No. 20-5375

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES MICHAEL HALL, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by instructing the jury that if it determined based on its consideration of the aggravating and mitigating factors found to exist that a capital sentence was justified, that it "must" record its determination, pursuant to which the law would require that such a sentence "must" be imposed.

2. Whether, after the jury had deliberated at the penalty-phase of the case for less than one full day, the district court abused its discretion in instructing the jury to continue its deliberations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A14) is reported at 945 F.3d 1035. The order of the district court (Pet. App. A25-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2019. A petition for rehearing was denied on March 17, 2020 (Pet. App. A17). On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of, as relevant here,

the order denying rehearing. The petition for a writ of certiorari was filed on August 12, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of first-degree murder, in violation of 18 U.S.C. 1111. Pet. App. A28. The jury unanimously recommended a capital sentence, and the district court imposed such a sentence. Id. at A29. The court of appeals affirmed. Id. at A4-A14.

1. On January 26, 2010, petitioner and his co-defendant Wesley Coonce murdered Victor Castro-Rodriguez while all three were inmates in a mental-health ward at the U.S. Medical Center for Federal Prisoners in Springfield, Missouri. Pet. App. A7, A28. Petitioner and Coonce followed Castro-Rodriguez into his cell, where they made him lie on his back, bound his hands and feet, stuffed a rag in his mouth, and blindfolded him. Id. at A7. Once Castro-Rodriguez was unable to move or call for help, Coonce repeatedly kicked him and stomped on his neck, and petitioner and Coonce stood on Castro-Rodriguez's throat. Ibid.; Tr. 1052-1053, 1480. After several minutes, petitioner stepped off, checked for a pulse, and punched Castro-Rodriguez's stomach "to see if he would react." Pet. App. A7.

That evening, correctional officers found Castro-Rodriguez unresponsive in his cell and medical staff pronounced him dead.

Gov't C.A. Br. 9-10. An autopsy revealed that Castro-Rodriguez died from suffocation caused by compression of his larynx. Pet. App. A7. The medical examiner estimated that it likely took "'more than three minutes, maybe [even] five minutes' for Castro-Rodriguez to die" from suffocation, and that "it was possible that he remained conscious nearly the entire time." Id. at A9 (brackets in original). The autopsy also revealed internal bleeding, scrapes, and bruises from the repeated blows to his head, neck, and chest. Id. at A7.

Shortly after prison staff found Castro-Rodriguez's body, petitioner admitted to killing him. With the unit still in lockdown, petitioner got the attention of a correctional officer and told him, "I killed Castro." Tr. 859-860. While still in his cell, petitioner also told the unit manager, "I did that" while pointing in the direction of Castro-Rodriguez's cell. Tr. 954; see Tr. 972. The unit manager then escorted petitioner away in handcuffs, at which point petitioner stated that he had "tied [Castro-Rodriguez's] hands and his feet," "stomped his throat," and "stood on his neck," adding that Castro-Rodriguez "was a snitch" and "deserved to die." Tr. 956-957; see Tr. 954-955.

Later on the evening of the murder, petitioner agreed to be interviewed by the FBI. Tr. 1169-1172, 1476-1479. After waiving his Miranda rights, petitioner provided a statement that explained that he and his accomplice had "discussed killing Castro 2 or 3 days ago"; provided details of the murder; stated that "if Castro

did not die, and I was given the opportunity to do this over again, I would kill Castro"; and added that "[i]f Castro was not available, I would have randomly selected another inmate and killed him." Gov't C.A. App. 60 (statement); see Tr. 1480-1482 (reading statement). That same night, petitioner also explained to a Bureau of Prisons (BOP) psychologist that he "had murdered [i]nmate Castro" because he "wanted to calm himself down." Tr. 1131; see Tr. 1125. Petitioner warned the psychologist that he could "kill again" if given the opportunity. Tr. 1132-1133.

In the months following the murder, petitioner repeatedly admitted to killing Castro-Rodriguez and threatened to kill again. See Gov't C.A. App. 38 (written note to BOP captain); Tr. 825 (statement to nurse), 1134-1135 (statements to BOP psychologist), 1198 (statement to a BOP official), 1493-1494 (statement to FBI agent); see also Tr. 1363, 1366-1367, 1412-1414, 1454 (statements to other inmates). In a letter to the prosecutor, petitioner stated that "I just want to make myself clear": "I will continue killing every chance I get" and "will not be limited to inmates but staff as well." Tr. 1530. Petitioner emphasized that "[t]he only thing that will stop me from killing again is to put me to death." Ibid.; see Gov't C.A. App. 62 (letter as exhibit).

