by a grand jury, even though the Fifth Amendment specifically requires that all capital crimes be prosecuted by indictment, and even though 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) and Fed. R. Crim. P. 7(b). Whether a defective indictment results in structural error is a recurring question that has plagued lower courts and which requires further guidance from this Court. Constitutional principles and this Court's evolving jurisprudence on the definition of structural error clearly light the way.

It is well-established that an indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *United States v. Carll*, 105 U.S. 611, 612 (1882). This Court has long recognized that the harm resulting from a constitutionally-defective indictment is significant: "A cryptic form of indictment in cases of this kind requires the defendant to go to

trial with the chief issue undefined. It enables his conviction to rest upon one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell v. United States*, 369 U.S. 749, 766 (1962). Though Robinson has always maintained that such harm is not subject to harmless error review, the lower courts determined otherwise based on pre-*Weaver* caselaw defining structural error as "a defect affecting the framework within which the trial proceeds" that "necessarily render[s] a trial fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 9 (1999). Now, with *Weaver*, *Williams*, and *McCoy*, this Court has further clarified the definition of structural error, making plain that the district court's refusal to allow Robinson to amend his petition was predicated on misguided interpretations of both the Indictment Clause and structural-error analysis.

The Government does not address the interplay between Robinson's claim and the three categories of structural error discussed in *Weaver*. Instead, the Government maintains that Robinson's reliance on *Weaver, Williams*, and *McCoy* is unfounded because those opinions do not specifically address defective-indictment claims. BIO at 22-24. This argument is misguided, but it also illustrates that there is a need for clarification on whether defective-indictment error is structural. *See* Supreme Court Rule 10(c). Moreover, a litigant should not be precluded from relying on

fundamental constitutional principles supporting a decision if his facts are not on all fours with the opinion. *Cf. Cady v. Dombrowski*, 413 U.S. 433, 446 (1973) (a review of this Court's Fourth Amendment search-and-seizure cases illustrated that the challenged search was not unreasonable, even though the previous decisions were "not on all fours with the instant case").

In further support of its position that Robinson's claim lacks merit, the Government points to the number of appellate courts, including the court below, holding that a defective indictment is subject to harmless error review. BIO at 25-26. Simply put, those courts are wrong. Petition at 19-23. Many of these cases, including the Fifth Circuit's decision below, rely on trial proceedings, including the jury verdict, to find indictment error harmless. But determining probable cause is not the only function of the grand jury:

> In 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. Moreover, "[the] grand jury is not bound to indict in every case where a conviction can be obtained." Thus, 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.

Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (internal citations omitted) (emphasis added). This is exactly the kind of error, the effects of which "are simply too hard to measure," that *Weaver* found to be structural. 137 S. Ct. at 1908.

Similarly, the Government asserts that Robinson's request for certiorari should be rejected because this Court has denied certiorari in a number of cases presenting the same defective-indictment issue. *Id.* at 27. However, the fact that this Court has denied prior petitions raising this question does not mean that the same result is warranted here. For example, in *Hill v. McDonough*, 547 U.S. 573 (2006), this Court granted certiorari to address whether a capital defendant could raise a method-of-execution challenge under 42 U.S.C. § 1983. This Court ruled unanimously in Hill's favor, despite the fact that it had denied a number of stays of execution and petitions for writs of certiorari making the very same argument.[2] Moreover, the Government's implication that certiorari should be denied here because it has been denied previously has repeatedly been rejected by this Court. "The denial of a writ of certiorari imports no expression of opinion upon the merits

[2] *See, e.g., Vickers v. Johnson*, 124 S. Ct. 1196 (2004), *Zimmerman v. Johnson*, 124 S. Ct. 979 (2003), *In re Roe*, 124 S. Ct. 1196 (2004); *see also Beck v. Rowsey*, 124 S. Ct. 980 (2004) (vacating stay entered by district court).

of the case, as the bar has been told many times." *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 404 (1931) (internal citations omitted).

The question of whether a constitutionally-defective indictment is structural error is, as the late Justice Scalia recognized, a "bullet" this Court has "dodged" in the past, but one which "the full Court will undoubtedly have to speak to . . . on another day." *United States v. Resendiz-Ponce*, 549 U.S. 102, 117 (2007) (Scalia, J., dissenting). Robinson respectfully submits that the day has come, and petitions this Court to grant certiorari to clarify that an error under the Indictment Clause can never be harmless. The Constitution requires no less. *See Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019) ("I am aware of no legitimate reason why a court may privilege a demonstrably erroneous interpretation of the Constitution over the Constitution itself.") (Thomas, J., concurring).

II. Certiorari should be granted to establish that barring criminal defendants from access to their trial jurors contradicts *Peña-Rodriguez v. Colorado*.

A. This is not a second-or-successive claim.

Robinson's Rule 60 motion concerning juror interviews is not a disguised second-or-successive motion, and the Fifth Circuit's decision to the contrary contradicts *Gonzalez*. The Government contends that Robinson has forfeited this argument by failing to raise it in the body of his petition. BIO

at 18. Not so. Robinson made this argument at pages 29-30 of his petition, echoing his previous argument at page 16 n.4. As such, there is no forfeit.

