No. ____________

IN THE

Supreme Court of the United States

JULIUS OMAR ROBINSON,

Petitioner,

v.

BRIAN LAMMER,

Respondent.

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

PETITIONER'S APPENDIX

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APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

March 4, 2026

Before

FRANK H. EASTERBROOK, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 24-3040 JULIUS OMAR ROBINSON, *Petitioner-Appellant*, *v.* BRIAN LAMMER, Warden, USP Terre Haute, *Respondent-Appellee*.	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute. No. 2:20-cv-00640-JPH-MG James Patrick Hanlon, *Judge*.

ORDER

Petitioner-Appellant filed a petition for rehearing and rehearing en banc on February 17, 2026. No judge* in regular active service has requested a vote on the petition for rehearing en banc, and all the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

*Circuit Judge Pryor did not participate in the consideration of this petition.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

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FINAL JUDGMENT

December 22, 2025

Before

FRANK H. EASTERBROOK, *Circuit Judge*
AMY J. ST. EVE, *Circuit Judge*
THOMAS L. KIRSCH II, *Circuit Judge*

No. 24-3040	JULIUS O. ROBINSON, Petitioner - Appellant v. BRIAN LAMMER, Warden, Respondent - Appellee
Originating Case Information:	
District Court No: 2:20-cv-00640-JPH-MG Southern District of Indiana, Terre Haute Division District Judge James P. Hanlon	

The judgment of the District Court is **AFFIRMED**, in accordance with the decision of this court entered on this date.

Clerk of Court

form name: c7_FinalJudgment (form ID: 132)

In the
United States Court of Appeals
For the Seventh Circuit

No. 24-3040

JULIUS OMAR ROBINSON,

Petitioner-Appellant,

v.

BRIAN LAMMER, Warden, USP Terre Haute,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Terre Haute Division.
No. 2:20-cv-00640-JPH-MG — **James Patrick Hanlon**, *Judge*.

SUBMITTED DECEMBER 16, 2025 — DECIDED DECEMBER 22, 2025

Before EASTERBROOK, ST. EVE, and KIRSCH, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Julius Robinson was convicted of murders committed in the course of drug offenses and was sentenced to death. His convictions and sentences were affirmed on appeal. 367 F.3d 278 (5th Cir. 2004). A petition under 28 U.S.C. §2255 was unsuccessful, 2008 U.S. Dist. LEXIS 90879 (N.D. Tex. Nov. 7, 2008), and the Fifth Circuit denied Robinson's request for a certificate of appealability. Robinson's attempt to reopen that decision was treated as a request for permission to file a second or successive petition, which the court of appeals denied. 917 F.3d 856 (5th Cir. 2019).

Robinson next sought relief under 28 U.S.C. §2241 in the district of confinement, the Southern District of Indiana. (The prison at Terre Haute holds all federal prisoners under capital sentences.) He presented five contentions:

> 1. The trial court lacked jurisdiction over the death-eligible offenses because the superseding indictment did not charge Robinson with a capital offense;
>
> 2. The prosecutor presented false and misleading evidence at the penalty trial, and trial counsel was ineffective in failing to challenge the false evidence;
>
> 3. Trial counsel was ineffective for failing to object to the prosecutor's racially motivated peremptory strikes of prospective jurors;
>
> 4. Trial counsel was ineffective at the penalty trial;
>
> 5. Robinson's rights under the American Declaration of the Rights and Duties of Man have been violated in multiple ways warranting habeas relief with respect to both the guilt and penalty portions of his trial.

[This language comes from one of Robinson's filings in this court.] The district court held that none of these five can be pursued under §2241, given §2255(e): "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained … unless it … appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." Relying on *Jones v. Hendrix*, 599 U.S. 465 (2023), the judge ruled that §2255 is neither inadequate nor ineffective and dismissed the petition. 2024 U.S. Dist. LEXIS 176932 (S.D. Ind. Sept. 30, 2024).

While Robinson's appeal was pending, President Biden commuted his death sentences to life in prison. We deferred action on the appeal to await decision by another panel in a similar case that had already been argued. See *Agofsky v. Baysore*, No. 24-1067 (7th Cir. Nov. 26, 2025). We then asked the parties to file supplemental memoranda addressing the effect of *Agofsky*. Robinson maintains that it has none; the Warden maintains that it is conclusive.

Ever since the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended §2255(h) to restrict the filing of multiple motions under §2255, prisoners have been arguing that this change makes §2255 inadequate and permits resort to §2241. Some courts of appeals were persuaded, but the Supreme Court was not. It held in *Jones* that a second or successive collateral attack is permissible only under the circumstances specified by §2255(h), unless the petitioner demonstrates "unusual circumstances in which it is impossible or impracticable for a prisoner to seek relief from the sentencing court"—for example, when that court has been dissolved. 599 U.S. at 474. *Agofsky* acknowledges that *Jones* supersedes contrary decisions from this circuit and holds that §2255(e) limits district courts' subject-matter jurisdiction.

Robinson was sentenced in the Northern District of Texas. That court still exists and is open to receive petitions under §2255. Robinson has not experienced difficulty seeking relief there. His problem is not inability to litigate but inability to *prevail*—for he lost on direct appeal, under §2255, and in an effort to enjoy a second round under §2255. Indeed, the sort of arguments that Robinson wants to make, and presses in this proceeding under §2241, are regularly heard and resolved on direct appeal or an initial round of collateral review under

§2255. (We are not suggesting that contentions based on the American Declaration of the Rights and Duties of Man, which the Organization of American States issued in 1948, have any legal status in a federal prosecution, cf. *Medellin v. Texas*, 552 U.S. 491 (2008); *Breard v. Greene*, 523 U.S. 371 (1998), only that these arguments have been available, for whatever they are worth, throughout these proceedings.)

Nonetheless Robinson tells us that §2255(h), *Jones*, and *Agofsky* are irrelevant to his §2241 proceeding because he wants to present new legal arguments about the adequacy of the indictment, which he asserts did not charge a capital offense and therefore (as he sees it) did not charge any offense at all. Any important new evidence or new argumentation takes a case outside §2255(e), according to Robinson.

For this proposition he relies on *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (en banc), and *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001). We do not doubt that some language in those decisions favors Robinson, but neither survives *Jones*. The Justices stated:

> Section 2255(h) specifies the two limited conditions in which Congress has permitted federal prisoners to bring second or successive collateral attacks on their sentences. The inability of a prisoner … to satisfy those conditions does not mean that he can bring his claim in a habeas petition under the saving clause [§2255(e)]. It means that he cannot bring it at all. Congress has chosen finality over error correction in his case.

599 U.S. at 480. Only the circumstances specified in *Jones* permit litigation under §2241, and Robinson has not argued that he can prevail under its approach.

Although the substantive argument presented in *Jones* arose from a new statutory decision, the way *Jones* interpreted

§2255(e) is not limited to novel understandings of old statutes. The holding of *Jones* is that a prisoner's inability to satisfy §2255(h), for whatever reason, does not authorize collateral review under §2241.

True enough, neither *Jones* nor *Agofsky* expressly overrules *Webster* or *Garza*. But they did not need to. *Jones* tells us that inability to satisfy §2255(h) does not authorize resort to §2241, when the sentencing court is open to the prisoner. As we have observed, Robinson does not contend that his current arguments allow more litigation under §2255(h) (or that he has received the Fifth Circuit's permission). To avoid any possibility of confusion, we now make clear that neither *Webster* nor *Garza* can be considered authoritative after *Jones*.