Additional evidence corroborated petitioner's admissions. Surveillance video placed petitioner and Coonce at Castro-Rodriguez's cell at the time of his murder. Tr. 1498-1513. Consistent with petitioner's admission that he stood on Castro-Rodriguez's throat,

Pet. App. A9, Castro-Rodriguez's autopsy showed that he died of suffocation as a result of a compressed larynx, id. at A7; the government's expert pathologist opined that the strangulation resulted from a "larger object" -- "consistent" with "a foot or shoe" -- compressing the neck, Tr. 1337; and Castro-Rodriguez's DNA was recovered from petitioner's right shoe, Tr. 1595-1597. Medical tape was used to bind Castro's hands, Tr. 743, consistent with petitioner's access to medical tape for a medical condition, Tr. 751-752, 767. And two pairs of tennis shoes seized from Coonce's cell had no shoelaces, consistent with petitioner and Coonce using shoelaces to bind Castro's ankles. Tr. 1017-1018.

2. Petitioner and Coonce were indicted for Castro-Rodriguez's murder, Pet. App. A162-A167, and a jury unanimously found both guilty of first-degree murder, Tr. 1731-1732.

a. The Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq., provides for a separate penalty-phase hearing before the same jury that determined the defendant's guilt. 18 U.S.C. 3593(b)(1). At the penalty phase, if the jury finds that the government has established beyond a reasonable doubt at least one of the mental states specified in 18 U.S.C. 3591(a)(2) and at least one of the statutory aggravating factors for homicide in 18 U.S.C. 3592(c), the defendant is eligible for a capital sentence. 18 U.S.C. 3593(d) and (e).

Once a defendant is found death-eligible, the case proceeds to what is referred to as the "selection" phase of the penalty

hearing, where the jury considers all the statutory and non-statutory aggravating factors that it unanimously finds to exist beyond a reasonable doubt and all the mitigating factors that at least one member of the jury finds to exist by a preponderance of information. 18 U.S.C. 3593(c) and (d). The jury "shall consider whether all 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" and, "[b]ased upon this consideration," shall "recommend whether the defendant should be sentenced to death." 18 U.S.C. 3593(e). A defendant who has been found guilty of a capital offense resulting in death "shall be sentenced to death if, after consideration of the [aggravating and mitigating factors] in the course of [the penalty-phase hearing], it is determined that imposition of a sentence of death is justified." 18 U.S.C. 3591(a).

In this case, petitioner requested that the district court instruct the jury that "[i]f you determine as a result of this weighing process that the factors do not justify a death sentence, such a sentence may not be imposed, and a sentence of life imprisonment without release is to be imposed. If you determine that the factors do justify a death sentence, that sentence may be imposed." Pet. App. A136 (proposed instruction). Petitioner further requested that the court instruct the jury that, "no matter what your decisions are regarding aggravating and mitigating factors, you are never required to return a sentence of death."

Id. at 138; see D. Ct. Doc. 212, at 7-8, 17 (Nov. 28, 2012); id. at 6-17.

The district court denied petitioner's requests. Pet. App. A25-A26; see id. at A22-A23. Following the Eighth Circuit's model jury instruction, the court instructed the jury that "[i]f" the jury unanimously finds that the aggravating factor or factors found to exist "sufficiently outweigh" the mitigating factors that any juror has found to exist "to justify imposition of a sentence of death," and that "death is therefore the appropriate sentence in this case," "the law provides that that Defendant must be sentenced to death," Pet. App. A55, and the jury "must record [its] determination that a sentence of death shall be imposed," id. at A91. See 8th Cir. Model Jury Instructions 12.01, 12.11 (2014).

b. After closing penalty-phase arguments and after the jury had deliberated for less than one full day, the jury's foreperson sent the district court a note. Pet. App. A13. The foreperson's note asked, "Do the lawyers have the option to poll the jury if we can't reach a unanimous decision[?]" Pet. App. A158. After the court explained to counsel that it did not want its response to lead jurors into believing "that coming back now with less than a unanimous verdict is acceptable," Tr. 5351, the court responded (without objection) that "You will not be polled if a nonunanimous verdict is accepted." Pet. App. A158; see Tr. 5347, 5354.