"When no claim is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application." *Gonzalez*, 545 U.S. at 533 (internal quotations omitted). Robinson's request to interview his trial jurors is not a claim upon which habeas relief could be granted. Yet the Government and the Fifth Circuit mistakenly believe that if a successful Rule 60(b) motion could potentially lead to the presentation of a previously unadjudicated claim, it is a disguised second-or-successive § 2255 motion. As Robinson explained previously, this argument is contrary to *Gonzalez*. Petition at 16 n.4. While valid Rule 60(b) motions must be directed at non-substantive issues such as procedural default or timeliness, many such challenges, if successful, could potentially open the door to amendment of the petition with new claims. *Gonzalez*, 545 U.S. at 532.

The Court's decision in *Martel v. Clair*, 565 U.S. 648 (2012), a capital habeas case, is instructive. There, after years of litigation, the district court announced that it would not accept any further submissions and issued its decision denying habeas relief. *Id*. at 665. After the Ninth Circuit appointed new counsel for the appeal, Clair filed a Rule 60(b) motion asking to reopen his case to explore newly discovered physical evidence that had never been fully tested. The district court denied the Rule 60(b) motion. The Ninth

Circuit consolidated the habeas and Rule 60 appeals and reversed, and this Court granted certiorari and reversed. Regarding the Rule 60 denial, this Court found that the district court validly denied the Rule 60(b) motion because any new claims Clair raised based on the new evidence would fail to meet the relation-back standard and thus be time-barred. *Id*. at 666. Nowhere in the lower courts' or this Court's analysis does it say that Clair's Rule 60(b) motion was actually a second-or-successive petition because it would lead to new claims and possible amendment of the petition.

While Rule 60(b) relief was fruitless in *Martel*, it would not be fruitless here. If Robinson were afforded the right to interview his jurors, any resulting claim would be timely under 28 U.S.C § 2255(f)(4) because Robinson could not have discovered the factual basis of the claim any earlier.

B. *Peña-Rodriguez* requires that local rules barring death-sentenced petitioners from interviewing their jurors give way to allow for reasonable investigations.

The Government argues that even if the Court finds that the district court abused its discretion in denying Robinson's Rule 60 motion, Robinson could not benefit from *Peña-Rodriguez,* 137 S. Ct. 855 (2017), because it does not apply retroactively to cases on collateral review. BIO at 29. Because the Government did not raise this issue below, the argument has been waived. *Buck*, 137 S. Ct. at 780 (because the state failed to argue below that new

caselaw would not apply to Buck's case if his Rule 60(b) motion was granted, the argument was waived).

Next, the Government contends that *Peña -Rodriguez* does not support a constitutional exception to local rules barring post-conviction interviews with jurors. BIO at 30. However, *Peña-Rodriguez* need not constitute a constitutional exception in order for Robinson to take advantage of this change in the law. Because Robinson only seeks the benefit of discovery, it is unnecessary for him to establish a constitutional right to interview jurors.

Alternatively, the Court could find that *Peña-Rodriguez* supports a constitutional right to interview jurors, particularly in capital cases. This Court has recognized a "heightened reliability" requirement in death-penalty litigation, which supports a finding that capital defendants have an Eighth Amendment right to conduct a reasonable post-conviction investigation, including juror interviews. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Moreover, federal districts vary greatly regarding their rules governing juror contact, resulting in unconstitutional disparity in access to jurors. Petition at 16-17. Had Robinson been tried in the Western District of Texas instead of in the Northern District of Texas, he would not have needed prior approval before interviewing the jurors. *Id*. at 17. Such arbitrariness in the ability to conduct a reasonable investigation flies in the face of this Court's core death-penalty principles. *Furman v. Georgia*, 408 U.S. 238 (1972).

The Fifth Circuit and the Government both chide Robinson for failing to produce evidence that any juror harbored racial bias. BIO at 31-32. Of course, Robinson has never been allowed to adequately investigate this issue. The Government also faults Robinson for not raising a claim of juror partiality. BIO at 33. But Robinson has been barred from gathering evidence to support the claim. The Fifth Circuit's and the Government's promotion of this Catch-22 is not a valid basis on which to deny certiorari, particularly given that this is a capital case.

CONCLUSION

For the reasons stated herein and in Robinson's petition, the writ of certiorari should issue.

Respectfully submitted,

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DATED: February 6, 2020

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the reply in opposition contains 2,910 words, excluding the parts of the reply that are exempted by Supreme Court Rule 33.1.(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 6, 2020.

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CERTIFICATE OF SERVICE

I, Jonathan C. Aminoff, do swear or declare that on this date, February 6, 2020, as required by the Supreme Court Rule 29, I have served the enclosed Reply Brief in Opposition, on each party to the above proceeding required to be served, or that party's counsel, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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