One final subject. Robinson contends that applying §2255(e) to a contention that the trial court lacked jurisdiction would violate the Suspension Clause: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I §9 cl. 2.

Jones rejected an argument that its reading of §2255(e) causes a problem under the Suspension Clause. 599 U.S. at 482–87. The Justices stated that the writ protected by the Suspension Clause is the writ known at the time the Constitution was adopted, rather than as expanded by statutes in later years. We held as much soon after the adoption of §2255(e):

> The writ known in 1789 was the pre-trial contest to the executive's power to hold a person captive, the device that prevents arbitrary detention without trial. The power thus enshrined did not include the ability to reexamine judgments rendered by courts possessing jurisdiction. Under the original practice, "a judgment of conviction rendered by a court of general criminal jurisdiction was

> conclusive proof that confinement was legal … [and] prevented issuance of a writ". …
>
> "Judgments about the proper scope of the writ are 'normally for Congress to make.'" Any suggestion that the Suspension Clause forbids every contraction of the powers bestowed by Congress in 1885, and expanded by the 1948 and 1966 amendments to §2254, is untenable. The Suspension Clause is not a ratchet.

Lindh v. Murphy, 96 F.3d 856, 867–68 (7th Cir. 1996) (en banc) (citations omitted), reversed on other grounds, 521 U.S. 320 (1997).

Robinson tells us that he contests the district court's jurisdiction, but that is not correct. What he wants to do is dispute the sufficiency of the indictment, which is not a jurisdictional matter. See *United States v. Cotton*, 535 U.S. 625 (2002). The Northern District of Texas has jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. §3231. Robinson is not being held without trial. He had every opportunity to argue before trial, at trial, after trial, on direct appeal, and on collateral review under §2255 that the indictment was deficient. The Suspension Clause does not entitle him to any further chances.

AFFIRMED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JULIUS OMAR ROBINSON, Petitioner, v. WARDEN USP-Terre Haute, UNITED STATES OF AMERICA, Respondents.	))))))))))	No. 2:20-cv-00640-JPH-MG

FINAL JUDGMENT

The Court now enters final judgment. The action is dismissed for lack of jurisdiction.

Date: 9/30/2024

James Patrick Hanlon
James Patrick Hanlon
United States District Judge
Southern District of Indiana

Roger A.G. Sharpe, Clerk of Court

By: Lana Hawes
Deputy Clerk

Distribution:

All Electronically Registered Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JULIUS OMAR ROBINSON,)
)
Petitioner,)
)
v.) No. 2:20-cv-00640-JPH-MG
)
WARDEN, et al.)
)
Respondents.)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Julius Omar Robinson is a federal prisoner on death row. After a jury found Mr. Robinson guilty, his convictions and sentence were affirmed on direct appeal, his § 2255 petition for post-conviction relief was denied and that decision was affirmed on appeal, and Mr. Robinson's petitions for certiorari to the United States Supreme Court were denied. Before the Court is Mr. Robinson's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Mr. Robinson alleges that his convictions and sentence violate the Constitution, and that § 2255 is inadequate and ineffective to test the legality of his convictions and sentence. Because § 2255(e) precludes the Court from adjudicating the petition, it is **DISMISSED** for lack of jurisdiction.

I.
Background

A. Mr. Robinson's Conviction at Trial and Direct Appeal

1. Trial proceedings

While the details of Mr. Robinson's offenses of conviction are not relevant to the ultimate resolution of his legal claims, a brief summary is appropriate for context. Mr. Robinson was indicted in the Northern District of Texas for numerous crimes related to drug trafficking, unlawful use of firearms, and murder. A jury found him guilty of having personally murdered two people: Johnny Lee Shelton, who Mr. Robinson murdered because he mistakenly believed that Mr. Shelton was responsible for an armed hijacking that cost him $30,000, and Juan Reyes, who Mr. Robinson murdered in retaliation for a fraudulent drug transaction that cost Mr. Robinson $17,000. *United States v. Robinson*, 367 F.3d 278, 282-83 (5th Cir. 2004). The jury also found Mr. Robinson guilty of being part of a conspiracy that was responsible for the murder of Rudolfo Resendez. *Id.* at 283; *see* dkt. 16 at 35–36.

The indictment charging Mr. Robinson did not allege any statutory aggravating factors required for death penalty eligibility. *Robinson*, 367 F.3d at 283 ("[T]he government concedes the indictment is constitutionally deficient because it fails to allege the statutory aggravating factors that make Robinson eligible for the death penalty."). Nevertheless, he received three death sentences for two counts of murder in the course of using or carrying a firearm during a drug trafficking crime and one count of murder while engaging in a continuing criminal enterprise. *Id.* at 282.

2. Direct Appeal

On direct appeal, Mr. Robinson argued, among other things, that his death sentences, combined with the omission of aggravating factors in his indictment, violated the Sixth Amendment. *Id.* at 284. The Fifth Circuit agreed that Mr. Robinson's indictment was deficient under *Ring v. Arizona*, 536 U.S.

584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but held that the error was not structural and was harmless beyond a reasonable doubt. *Robinson*, 367 F.3d at 285–89. In reaching that conclusion, the Court analyzed whether the two primary functions of an indictment—(1) that the indictment provided requisite notice of the crime for which the defendant had been charged, and (2) that the public is involved in "the charging decision, such that a defendant is not subject to jeopardy for a crime alleged only by the prosecution"—were met in this case. *Id.* at 287.

As to the first function, the Court concluded that Mr. Robinson received adequate notice because the government had filed notice under 18 U.S.C. § 3593(a) of intent to seek a death sentence four months before trial, and Mr. Robinson did not argue that the content or timing of the notice rendered him unable to prepare a defense. *Id.*

As to the second function, the Court applied the test announced in *Chapman v. California*, 386 U.S. 18, 23 (1967), which asked "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 286–87. The Fifth Circuit concluded that the indictment error was harmless beyond a reasonable doubt. It explained:

> No categorical rule is needed to convince us that any rational grand jury would find probable cause to charge Robinson with at least one of the statutory aggravating factors omitted from his indictment. In addition to the petit jury's unanimous findings—which we consider to be, at minimum, persuasive evidence of how a grand jury would find—the evidence overwhelmingly shows that

> there existed probable cause to charge Robinson with the aggravating factors used in his sentencing.
>
> All three death sentences involved the aggravating factor that in the killings of Shelton and Reyes, Robinson "knowingly created a grave risk of death to one or more persons in addition to ... the victim." *Cf.* 18 U.S.C. § 3592(c)(5). Robinson killed Shelton by firing an AK–47 assault rifle from the window of a moving vehicle on a public highway, directly endangering Shelton's passenger and anyone else in range. The record also shows that in the course of killing Reyes, Robinson and his co-assailant managed to shoot Rodriguez three times and to fire enough times at Marques's car fleeing the scene to leave it riddled with bullets. All this took place in a residential neighborhood in close proximity to at least two adolescent eyewitnesses playing on a nearby porch, and across the street from a barbecue attended by at least ten people.
>
> No rational grand jury would fail to find that this evidence constituted anything less than probable cause to believe that, in the course of committing each murder, Robinson created a grave risk of death to someone other than the victim. As a result, and beyond a reasonable doubt, the failure to charge those factors in an indictment did not contribute to Robinson's conviction or death sentence.

The United States Supreme Court denied Mr. Robinson's petition for writ of certiorari. *Robinson v. United States*, 543 U.S. 1005 (2004).