The foreperson then promptly submitted a second note stating, "We have reached a decision in regards to Defendant Coonce. But

I feel with 100% certainty that we are unable to reach a unanimous decision in regards to [petitioner]." Pet. App. A159; see id. at A158; Tr. 5358. After conferring with counsel and over petitioner's and Coonce's objection, the district court responded, "You should continue your deliberations and try to reach unanimous verdicts." Pet. App. A159; see Tr. 5358-5360.

The jury then requested three exhibits relevant to petitioner's lack of remorse and his future dangerousness (his confession and two letters that he wrote, including the letter to the prosecutor); deliberated for approximately one additional hour; and returned unanimous verdicts recommending death sentences for both defendants. Pet. App. A13; Tr. 5361 (discussing exhibits); see id. at A145-A155 (special verdict for petitioner); Tr. 5370-5377 (reading verdict).

As to petitioner, the jury unanimously found beyond a reasonable doubt each of the six aggravating factors submitted by the government: petitioner "committed the [murder] in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to [the victim]"; he did so "after substantial planning and premeditation"; his conduct reflected "a grave indifference to human life"; he "has shown lack of remorse"; he "presents a future danger to others"; and he acted to "obstruct justice" or to "retaliate" against Castro-Rodriguez for his "assistance to prison officials and guards in reporting inmate misconduct and in physical altercations." Pet. App. A147-A150.

The jury also unanimously rejected all but two of petitioner's numerous alleged mitigating factors, including his contentions that he had suffered from bipolar disorder or a significant brain injury, had diminished "capacity to appreciate the wrongfulness of his conduct," and had committed the murder under "severe mental or emotional disturbance." Id. at A150-A153. Six jurors concluded that petitioner had suffered from "the serious illness of Crohn's disease," and one juror concluded that petitioner had "a loving and caring relationship" with his parents and sister that would continue if a life sentence were imposed. Id. at A151-A152.

The special verdict form, as returned by the jury, contained the jury's determination that a "sentence of death" was warranted based upon its consideration whether the aggravating factors "sufficiently outweigh[ed]" the two mitigating factors found to exist and were "sufficient to justify a sentence of death," such that "death is therefore the appropriate sentence in this case." Pet. App. A153-A154. At petitioner's request, the jurors were polled and each confirmed agreement with that verdict, verifying that the jury had "determine[d] by unanimous vote that a sentence of death shall be imposed on [petitioner]." Tr. 5375; see Tr. 5376-5377. The district court accordingly imposed a capital sentence. Pet. App. A29.

3. The court of appeals affirmed. Pet. App. A4-A14.

As relevant here, the court rejected petitioner's contention that the district court had abused its discretion by instructing

that the jury "must" record its determination that a sentence of death shall be imposed if the jury unanimously concluded that the aggravating factors found to exist "sufficiently outweigh[ed]" the mitigating factors that any juror found to exist so as "to justify a sentence of death," Pet. App. A91. See id. at A14. The court observed that petitioner's contention was "squarely foreclose[d]" by "[c]ontrolling precedent." Ibid. (citing United States v. Montgomery, 635 F.3d 1074, 1099 (8th Cir. 2011), cert. denied, 565 U.S. 1263 (2012)).

The court of appeals also rejected petitioner's contention that the district court had abused its discretion in its response to the foreperson's note by stating that the jury should continue its penalty-phase deliberations and try to reach unanimous verdicts. Pet. App. A13-A14. The court of appeals emphasized that "context matters" and observed that the district court here "was faced with a choice: declare the jury deadlocked" based on the foreperson's note when the "jury had been deliberating for less than one full day" or "direct [the jury] to continue its deliberations." Id. at A13. And the court of appeals determined that, in the circumstances of this case, the trial court permissibly exercised its "authority to insist that [jurors] deliberate further," ibid. (quoting Lowenfield v. Phelps, 484 U.S. 231, 238 (1988)) (brackets in original), adding that "it was reasonable for the court to conclude that the jury was not trying to return a

final verdict" through the foreperson's note "and that further deliberations would eventually allow it to do so," id. at A14.

The court of appeals furthermore determined that "nothing here raises a red flag" that the district court's response might have "coerc[ed]" the jury to reach a particular verdict. Pet. App. A13. First, the court observed, "[t]he jury had previously been instructed that its task was to choose between life in prison and a death sentence," and simply "[t]elling the jurors to deliberate further in an effort to reach unanimity did not 'coerce' them into picking one alternative over the other." Ibid. The court noted that the district court did not "tell the jurors to reconsider their positions" or even "that they must be unanimous in the end," and that the district court was instead "simply exercising its judgment that it was sensible under the circumstances to ask the jury to deliberate longer before giving up." Ibid. Second, the court of appeals found that "[t]he jury's response showed that it did not feel pressured to choose either alternative." Ibid. The court observed that the jury's review of three pertinent exhibits and its ongoing deliberation before it ultimately reached a verdict "suggests that the jurors continued to debate whether the death penalty was justified; discussed and reexamined the evidence that they found most compelling; and eventually agreed on a recommendation." Ibid. The court added that if, as petitioner argued, the jurors had "felt no choice but

to impose the death penalty," "there would have been little reason [for the jury] to request the exhibits." Ibid.

The court of appeals rejected petitioner's assertion that the foreperson's note showed that "the jury had effectively ruled out death" because the special-verdict form had instructed jurors to "proceed to" consider a life sentence if they could not unanimously agree on a death sentence. Pet. App. A13. The court observed that the note "said only that the jury was not unanimous, not that death was off the table"; "[n]othing prevented the jury from moving back and forth between the[] two alternatives" of life imprisonment and death that the jury had been instructed to consider; and the note thus "simply reflected the fact that, up to that point, there was a lack of agreement on which of the two to choose." Id. at A13-A14.

ARGUMENT

Petitioner renews his contention (Pet. 10-25) that the district court abused its discretion in its jury instructions about recording the jury's determination and the imposition of a capital sentence. Petitioner further contends (Pet. 25-37) that the district court abused its discretion when, after less than a full day of penalty-phase deliberations, the court instructed the jury to continue its deliberations. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of any other court of appeals. No further review is unwarranted.

1. The court of appeals correctly determined, based on its decision in United States v. Montgomery, 635 F.3d 1074, 1099 (8th Cir. 2011), cert. denied, 565 U.S. 1263 (2012), that the district court permissibly instructed that "[i]f" the jury unanimously determined that the aggravating factors "sufficiently outweigh" the mitigating factors "to justify imposition of a sentence of death" and that "death is therefore the appropriate sentence in this case," "the law provides that th[e] Defendant must be sentenced to death," Pet. App. A55, and that the jury "must" record such a determination, id. at A91. See id. at A14. That decision does not warrant further review. Petitioner himself acknowledges (Pet. 12, 21) that no circuit conflict exists on the issue. And this Court has repeatedly denied review on the same question, including in the very case that the court of appeals identified as "squarely foreclos[ing]" petitioner's position, Pet. App. A14. See Montgomery v. United States, 565 U.S. 1263 (2012) (No. 11-7377); Lighty v. United States, 565 U.S. 962 (2011) (No. 10-1010); Purkey v. United States, 549 U.S. 975 (2006) (No. 05-11528); Nelson v. United States, 543 U.S. 978 (2004) (No. 03-10620); Ortiz v. United States, 540 U.S. 1073 (2003) (No. 02-11188). No reason exists for a different result in this case.

a. The district court's instructions correctly stated the law and were not an abuse of discretion. See United States v. Park, 421 U.S. 658, 675 (1975) (reviewing jury instructions for an abuse of discretion). The FDPA provides that a defendant convicted

of a capital crime who acted with the requisite intent "shall be sentenced to death" if, after jury consideration of the aggravating and mitigating factors, "it is determined that imposition of a sentence of death is justified." 18 U.S.C. 3591(a) (emphasis added). Congress's use of the mandatory "shall" demonstrates that, once the jury has itself found that the death penalty is justified based on its own balancing of the aggravating and mitigating factors, the jury must record that determination and a capital sentence must be imposed. See United States v. Lighty, 616 F.3d 321, 367 (4th Cir. 2010) (concluding that "once the jury concludes a death sentence is justified under [Section] 3591, it must impose the death penalty" because "'[Section] 3591 states plainly that an eligible defendant shall be sentenced to death if . . . it is determined that imposition of a sentence of death is justified'") (citation omitted), cert. denied, 562 U.S. 1118 (2010), and 565 U.S. 962 (2011). The FDPA thereby "precludes the jurors from arbitrarily disregarding [their] unanimous determination that a sentence of death is justified," United States v. Allen, 247 F.3d 741, 781 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002), which would effectively allow a jury to nullify the imposition of capital punishment even though it has unanimously determined that a capital sentence is appropriate.