B. Mr. Robinson's § 2255 Proceedings

1. Initial § 2255 Motion

In 2005, Mr. Robinson filed a 28 U.S.C. § 2255 motion challenging his convictions and sentences. *See In re Robinson*, 917 F.3d 856, 860 (5th Cir. 2019). In that motion, Mr. Robinson raised the following issues: (1) ineffective assistance of counsel during the penalty phase; (2) a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the prosecutor's use of peremptory challenges; (3) a claim that the Federal Death Penalty Act, as applied in Texas, violated the Equal Protection Clause; (4) a claim of ineffective assistance of counsel on appeal; (5) a due process claim related to the prosecutor's alleged pursuit of inconsistent theories at seriatim capital trials; and (6) a due process claim related to the prosecutor's alleged use of false and misleading testimony during the penalty phase. *Id.* Mr. Robinson then tried to amend his motion to add a seventh ground of relief—a claim that the indictment was defective because the prosecutor failed to include aggravating factors for the capital charge. The district court denied permission to add that claim because it had been decided on direct appeal, but it permitted the amendment insofar as it allowed Mr. Robinson to "add documentary evidence and corresponding argument relating back to his original petition." *Id.*

The district court denied Mr. Robinson's request for an evidentiary hearing, finding that "the record before [it], including the exhibits submitted by Robinson with his motion, do[es] not create any contested fact issues that must be resolved in order to decide Robinson's claims." *Id.* In deciding Mr. Robinson's claims, the court assumed that Mr. Robinson's factual contentions were true, or that his claims were "based on legal, not factual bases." *Id.*

The district court denied the petition, finding that his claims lacked merit. *Robinson v. United States*, 2008 WL 4906272, at *8–25 (N.D. Tex. Nov. 7, 2008) (unreported). The court found that Mr. Robinson's ineffective assistance of trial counsel claims failed for the following reasons:

- Mr. Robinson's claim that trial counsel failed to hire a skilled investigator was contradicted by the fact that counsel retained an investigator with whom the team had worked on previous occasions, and that investigator interviewed Mr. Robinson and Mr. Robinson's suggested fact witnesses. Trial counsel then presented testimony of those witnesses during the penalty phase at trial, *id.* at *9;

- The evidence that Mr. Robinson marshaled on post-conviction proceedings alleging that trial counsel was ineffective in his failure to investigate and rebut the government's evidence regarding future dangerousness was so contradictory that it would not have resulted in a different outcome at trial; nor did Mr. Robinson show that trial counsel handled the evidence that was presented unreasonably, *id.* at *9−11;

- Trial counsel's investigation of another aggravating factor—the attempted murder of Sarah Tucker—was not deficient where, despite Mr. Robinson's ultimate plea to a lesser count of "deadly conduct," Ms. Tucker testified at the trial that Mr. Robinson shot at her while she was in her vehicle, *id.* at *11−12;

- Trial counsel made a strategic decision not to hire a mitigation investigator where the investigation revealed no red flags that would cause them to delve further into Mr. Robinson's education background; Mr. Robinson's full-scale IQ of 107 belied his contention that counsel should have investigated his pesticide exposure and *in utero* exposure to drugs and alcohol or presented a mental health expert to testify about the impact that those exposures or Mr. Robinson's childhood had on his mental state, *id.* at *12-15;

- Trial counsel made a strategic decision not to investigate Mr. Robinson's social history more than they did because evidence about his gang involvement was more likely to alienate the jury, and, moreover, none of the information would have affected the outcome of the jury's sentencing decision, *id.* at *15−17, and;

- Trial counsel's decision not to raise a *Batson* challenge on appeal was not deficient because the prosecutor presented race-neutral reasons for striking three Black jurors, and thus the issue would not have prevailed on appeal, *id.* at *18−22.

The district court further held that Mr. Robinson's selective-prosecution claims—which argued that studies showed that the government impermissibly used ethnicity as a basis for seeking the death penalty against Black defendants—failed, as it had been previously rejected by the Fifth Circuit. *Id.*

at *22−23. The court found that Mr. Robinson's claim that the prosecutor pursued fundamentally inconsistent theories at seriatim capital trials by arguing that Mr. Robinson was the leader and most culpable at his trial, while then arguing the same about his co-defendant L.J. Britt at his trial, was procedurally defaulted because it could have been raised on direct appeal. *Id.* at * 23. Finally, the district court concluded that Mr. Robinson failed to make a prima facie claim under *Giglio v. United States*, 405 U.S. 150 (1972) that the government knowingly used or failed to correct false testimony during the penalty-phase aggravating factor of future dangerousness. *Id.* at *24.

2. Motion for reconsideration

Mr. Robinson then filed a motion for reconsideration of the order denying the motion to vacate without an evidentiary hearing under Federal Rule of Civil Procedure 59(e). *In re Robinson*, 917 F.3d at 861. The district court denied that motion and declined to issue a certificate of appealability. *Id.* The Fifth Circuit also declined to issue a certificate of appealability, and the United States Supreme Court denied Mr. Robinson's petition for writ of certiorari. *Id.; Robinson v. United States*, 565 U.S. 827 (2011).

3. Rule 60(b) Motion

In 2018, Mr. Robinson filed a motion for relief from judgment under Federal Rule of Civil Procedure Rule 60(b)(6) in his § 2255 litigation. *In re Robinson*, 917 F.3d at 861. In the motion, Mr. Robinson argued that (1) both the district court and the Fifth Circuit "wrongly denied his ability to appeal" because the courts "applied an erroneously high standard for obtaining a

[COA]," (2) that the district court prevented him from conducting a reasonable investigation, and (3) that the district court erred when it denied his right to amend his § 2255 motion to include his defective-indictment claim. *Id.* The district court construed the motion as an unauthorized successive § 2255 motion and transferred it to the Fifth Circuit. *Id.* The Fifth Circuit denied Mr. Robinson leave to file a successive § 2255 motion, and the United States denied his petition for writ of certiorari. *Id.* at 870; *Robinson v. United States*, 140 S. Ct. 1128 (2020).

4. § 2241 Petition

In 2020, Mr. Robinson filed a 28 U.S.C. § 2241 petition for a writ of habeas corpus in this Court. The petition raises five claims:

1. the trial court lacked jurisdiction over any death-eligible offenses because they were not charged in the indictment;
2. the prosecutor presented false and misleading evidence, and trial counsel was ineffective for failing to challenge it;
3. counsel was ineffective for failing to challenge racially motivated peremptory strikes on appeal;
4. trial counsel was ineffective at the penalty phase; and
5. Mr. Robinson's convictions and sentences should be vacated based on violations of the American Declaration of the Rights and Duties of Man.

Dkt. 4 at 28–161.[1]

After the Court denied the government's motion to dismiss, dkt. 22, the government filed a response to the § 2241 petition, arguing that the Court has

[1] Where the parties' page numbering is inconsistent with CM-ECF page numbering, this Order refers to the CM-ECF page numbers.

no jurisdiction to adjudicate most of Mr. Robinson's claims and that all the claims lack merit, dkt. 27. Mr. Robinson filed a reply. Dkt. 31. After the petition was fully briefed, Mr. Robinson filed a notice of supplemental authority arguing that his petition is not subject to dismissal under *Jones v. Hendrix*, 599 U.S. 465 (2023). Dkt. 33.

II.