The FDCA does not, of course, prevent the jury from considering mercy in weighing of the aggravating and mitigating factors. The statute requires the jury to consider whether the aggravating

factors "sufficiently outweigh" the mitigating factors (or, if there are no mitigating factors, whether the aggravating factors alone are "sufficient") "to justify a sentence of death," 18 U.S.C. 3593(e), and that qualitative weighing is in significant part "a question of mercy," Kansas v. Carr, 577 U.S. 108, 119 (2016). The district court here, moreover, specifically instructed the jury that "whether or not the circumstances in this case justify a sentence of death is a decision that the law leaves entirely to you." Pet. App. A90. But Section 3593(e) makes clear that those considerations of mercy are limited to the process of weighing aggravating and mitigating factors because, immediately after defining that process, the statute provides that "[b]ased upon this consideration [i.e., the weighing process], the jury by unanimous vote * * * shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence." 18 U.S.C. 3593(e). Section 3593(e)'s use of the phrase "'[b]ased on this consideration[]'" thus itself "refers back to the preceding sentence and thereby implies that when selecting a sentence the jury may consider only whether the death penalty is justified." United States v. Caro, 597 F.3d 608, 632 (4th Cir. 2010) (quoting 18 U.S.C. 3593(e)), cert. denied, 565 U.S. 1110 (2012).

Petitioner appears to contend (Pet. 14, 16) that Section 3593(e) should by itself be read to leave the jury "free to determine that

a death sentence would not be imposed," regardless of its determination that a death sentence is justified based on its weighing of the aggravating and migrating factors. But petitioner fails to reconcile his position with Congress's direction that a defendant "shall be sentenced to death" if, "after [the jury] consider[s]" the aggravating and mitigating factors, "it is determined that imposition of a sentence of death is justified." 18 U.S.C. 3591(a) (emphasis added). If Congress had wanted to authorize juries to reject capital sentences that they have themselves determined are "justif[ied]," 18 U.S.C. 3593(e), it would have specified -- as it previously did for drug kingpins -- that a jury "is never required to impose a death sentence," "regardless of its findings with respect to aggravating and mitigating factors." 21 U.S.C. 848(k) (2000) (repealed 2006). Section 3591(a) does exactly the opposite.

b. Petitioner states (Pet. 9) that review is warranted because of "a twenty-year-long split between the Circuits" concerning whether a jury "'must' return a sentence of death if proven aggravating factors sufficiently outweigh[] proven mitigating factors." But petitioner clarifies (ibid.) that his claim of a conflict rests simply on jury instructions delivered by "District Courts outside the Eighth Circuit," rather than on any conflicting decision by any court of appeals. See also Pet. 11-12, 15-18, 20-21. A decision of a district judge, however, "is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different

case." Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) (citation omitted). For that reason, even if district courts were to have squarely rejected the Eighth Circuit's interpretation of the FDPA, such decisions would not give rise to a conflict of authority that might warrant this Court's review. See Sup. Ct. R. 10(a).

Petitioner's acknowledgement (Pet. 21) that "there have not been Circuit rulings directly considering and approving [the jury] instructions" on which he rests his claim of "conflict" underscores that no further review is warranted. See also Pet. 12 (stating that "there has not been a direct, conflicting decision upon the matter by another United States Court of Appeals"). While petitioner notes (Pet. 18-19) that this Court and two other courts of appeals have issued decisions in cases in which district courts have instructed juries that they were never required to impose a death sentence, each of those decisions resolved other issues and none passed on whether such an instruction is correct or whether a district court would abuse its discretion by declining to provide it. See Jones v. United States, 527 U.S. 373, 385, 387-390 (1999); United States v. Brown, 441 F.3d 1330, 1355-1356 (11th Cir. 2006), cert. denied, 549 U.S. 1182 (2007); United States v. Tsarnaev, 968 F.3d 24, 90-93 (1st Cir. 2020), petition for cert. pending, No. 20-443 (filed Oct. 6, 2020). In the absence of a division of authority, this Court has repeatedly denied certiorari on the question petitioner presents. See p. 13, supra. The same disposition is warranted here.

2. Petitioner separately contends (Pet. 25-37) that the district court abused its discretion by informing the jury that it "should continue [its] deliberations and try to reach unanimous verdicts" after the foreperson had submitted a note stating that he "fe[lt]" with "100% certainty" that the jury would be unable to reach a unanimous verdict for petitioner, Pet. App. A159 (note). See Renico v. Lett, 559 U.S. 766, 774 (2010) (trial judge has "broad discretion" in determining if a jury is deadlocked and in choice of response) (citation omitted); Park, 421 U.S. at 675 (reviewing jury instructions for an abuse of discretion). Petitioner's factbound contentions lack merit, and the court of appeals' decision does not conflict with any decision of this Court or any other court of appeals.

a. As a threshold matter, review is unwarranted because petitioner's second question presented -- and his arguments for review of that question -- rest on the counterfactual assertion that the second sentence of the foreperson's relevant note reflects "the jury's report of '100% certainty' about [its] inability to make a unanimous decision." Pet. i (emphasis added; capitalization omitted); see, e.g., Pet. 26 (asserting that the note was a "clear report about two jury determinations"). The note in fact conveys only the foreperson's personal assessment.

Tellingly, each of the foreperson's multiple notes to the district court consistently conveyed the whole jury's views and actions by referring to the jurors collectively as "we," including

in the first sentence of the relevant note. See Pet. App. A159 (stating that the jury -- "[w]e" -- had "reached a decision" with respect to Coonce).[1] The second sentence of that note, in contrast, states how "I" -- the foreperson -- "feel" about the likelihood of a unanimous verdict. Ibid. It thus conveys only the individual view of the foreperson, not the collective view of the jurors. Cf. Blueford v. Arkansas, 566 U.S. 599, 606 (2012) (explaining that a "foreperson's report" that jurors were "unable to reach a verdict" is not "a final resolution of anything"). Because the question petitioner presents does not reflect the facts in this case, this case is not a suitable vehicle for this Court to consider it.

b. In any event, the court of appeals correctly rejected petitioner's challenge to the district court's response, given after the jury had deliberated for less than a full day, that "[y]ou should continue your deliberations and try to reach unanimous verdicts." Pet. App. A159.

This Court has "long been of the view that '[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" Jones, 527 U.S. at 382 (quoting Allen v. United States, 164 U.S. 492, 501 (1896)) (brackets in original). In contexts in which a jury has "report-[ed] itself as deadlocked," the Court has accordingly "approved of

[1] See also Pet. App. A157 ("We would like a definition of 'obstruct justice.'") (emphasis added); id. at A158 ("Do the lawyers have the option to poll the jury if we can't reach a unanimous decision") (emphasis added).

the use of a supplemental charge to encourage [the] jury * * * to engage in further deliberations, * * * even capital sentencing juries." Id. at 382 n.5 (citing Allen, supra, and Lowenfield v. Phelps, 484 U.S. 231, 237-241 (1988)). In Allen v. United States, supra, for instance, the Court approved a supplemental charge that specifically urged the minority members of a deadlocked capital jury to consider the views of the majority and "ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." Allen, 164 U.S. at 501. This Court's determination that jurors in "capital sentencing proceeding[s]" must carefully consider the contrary views of others in light of the jury system's object of "'secur-[ing] unanimity by a comparison of views'" remains good law. Lowenfield, 484 U.S. at 237-238 (citation omitted). And it "appl[ies] with even greater force" where "the charge given" -- in contrast to a traditional Allen charge -- "does not speak specifically to the minority jurors." Ibid.

In light of those principles, the question whether a trial court has "improperly coerced" jurors by giving a supplemental charge regarding ongoing deliberations is evaluated in "'context and under all the circumstances.'" Lowenfield, 484 U.S. at 237 (citation omitted). But "even in capital cases," this Court has made clear that a trial court "incontestably" has "authority to insist that [a jury] deliberate further" if the jury, after

deliberating for only a short period, informs the court of its failure to reach unanimity. Id. at 238.

After the lengthy penalty-phase proceedings in this case, which spanned nearly a month and which are memorialized in thousands of pages of transcripts, the jury deliberated on the sentences for two defendants for "less than one full day" before the foreperson submitted his note stating that he felt that the jury would not reach a unanimous verdict for petitioner. Pet. App. A13; see Tr. 1727, 1732-5380 (penalty phase from May 7 to June 2, 2014). In expressing his "feel[ing]" on the subject, the foreperson did not disclose whether the jury had yet voted on petitioner's sentence or whether other jurors shared his pessimism. See Pet. App. A159. Moreover, the jury had already been instructed of the possibility that, "[a]t the end of [its] deliberations," it might not "unanimously agree" on "death or life imprisonment" and that the trial court would in that circumstance impose a life sentence. Id. at A92. Yet despite that instruction, the jury elected not to inform the court that it was, in fact, deadlocked. In those circumstances, the district court permissibly responded to the jury foreman, "You should continue your deliberations and try to reach unanimous verdicts." Id. at A159.