Applicable Law

The Court begins its analysis by examining the statutory framework governing federal prisoners' collateral attacks on their convictions or sentences. It then discusses Seventh Circuit precedent involving the narrow scope of claims that could proceed under the saving clause, and the recent Supreme Court opinion in *Jones v. Hendrix* which further narrowed the scope of available claims. The Court then addresses Mr. Robinson's arguments that he is entitled to have the Court consider the merits of his claims under § 2241.

A. Statutory Framework

The primary vehicle for a collateral attack on a federal conviction or sentence is a motion in the sentencing court pursuant to 28 U.S.C. § 2255. *Shepherd v. Krueger*, 911 F.3d 861, 862 (7th Cir. 2018). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress placed limitations on a federal prisoner's ability to bring a § 2255 action. First, such action can only be brought in the court which imposed the sentence. 28 U.S.C. § 2255(a). Second, a federal prisoner is limited to bringing one § 2255 motion, unless the court of appeals for the district where the action is filed determines that a second or successive motion contains:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

Congress created within § 2255 a narrow exception to the "general rule" that requires a federal prisoner to bring a collateral attack under § 2255. A petitioner may seek relief by filing a § 2241 habeas corpus petition if "the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). This provision is referred to as the "saving clause." *See Jones*, 599 U.S. at 471.

B. Seventh Circuit Precedent Pre-*Jones*

Before June 2023, the Seventh Circuit and other courts had applied the saving clause to allow an individual to attack his conviction or sentence in a § 2241 petition if this vehicle was the only "reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998); *see Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (en banc) ("[T]here must be some kind of structural problem with section 2255 before section 2241 becomes available.").

The Seventh Circuit had identified three sets of claims that satisfy § 2255(e)'s saving clause. *See Davenport*, 147 F.3d at 611–12 (claim based upon new statutory interpretation made retroactive by Supreme Court); *Webster*, 784 F.3d at 1140 (claim relying on newly available evidence that existed at the time of trial and could show that petitioner is categorically ineligible for death penalty); *Garza v. Lappin*, 253 F.3d 918, 920–21 (7th Cir. 2001) (claim based on ruling of international tribunal issued after petitioner's original § 2255 motion had been resolved). The Seventh Circuit later clarified that these categories did not "rigidly describe the outer limits" of claims that might satisfy the saving clause. *Purkey v. United States*, 964 F.3d 603, 611–12 (7th Cir. 2020).

C. *Jones v. Hendrix*

In *Jones*, the Supreme Court held that "§ 2255(e)'s saving clause does not permit a prisoner asserting an intervening change in statutory interpretation to circumvent AEDPA's restrictions on a second or successive § 2255 motion by filing a § 2241 petition." 599 U.S. at 471. The Court thus abrogated *Davenport* and precedent from other circuits that had permitted petitioners to bring statutory claims under § 2241. The Court determined that both the text and structure of AEDPA demonstrate that § 2255(e) does not expand § 2255(h)'s narrow exceptions for when a petitioner may bring a second or successive collateral attack on his conviction or sentence:

> We now hold that the saving clause does not authorize such an end-run around AEDPA. In § 2255(h), Congress enumerated two—and only two—conditions in which a second or successive § 2255 motion may proceed. Because § 2255 is the ordinary vehicle for a collateral attack on a federal sentence, the straightforward negative inference from § 2255(h) is that **a second or successive collateral attack on a federal sentence is not authorized unless one of those two conditions is satisfied**. . . . The saving clause does not undermine this strong negative inference.

Jones, 599 U.S. at 477–78 (emphasis added).

Thus, if § 2255(h) is the only obstacle to a petitioner bringing a collateral attack on his conviction or sentence in a § 2255 motion, then § 2255(e) does not permit the petitioner to instead bring the collateral attack in a § 2241 petition. *Jones*, 599 U.S. at 478 ("Basic principles of statutory interpretation require that we construe the saving clause and § 2255(h) in harmony, not set them at cross-purposes."); *see Voneida v. Johnson*, 88 F.4th 233, 237 (3d Cir. 2023) ("§ 2255(h) 'specifies the two circumstances under which a second or successive collateral attack on a federal sentence' via § 2241 'is available. . . .'").

As the Court explained in *Jones*, a § 2241 petition may be used for a collateral attack on a sentence or conviction only "in cases where unusual circumstances make it impossible or impracticable to seek relief in the sentencing court." *Jones*, 599 U.S. at 478. The Court observed that "[t]he clearest such circumstance is the sentencing court's dissolution; a motion in a court that no longer exists is obviously 'inadequate or ineffective' for any purpose." *Id.* at 474 (citing cases where court-martial, the District Court of the Canal Zone, and an Alaska territorial court were dissolved). As another example, "[t]he saving clause might also apply when 'it is not practicable for the prisoner to have his motion determined in the trial court because of his inability to be present at the hearing, or for other reasons." *Id.* at 475.

Finally, the Court observed that, "AEDPA's second-or-successive restrictions . . . embody Congress' judgment regarding the central policy question of postconviction remedies—the appropriate balance between finality and error correction." *Id.* at 491.

III.
Discussion

This Court lacks jurisdiction to adjudicate Mr. Robinson's § 2241 petition because Mr. Robinson cannot satisfy the saving clause. He sets forth several arguments for doing so, but none is persuasive.

A. Adequacy and Effectiveness of § 2255 for Persons Challenging Death Sentences in the Fifth Circuit

Mr. Robinson contends that § 2255 is inadequate or ineffective to test the legality of his detention because he was forced to litigate his § 2255 motion in the Fifth Circuit, which he contends does not afford adequate or effective process to § 2255 petitioners who face death sentences. Dkt. 4 at 14–27; dkt. 31 at 9 (arguing that "courts in the Fifth Circuit, both systemically and specifically in his case, deny petitioners a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of their conviction and sentence" (cleaned up)).

In support of this argument, Mr. Robinson cites his own analysis of capital § 2255 proceedings in the Fifth Circuit. Dkt. 4 at 15–22. For example, Mr. Robinson asserts that of the 39 federal prisoners whose convictions and death sentences were affirmed on direct appeal and whose § 2255 motions have been processed through appeal, 31 of the 39 (approximately 80%) were granted evidentiary hearings in the district court and/or a certificate of appealability. *Id.* at 16−17. The final eight were provided neither, and seven of those eight were individuals sentenced to death in the Fifth Circuit. *Id.* at 17. He also cites a statement regarding the denial of certiorari from a Fifth Circuit § 2255 decision, where Justice Sotomayor criticized the Fifth Circuit's Rule 60(b)(6) jurisprudence. Dkt. 4 at 27; *Crutsinger v. Davis*, 140 S. Ct. 2 (2019) (Sotomayor, J., respecting the denial of certiorari). But even if courts in the Fifth Circuit were sufficiently out of step with other courts as to call into doubt the procedures afforded to § 2255 petitioners—and this Court makes no such finding—a § 2241 petition would not be the vehicle to resolve the issue. *Vialva v. Watson*, 975 F.3d 664, 666 (7th Cir. 2020) ("[A] § 2241 proceeding is not an authorized way to contest the procedure the Fifth Circuit used."); *see also Von Kahl v. Segal*, 19 F.4th 987, 988 (7th Cir. 2021) ("Section 2241 is not a means to get a second opinion in a different circuit.").

Mr. Robinson attempts to distinguish *Vialva* by noting that he, unlike the petitioner in *Vialva*, alleges a systemic lack of process in the Fifth Circuit, not just an individual lack of process. Dkt. 31 at 13 ("Robinson does not simply argue that the Fifth Circuit erroneously denied him a COA and therefore he is entitled to Section 2241 review; rather, Robinson establishes that the Fifth

Circuit routinely misapplies the COA standard generally, thereby depriving post-conviction litigants, including himself, of meaningful appellate review.").