As the court of appeals correctly recognized, "context matters" and, in this case, "it was reasonable for the [district] court to conclude that the jury was not trying to return a final verdict" through the foreperson's note. Pet. App. A13-A14. The note did

not state that "death was off the table," and it at most reflected the foreperson's perception that, "up to that point, there was a lack of agreement" on whether to choose a capital or a life sentence. Ibid. Moreover, the district court's response neither told "jurors to reconsider their positions" nor suggested that "they must be unanimous in the end"; it simply reflected the "judgment that it was sensible under the circumstances to ask the jury to deliberate longer before giving up." Id. at A13. In short, "nothing here raises a red flag" that the response might have "coerc[ed]" the jury to reach a particular result. Ibid.

c. Petitioner's factbound attempts (Pet. 35-36) to identify possible coercion lack merit and do not warrant review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). The court of appeals did not, as petitioner asserts (Pet. 28), "concede[]" that "there were earmarks of coercion" when it observed that the jury had deliberated for about one full day before the foreperson's note and then an additional hour before rendering its verdict. See Pet. 35. The court correctly interpreted the jury's pre-note deliberations and its continuing deliberations after the district court's response -- which included the jury's review of exhibits pertinent to the "lack-of-remorse and future-dangerousness aggravating factors" for petitioner -- as indicating that the jury was not coerced into reaching a verdict. Pet. App. A13. Petitioner notes (Pet. 35-36) that the record does not show which

jurors wanted to review the exhibits. But regardless who requested them, the timeline of the request and the ongoing deliberation "suggests that the jurors continued to debate whether the death penalty was justified"; "discussed and reexamined the evidence"; and "eventually agreed on a recommendation." Pet. App. A13.[2]

Petitioner cites (Pet. 36) State v. Thompson, 85 S.W.3d 635, 641 (Mo. 2002) (en banc), to support his claim that the district court's response to the note was coercive, but Thompson is inapposite. In Thompson, a state capital jury announced that it had reached a verdict of life imprisonment but, after polling the jurors individually and perceiving a lack of unanimity, the trial court rejected the verdict and instructed the jury to deliberate further. Id. at 637. The jury then returned a "'deadlocked' verdict," and, following state law, the court proceeded to sentence the defendant itself, imposing a sentence of death. Id. at 637-638. The state supreme court held that the trial court had erroneously "refus[ed] to allow the follow-up polling questions

[2] Petitioner states (Pet. 27) that "the fact that the jury originally recorded their anti-death-penalty determination on their form of verdict, only to scratch [it] out," supports his view that the jury had been deadlocked. Cf. Pet. App. A154 (special verdict form). But as the court of appeals explained, neither the district court nor the court of appeals "ha[d] [any] way of knowing when [the mark] happened or why." Id. at A14 n.6. And in any event, petitioner's speculation that the verdict form may have been marked before the foreperson sent his inquiry to the court "cannot have a bearing on [the] assessment of [the district court's] decision to send the jury back for further deliberations" because jury did not produce the verdict form until later, when it rendered its actual verdict. Ibid.

[that the defendant] requested, which would have clarified" the nature of jury's original verdict. Id. at 642.

Without those "clarifying questions," the state supreme court found "too great a risk" that the jury could have "in fact properly arrived at a life imprisonment verdict" under the State's sentencing procedure that required such a verdict if the jury failed to make certain types of unanimous findings, but that jurors could have "misunderstood the [trial court's] ambiguous polling question" and provided responses that led to the court to reject the legally valid verdict. Thompson, 85 S.W.3d at 641; see id. at 639 (discussing findings required by state law). The state supreme court then reasoned that if the trial court had in fact sent the jury back to deliberate even though it had properly followed the jury instructions and reached a valid verdict based on a lack of unanimity on specific findings, that would have created a significant risk that the jurors would be "confused as to the reason they [we]re being sent back for further deliberations," and could lead them "mistakenly [to] assume that the only possible proper verdict" in the situation was the "'deadlocked' verdict" that it ultimately delivered. Id. at 641.