But the reasoning in *Vialva* applies equally to Mr. Robinson's argument. Regardless of whether the error is isolated or systemic, it is not this Court's role to review the Fifth Circuit's processes. *See Vialva*, 975 F.3d at 666 ("[W]e do not sit in judgment on the decisions of our sister circuits. That power belongs to the Supreme Court."). Further, the argument that § 2241 should be available if the § 2255 court misapplies substantive law was considered and rejected by the Court in *Jones*:

> This argument ignores that the saving clause is concerned with the adequacy or effectiveness of the remedial *vehicle* . . ., not any court's asserted errors of law. . . . Even when *circuit law* is inadequate or deficient because a Court of Appeals' precedents have resolved a legal issue incorrectly, that is not a fault in the § 2255 remedial vehicle itself.

599 U.S. at 480−81 (cleaned up, emphases in *Jones*).

Finally, setting aside Mr. Robinson's concerns about systemic deficiencies in the Fifth Circuit's handling of § 2255 capital cases, he has not shown that there was any structural problem with § 2255 when applied to the facts of his case. A structural problem requires "something more than a lack of success with a section 2255 motion." *Webster*, 784 F.3d at 1136. It must "foreclose[ ] even one round of effective collateral review, unrelated to the petitioner's own mistakes." *Poe v. LaRiva*, 834 F.3d 770, 772 (7th Cir. 2016) (internal quotation omitted).

Here, Mr. Robinson presented his jurisdictional challenge regarding the indictment on direct appeal and six issues in his § 2255 motion (including an ineffective assistance of counsel claim with many subparts). Further, the district court explained that, while it did not hold an evidentiary hearing, it treated Mr. Robinson's factual assertions as true or based on legal rather than factual bases. *Robinson*, 2008 WL 4906272, at *25. The district court thoroughly explained why it rejected each of Mr. Robinson's claims presented in his motion. *Id.* at *8−24. Mr. Robinson's subsequent challenges to the adequacy of the § 2255 proceedings were raised and rejected by both the district court and the Fifth Circuit. The Supreme Court declined to hear Mr. Robinson's case on three separate occasions. Thus, the record demonstrates that Mr. Robinson had "a reasonable opportunity in a prior § 2255 proceeding to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019) (cleaned up). This is not an "unusual circumstance[ ] in which it [was] impossible or impracticable" for Mr. Robinson to obtain relief in the sentencing court. *Jones*, 599 U.S. at 474.

B. Trial Court's Jurisdiction over Capital Charges

Mr. Robinson contends that because his indictment did not include aggravating factors as required for imposition of a death sentence, the trial court lacked jurisdiction to adjudicate the charges for which he was sentenced to death. Dkt. 4 at 28–35. He argues that this claim satisfies § 2255(e) because (1) § 2255(h) prevents him from raising the claim in a successive

§ 2255 motion and (2) his claim challenges the sentencing court's jurisdiction. Dkt. 4 at 38–43; dkt. 33 at 3.

Neither of these arguments provides a basis for jurisdiction over the § 2241 petition. Section 2255(h) allows a petitioner to bring a successive § 2255 motion in two situations. *Jones* makes clear that where § 2255(h) is the only barrier to raising the claim in a § 2255 motion, the saving clause does not open the door to bringing the claim in a § 2241 petition. 599 U.S. at 478; *see Voneida*, 88 F.4th at 237–38.

Here, Mr. Robinson contends that *Jones* left open the possibility of bringing a § 2241 petition alleging that the sentencing court lacked jurisdiction. Dkt. 33 at 3. But *Jones* explained that, so long as judgment was imposed by a court with "general criminal jurisdiction," a traditional habeas corpus court "had no power to look beyond the judgment to re-examine the charges on which it was rendered for substantive errors of law." 599 U.S. at 483 (cleaned up). Mr. Robinson does not contend that the sentencing court here lacked general criminal jurisdiction. He has therefore failed to demonstrate that he may circumvent the statutory limits on § 2255 motions by bringing his claim in a § 2241 petition.

C. Newly Discovered Evidence and Ineffective Assistance of Counsel

Mr. Robinson contends that some of his ineffective assistance of counsel claims satisfy the saving clause because the supporting evidence was either unavailable or excluded from his § 2255 proceedings. Dkt. 4 at 78–80, 95–98, 153–60. Much of this argument overlaps with Mr. Robinson's arguments about systemic lack of process in the Fifth Circuit and its district courts. To the extent Mr. Robinson relies on the path outlined in *Webster*—newly available evidence showing the petitioner is categorically ineligible for the death penalty—he still fails to satisfy the saving clause.

Section 2255(h)(1) sets statutory limits on the types of newly discovered evidence claims that can be brought in a second or successive collateral attack on a conviction or sentence. If Mr. Robinson can satisfy § 2255(h)(1), he may seek leave from the Fifth Circuit to file a successive § 2255 motion. But as nothing other than § 2255(h) bars him from bringing the claim in a § 2255 motion, he may not bring it in a § 2241 petition. *Jones*, 599 U.S. at 480 ("The inability of a prisoner . . . to satisfy [§ 2255(h)] does not mean that he can bring his claim in a habeas petition under the saving clause. It means that he cannot bring it at all. Congress has chosen finality over error correction in his case.").

D. The American Declaration of the Rights and Duties of Man

Before *Jones*, the Seventh Circuit held that a petitioner whose claim was based on violations of international law that could not have been raised on direct appeal or in the petitioner's initial § 2255 motion could bring the claim in a § 2241 petition. *Garza*, 253 F.3d at 923.

As Mr. Robinson points out, dkt. 33 at 4, *Jones* did not expressly abrogate *Garza*. Still, *Jones* leaves no room for *Garza*'s application of the saving clause. In *Garza*, the Seventh Circuit—relying heavily on *Davenport*—held that because the petitioner could not have brought his claim on direct appeal or in his original § 2255 motion, and because § 2255(h) barred the petitioner from bringing his claim in a successive motion, the saving clause permitted him to bring it in a § 2241 petition. *Garza*, 253 F.3d at 923. That is not enough after *Jones*. A petitioner's inability to satisfy § 2255(h) means that he cannot bring a second or successive[2] challenge to his conviction or sentence, either in a § 2255 motion or in a § 2241 petition.[3] *Jones*, 599 U.S. at 478; *see Voneida*, 88 F.4th at 237–38.

IV.
Conclusion

Mr. Robinson has not satisfied § 2255(e)'s saving clause, so this Court lacks jurisdiction to review the merits of his arguments challenging his conviction and sentence. The § 2241 petition is therefore **DISMISSED** for lack of jurisdiction. Final judgment shall now issue.

SO ORDERED.

Date: 9/30/2024

James Patrick Hanlon

James Patrick Hanlon
United States District Judge
Southern District of Indiana

Distribution:

All electronically registered counsel

[2] Whether Mr. Robinson could now raise his treaty claim in an "original" § 2255 motion is a question for the sentencing court. *See Garza*, 253 F.3d at 923–24 (questioning whether Garza's petition was truly "second or successive" for purposes of § 2255(h), but deferring to the law of the case and not resolving the question independently).

[3] Because the Court does not have jurisdiction to adjudicate any of Mr. Robinson's claims, it need not resolve the parties' dispute about whether a court has jurisdiction over an entire § 2241 petition that satisfies the saving clause as to only one claim. *See* dkt. 4 at 161; dkt. 27 at 32–40.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

No. 18-10732

IN RE: JULIUS OMAR ROBINSON,

Movant.

* * * * *

No. 18-70022

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

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

Defendant–Appellant.

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

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

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

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

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

I.

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

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

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

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

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

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and 14).

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

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

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

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

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

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

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

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

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

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

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

II.

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

A.

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

> [a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C §2255(h). Section 2244(a) provides,

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

A petition is successive when it 'raises a claim . . . that was or could have been raised in an earlier petition . . . .'" *Edwards*, 865 F.3d at 203 (quoting *Hardemon v. Quarterman*, 516 F.3d 272, 275 (5th Cir. 2008)).

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

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

C.

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

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

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

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

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

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

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

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

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

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

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

The denial of Robinson's discovery request during his initial habeas proceedings—a request that was then related to his *Batson* and IAC claims—did not prevent a merits determination on those issues. Moreover, Robinson was not prevented from litigating his impartial-jury claim because of "a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *See Gonzalez*, 545 U.S. at 532 n.4. Instead, Robinson chose

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

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

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

To the extent that Robinson now attempts to bring such a claim, the government rightly posits that "[b]ecause the merits of Robinson's discovery request to interview jurors [are] wrapped up with, and dependent on, his ability to bring a new claim for relief from the judgment of his conviction," his request is "a paradigmatic habeas claim." *Rodwell v. Pepe*, 324 F.3d 66, 72 (1st Cir. 2003).[17] Accordingly, this claim is best viewed as a second or successive § 2255 motion.

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

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

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

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

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D.

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

Robinson maintains that *Weaver*, in particular, "casts serious doubt on [our] denial of Robinson's defective indictment claim in two significant ways." First, "the *Weaver* Court's description of the three general categories of structural error[[19]] make clear that this Court's requirement that [Robinson's] defective indictment claim affect the 'fundamental fairness' of his trial in order to be structural was misguided." Second, "*Weaver* left no doubt that this Court's application of the harmless error standard to Robinson's *preserved* defective indictment claim—a claim of structural error—was improper."

Robinson contends that *Williams* "establishes that the indictment error at issue in *Robinson* is structural because it falls under *Weaver*'s rubric of an error whose effects are 'simply too hard to measure'" (quoting *Weaver*,

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

137 S. Ct. at 1908).[20] Ultimately, Robinson avers that "these opinions demonstrate that the earlier denial of Robinson's motion to amend is clearly erroneous; and the courts' continued denial of Robinson's right to litigate the impact of the structural error inherent in his defective-indictment claim would work a manifest injustice, especially since this is a death-penalty case."

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

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

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

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

successive [§] 2255 motion."

At bottom, Robinson challenges not "some defect in the integrity of the habeas proceedings," *Gonzalez*, 545 U.S. at 532, but rather our previous resolution, on the merits, of his defective-indictment claim, *Robinson*, 367 F.3d at 286–89. Attempting to disguise this claim, which was definitively resolved on direct appeal nearly fifteen years ago,[22] Robinson submits that the district court's refusal to allow, on collateral review, an amendment to his habeas petition to include defective-indictment claim was a procedural defect in the integrity of the habeas proceedings.

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

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

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

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

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

III.

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

A.

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

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

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B.

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

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

Id. at 869.

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

C.

The Supreme Court has not expressly stated whether *Pena-Rodriguez* announced "a new rule of constitutional law, made retroactive to cases on collateral review . . . that was previously unavailable." 28 U.S.C. § 2255(h)(2). Nonetheless, Robinson avers that *Tharpe v. Sellers*, 138 S. Ct. 545, 545–47 (2018) (per curiam), "indicate[s] that *Pena-Rodriguez* is indeed retroactively applicable."

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

Although Robinson's contention that *Pena-Rodriguez* (in conjunction with *Tharpe*) announced a new substantive rule that applies retroactively to cases on collateral review is exceedingly doubtful, we need not reach that issue here. Even if the rule announced in *Pena-Rodriguez* did apply retroactively to cases on collateral review, Robinson fails to make the requisite *prima facie* showing of possible merit necessary, under 28 U.S.C. §§ 2244(b)(3)(C) and 2255(h)(2), to warrant the certification of his second or successive habeas motion. Over the past seventeen years, Robinson has proffered absolutely no evidence of juror misconduct or bias.[24] Accordingly, we decline, as did the district court, Robinson's invitation to join his "improper fishing expedition in support of a hypothetical claim." Because Robinson fails to "put forth minimally sufficient evidence to make a *prima facie* case" and there is not "sufficient . . . merit in [his] motion to warrant further exploration by the district court," we deny the motion for authorization to file a second or successive § 2255 petition. *See Hearn*, 418 F.3d at 447–48.

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

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

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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Suite 115
NEW ORLEANS, LA 70130

March 08, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

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

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

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

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

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

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

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

Sincerely,

LYLE W. CAYCE, Clerk

By:________________________
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

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

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

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

MEMORANDUM OPINION AND ORDER TRANSFERRING 60(b) MOTION

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

Background

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

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

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

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

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

Applicable Law

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

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

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

Denial of COA

Robinson first contends that an erroneously high standard was used in denying a COA on his ineffective-assistance-of-counsel claim. He cites *Buck v. Davis*, 137 S. Ct. 759 (2017) as "the Supreme Court's most recent case on the COA standard" and argues that this Court and the Court of Appeals erred under *Buck* by making a COA determination on the merits rather than simply asking whether the district court ruling was debatable. Motion, p. 5-9. Robinson argues that the COA is a valid subject for Rule 60(b) relief because it is by definition a "non-merits based decision." *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *see* Reply, p. 1.

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

Inability to Question Jurors

Next, Robinson reasserts a request to interview jurors that this Court had denied during the § 2255 litigation. He argues that he should be permitted to "conduct an investigation no more intrusive than necessary to determine what role, if any, racial bias played in his convictions and sentences." Motion, p. 11. This request relies on *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), which held that the "no impeachment" evidence rule for jurors must yield to the Sixth Amendment when a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict. *See* Fed. R. Evid. 606(b); *see also* L. Cr. R. 24.1 (N.D. Tex.); Motion, p. 9-11.

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

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

Indictment Error

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

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

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

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

Robinson's argument badly misreads *Gonzalez*. The difference between the limitations ruling challenged in *Gonzalez* and the procedural rulings challenged by Robinson is that the limitations ruling *precluded* a merits determination. Here, Robinson challenges a ruling that did not prevent any merits determination (the COA) or leverages "procedural" errors to present new claims challenging his conviction (the impartial-jury claim and indictment error). Even though couched in terms of procedural error, these issues are, at bottom, merits-based challenges to his conviction.

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

Transfer

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

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

* * * * *

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

SIGNED June 20, 2018.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
F I L E D
June 8, 2010

Lyle W. Cayce
Clerk

No. 09-70020

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

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

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:05-CV-756

Before HIGGINBOTHAM, SMITH, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Julius Robinson, a federal prisoner, was convicted of two murders and conspiring in the death of a third victim. He was sentenced to death. He seeks a certificate of appealability ("COA") to appeal the denial of post-conviction relief under 28 U.S.C. § 2255, alleging that he received ineffective assistance of coun-

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sel ("IAC") at sentencing and that the district court erred by denying his IAC claim without a hearing. We deny the application.

I.

A.