No similar circumstances are present here. The district court did not poll the jurors, reject an actual verdict, or refuse any request by petitioner to seek clarification.

d. Petitioner ultimately appears to argue (Pet. 28-35) that under Stringer v. Black, 503 U.S. 222 (1992), the court of appeals

erred by relying on Lowenfield v. Phelps, supra, to uphold the district court's authority to ask jurors to continue deliberating. Petitioner invokes (Pet. 28-35) a distinction between "weighing" and "non-weighing" jurisdictions that employ aggravating factors differently in their respective capital sentencing schemes. A "weighing" jurisdiction requires a capital jury to "weigh the aggravating factor or factors against the mitigating evidence" when deciding whether to recommend a death sentence, while a "non-weighing" jurisdiction requires the jury to find at least "one statutory aggravating factor" but then simply requires the jury to decide whether a death sentence is warranted after "'tak[ing] into consideration all circumstances before it.'" Stringer, 503 U.S. at 229-230 (citation omitted). Neither Stringer nor that distinction speaks to the propriety of the district court's response to the foreperson's note in this case.

In Stringer, the Court found the distinction between weighing and nonweighing jurisdictions relevant to the question whether granting federal habeas relief in a case arising from a weighing State (Mississippi) would erroneously "create a new rule" by applying to "a novel setting" a prior decision of the Court (Godfrey v. Georgia, 446 U.S. 420 (1980)), which had held that the undefined language of a particular aggravating factor was impermissibly vague in the context of the sentencing framework of a nonweighing State (Georgia). 503 U.S. at 228-229. The Court reasoned that, "[i]n a nonweighing State, so long as the [jury] finds at least

one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty," because that process turns on all the circumstances before the jury, not on a balancing that would need to consider the invalid aggravator. Id. at 232. By contrast, when a jury in a weighing state "is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference" in the outcome. Ibid. Stringer thus deemed the "difference between a weighing State and a nonweighing State" to be "of critical importance" to "the function of a state reviewing court" confronting a potentially invalid statutory aggravator. Id. at 231-232. And because this Court's prior decision in Godfrey invalidated an aggravating factor on vagueness grounds in a nonweighing state, the Court concluded that Godfrey could be applied on federal habeas review consistent with Teague v. Lane, 489 U.S. 288 (1989), because Godfrey would apply "a fortiori" to a weighing State, where "the requirement that aggravating factors be defined with [sufficient] precision" applies with even greater force. Stringer, 503 U.S. at 229-230.

As part of its decision, Stringer rejected Mississippi's attempt to defend its vague aggravating factor with a portion of Lowenfield's analysis, which concluded that a nonweighing state (Louisiana) may sufficiently "narrow the class of death-eligible defendants" with a statutory aggravating factor, even though that

factor "duplicated the elements" of the first-degree-murder offense that the jury "already had found" in returning a verdict of guilt. Stringer, 503 U.S. at 233. Stringer explained that Lowenfield's aggravating-factor analysis did not apply to a sentencing scheme "in which aggravating factors are critical in the jury's determination whether to impose the death penalty," id. at 234-235, and that, in any event, Lowenfield "did not involve a claim that a statutory aggravating factor was ambiguous" and thus did not "permit[] a State in which aggravating factors are decisive" to "use factors of vague or imprecise content," id. at 235-236.

Petitioner argues (Pet. 28-29) that the FDPA and the jury instructions reflect "a 'weighing' scheme"; states (Pet. 30-31) that Stringer found a weighing State's reliance on Lowenfield to be "misplaced"; and concludes (Pet. 34-35) that, under Stringer, Lowenfield's "teachings [from] the non-weighing context cannot be applied to the very different issues which a weighing scheme [like that in the FDPA] presents." See Pet. 27, 30. Petitioner's analytical claim is flawed. Lowenfield addressed two entirely distinct issues: whether a trial court's supplemental charge "improperly coerced" a jury into recommending a capital sentence, Lowenfield, 484 U.S. at 237-241; and whether a capital sentence can stand if "the sole aggravating circumstance found by the jury at the sentencing phase was identical to an element of the capital crime" of conviction, id. at 241-246. Stringer's analysis of the

distinct function of aggravating factors in weighing and nonweighing jurisdictions, like its discussion of Lowenfield, relates only to the latter, not the former, issue. Yet the former issue -- possible jury coercion -- is the only issue relevant here. Petitioner's lengthy discussion (Pet. 29-35) of Stringer and "weighing" jurisdictions is thus irrelevant to his claim that the district court impermissibly coerced the jury into rendering a recommendation of death. Petitioner identifies no decision applying his Stringer-based theories to the jury-coercion context, much less a decision by a court of appeals that conflicts with the Eighth Circuit's decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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