We described the events leading to Robinson's conviction and sentence in *United States v. Robinson* ("*Robinson I*"), 367 F.3d 278 (5th Cir.), *cert. denied*, 543 U.S. 1005 (2004). In summary, Robinson was a wholesale drug dealer operating in five states. In 1998, he ambushed and killed Johnny Shelton with an assault rifle because Robinson had mistaken Shelton for another man whom Robinson blamed for an earlier hijacking. Several months later, Robinson gunned down and killed Juan Reyes because Reyes was the brother-in-law of another drug dealer who had defrauded Robinson. Robinson was also involved in a broad conspiracy that led to the murder of a third man, Rudolfo Resendez.

B.

For these murders and his complicity in an ongoing criminal enterprise, Robinson was convicted and sentenced to death on three separate counts, to life imprisonment on two others, and to a consecutive 300-month sentence on another. *Robinson I*, 367 F.3d at 282. During the sentencing phase, the prosecution presented evidence of Robinson's likely future dangerousness, referring to his membership in a gang and two additional incidents from his past. Sarah Tucker, Robinson's former high school classmate, testified that he had once fired several shots into her truck and her grandparents' apartment while she sat parked in the driveway, because she owed him $120 for crack cocaine. Robinson was convicted of deadly conduct in Texas state court for that episode.

The prosecution also presented evidence that, while in prison awaiting trial for murder, Robinson ordered a hit on the life of Michael "One Love" Williams, who was from Robinson's hometown of Dermott, Arkansas, and who had testified against Robinson before the grand jury. According to one of Robinson's co-defendants, Nathan Henderson, Robinson said he hoped someone would "get" Williams. At one point, Robinson participated in a three-way phone call with his brother and aunt during which he said, "That dude One Love, man that dude right there go hard, Joe." Williams (i.e., One Love) testified at trial that he was accosted in Dermott by three young men who told him they would kill him for snitching on their leader in Texas. Williams eventually escaped from the three men. Robinson later told Henderson that the "youngsters" in Dermott "got" One Love.

The defense called numerous witnesses. Several of Robinson's former coaches and one former teammate testified that Robinson was polite, well-liked, and responsible. An employee at the computer training school where Robinson took classes testified to his good attendance and successful course work. The defense also called several witnesses from the facility where Robinson was incarcerated before trial. They testified that he was a quiet, courteous, and well-behaved inmate. On cross-examination, one of the witnesses admitted that Robinson had broken a rule by participating in a three-way telephone call.

Two members of Robinson's family testified. John Hollimon, Jr., his uncle, said that Robinson had been raised by his grandparents in Dermott when he was young and that that environment, though poor, was a loving one. When Robinson and his brother grew older, his mother, Rose Hollimon, brought the boys to Arlington, Texas, to live with her. There, according to John Holimon, Robinson lived in a dangerous environment and was forced to fend for himself. Holimon also said that Robinson had supported his grandparents in the past and was excited about his computer course.

Rose Holimon then described how she had married Robinson's father when she was fifteen years old and that her husband abandoned her several years later. She left her sons with their grandparents, believing it would be the best thing for them. She admitted abusing alcohol and drugs while her sons lived with her in Arkansas. She also described Robinson as an average student.

The government and defense called witnesses to testify as to the likelihood of prison violence. The defense witness testified that there was a 20-30% chance that a capital inmate like Robinson would be involved in serious prison violence and a 1% chance such an inmate would commit murder in prison. The government witness opined that the main predictors of prison violence were young age and past violence. He also noted that Robinson was likely to be housed in a facility where he would interact often with other inmates and have telephone access.

C.

Robinson unsuccessfully moved for post-conviction relief under § 2255, then filed an application for COA in the district court on two questions: whether he received IAC at the sentencing phase and whether the district court was required to hold an evidentiary hearing on that issue. The district court denied the application, and Robinson petitions this court for a COA on the same two issues.

II.

A petitioner must obtain a COA as a "jurisdictional prerequisite" to appealing the denial of relief under § 2255. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). Where the district court has rejected a petitioner's constitutional claims on the merits, he must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327 (citation omitted). “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that the petitioner will not prevail.” *Id.* at 338. In our COA determination, we conduct a “threshold inquiry” consisting of “an overview of the claims in the habeas petition and a general assessment of their merits.” *Id.* at 336. In a death penalty case, we resolve any doubt about whether a COA should issue in favor of the petitioner. *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005).

A.

Robinson presents two bases for his IAC claim. First, he alleges that his trial counsel did not adequately investigate and rebut the prosecution’s evidence regarding future dangerousness––Robinson’s alleged gang involvement, the shooting of Tucker’s truck, and the purported hit order on Williams. Second, Robinson claims his trial counsel did not adequately investigate his life history, which would have uncovered additional mitigating evidence.

Reviewing a COA petition, we do not decide the merits of Robinson’s IAC claims; indeed, we lack jurisdiction to do so. *Miller-El*, 537 U.S. at 336-37. That said, our threshold inquiry of the merits necessarily involves consideration of the elements of the underlying claim for which a COA is requested. *Miller v. Dretke*, 404 F.3d 908, 916 (5th Cir. 2005). To prove IAC, Robinson must show that (1) counsel’s performance was deficient, that is, below an objective standard of reasonableness; and (2) the deficient performance prejudiced his defense, that is, but for counsel’s unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* at 916-17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). Under *Washington*’s first prong, there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Washington*, 466

U.S. at 689. Under the second prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. If a court concludes that "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed" without analyzing the objective reasonableness of counsel's performance. *Id.* at 697.

We first address Robinson's contention that sentencing counsel failed adequately to investigate and rebut evidence of future dangerousness. With regard to the alleged hit order from prison, Robinson now produces declarations of those involved in accosting Williams, and Williams himself, denying that the three young men were acting under Robinson's orders. Robinson also claims his words "that dude [Williams] right there go hard" were not an instruction to kill Williams, but rather a comment that Williams would do or say anything. On the other hand, none of those declarations rebuts Henderson's testimony concerning Robinson's comments about "get[ting]" Williams before and after the incident, and, as the district court observed, the declarations themselves are contradictory in some respects.

As for the shooting of Tucker's truck, Robinson proffers evidence that he did not know Tucker was in the vehicle. Robinson's companion during the shooting now claims, in contradiction to the earlier testimony that he and Robinson were elsewhere during the shooting, that neither of them saw Tucker inside the truck. According to Robinson, that evidence suggests he was not attempting to murder Sarah Tucker but rather was spraying bullets into her truck and grandparents' apartment "in frustration." Robinson's § 2255 counsel also interviewed Robinson's defense counsel for the deadly conduct prosecution, who avers that Robinson's plea to a third-degree felony and a relatively light sentence––five years of probation and deferred adjudication—confirms the "minor nature" of the crime.

Robinson also claims that his trial counsel should have suppressed any evidence of his affiliation with the Dermott Crips gang under *Dawson v. Delaware*, 503 U.S. 159, 165-67 (1992). *Dawson* held that a stipulation to the defendant's membership in the Aryan Brotherhood prison gang was irrelevant to his sentencing and led to constitutional error, because the only information presented about the gang was its racist beliefs. *Id.* at 162, 165. But had the prosecution given some other justification for referring to the gang, such as a reputation for violence, it would have presented "a much different case." *Id.* at 165. That was precisely the reason for linking Robinson to the Dermott Crips, so references to the gang were relevant.

Alternatively, Robinson argues his lawyers should have interviewed the police chief or consulted an expert to testify that the Dermott Crips were "nothing more than a group of adolescent hoodlums" rather than a "fearsome gang." But in his own brief, Robinson cites trial testimony from Terence Holimon that already presented a similar view to the jury.

After a threshold inquiry into Robinson's complaints that his trial counsel failed adequately to investigate and rebut evidence of future dangerousness, we conclude that no reasonable jurist would find that Robinson was prejudiced by the above alleged deficiencies. Even if Robinson had been able to introduce all of his newfound rebuttal evidence, the jury would have been left with plausible evidence that Robinson ordered a hit from prison; his open admission that he fired shots into a car and apartment in anger over a $120 debt; and nothing new about the Dermott Crips.

And most importantly, Robinson's two brutal murders and complicity in a third would have remained in the fore. Though the future dangerousness evidence was a significant element in the verdict, *see Robinson I*, 367 F.3d at 283, no jurist of reason would believe that the dent in that evidence, which Robinson alleges, would have created a reasonable probability of a different verdict.

B.

Robinson claims he received IAC because his trial counsel failed adequately to investigate and present mitigating evidence about a rocky upbringing and childhood exposure to brain-damaging substances. We consider these claims in turn.

Robinson proffers new witness statements to show that his childhood was less structured and rougher than was indicated by John Holimon's and Rose Holimon's testimony at trial. Some of the new evidence is cumulative of what the jury heard: Rose's drug abuse, her decision to abandon Robinson to his grandparents, his grandfather's blindness, and Robinson's dangerous years as a teenager in Arlington. Some of the information is new: allegations of physical fighting between Robinson's parents (some, however, before Robinson's birth); the alleged beating Robinson suffered as part of his initiation into the Dermott Crips "pseudo-gang;"[1] the allegation that Robinson was abusing alcohol by the time he reached middle school; and a brief, uncorroborated suggestion by his father that a neighbor sexually touched Robinson when he was five years old.

Robinson also offers new evidence that brain damage caused by exposure to alcohol in the womb and to pesticides as a young child mitigates his culpability. That evidence is scant on specifics. He claims, for instance, that the effects of *in utero* alcohol exposure were apparent at his birth, but the only physical evidence he offers is that his birth weight was five pounds, six ounces. He also claims that his grandparents' home in Dermott was "very near" a farm that was crop-dusted regularly with pesticides. He suggests that as a result he was likely exposed to two common, highly-toxic pesticides used to control *mosquitoes* in Arkansas, repeated exposure to which can cause cognitive and emotional difficul-

[1] Robinson is careful not to acknowledge the Dermott Crips as an actual gang, perhaps because, to rebut future dangerousness evidence, he also insists that they were "nothing more than a group of adolescent hoodlums."

ties.

Robinson insists that his early difficulties in school and his struggle to obtain a C-minus grade point average by the time he graduated high school are direct evidence of fetal alcohol and childhood pesticide exposure. He also offers the statement of a neuropsychologist that Robinson exhibits "subtle cognitive deficits" that are "consistent with"––but not indicative of––exposure to the two pesticides.

Any reasonable jurist would agree with the district court's holding that neither strand of Robinson's new mitigation evidence shows IAC. With respect to the new evidence of a difficult childhood in Dermott, Robinson has not made a substantial showing that the omission of that evidence was prejudicial. Robinson's case for a difficult childhood's mitigating his culpability is far less compelling than the showing in recent cases in which the Supreme Court found the omission of mitigation evidence prejudicial.[2]

As for Robinson's claim that childhood brain damage reduces his culpability, the supporting evidence is, even under the most generous interpretation, exceedingly thin. No reasonable jurist would find its omission prejudicial. Because Robinson has not shown that reasonable jurists could disagree with the district court's denial of his IAC claims, we deny his application for a COA on those grounds.

[2] *See Rompilla v. Beard*, 545 U.S. 374, 391-92 (2005) (Rompilla was repeatedly beaten by his father, was locked with his brother in an excrement-filled dog pen, and grew up without proper clothing or indoor plumbing); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (Wiggins's alcoholic mother left him alone with his siblings for extended periods to beg for food or eat paint chips, his mother beat him when he broke into the kitchen to get food, he was hospitalized when his mother pressed his hand to a stove burner, and he was repeatedly raped and sexually abused in foster care and a Jobs Corps program); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (Williams was repeatedly and severely beaten by his father, his parents were imprisoned for criminal neglect, he was abused in foster care, and he was borderline mentally retarded).

III.

Robinson claims that the district court erred by disposing of his § 2255 motion without a hearing. The court should hold a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). The court denied a hearing because it had "decided [his] claims either by assuming that everything Robinson alleges is true or based on legal, not factual bases."

We review the denial of an evidentiary hearing in a § 2255 proceeding for abuse of discretion. *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992). To prove abuse of discretion, a petitioner must "produce independent indicia of the likely merit of [his] allegations." *United States v. Edwards*, 442 F.3d 258, 264 (5th Cir. 2006). Contested factual issues may not be decided on the basis of affidavits alone unless the affidavits are supported by other evidence in the record. *United States v. Hughes*, 635 F.2d 449, 451 (5th Cir. Unit B Jan. 1981).

Robinson's chief complaint is that the court accepted as fact, without corroboration in the record, his trial counsel's assertion that they had strategic reasons for not presenting evidence about the Dermott Crips. Even if we assume *arguendo* that this was an improper factual determination outside of a hearing, it was harmless. The court relied on the "strategic reasons" of trial counsel at two points in its decision: in finding counsel were not ineffective for failing to *rebut* evidence about the dangerousness of the gang, and (ironically) in finding counsel were not ineffective for failing to *present* evidence about the gang's dangerous impact on Robinson's upbringing. Both of those conclusions were also supported by alternative grounds, including other evidence that counsel had not been deficient, and also––regardless of counsel's adequacy or lack thereof––the finding that any hypothetical deficiency was not prejudicial.

Robinson points to three other places in the court's opinion that, he claims, amount to improper factual determinations: (1) the court's comment that the declaration of Robinson's companion during the Tucker shooting was of questionable credibility, because it contradicted his previous sworn testimony; (2) the court's agreement with the government that pleas to lesser charges, like Robinson's plea in the Tucker shooting, are common and do not necessarily indicate that the factual basis of an original greater offense is incorrect; and (3) the court's faulting of Robinson for failing to support with useful documentation his assertion that trial counsel spent inadequate time meeting with him.

The first two supposed "fact-findings" are uncontroversial and uncontroverted statements of the obvious. The third is not a fact-finding at all, nor is it, as Robinson alleges, an unfair denial of the opportunity to prove that his attorneys inadequately prepared; if Robinson wanted to support his contentions with additional documentation, he was free to do so. Because Robinson has not shown that the district court erred by denying his motion for a hearing, we deny his petition for a COA on that ground.

The application for a COA is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

June 08, 2010

Ms. Karen S. Mitchell
Northern District of Texas, Fort Worth
United States District Court
501 W. 10th Street
Room 310
Fort Worth, TX 76102

No. 09-70020, USA v. Julius Robinson
USDC No. 4:05-CV-756
USDC No. 4:00-CR-260-2

Dear Ms. Mitchell:

Enclosed is a copy of an opinion-order entered on 06/08/2010. We have closed the case in this court.

We will forward the record on appeal at a later date.

Sincerely,

LYLE W. CAYCE, Clerk

By: Jamei R. Cheramie
Jamei R. Cheramie, Deputy Clerk

Enclosures

cc:
Mr. Michael B Charlton
Ms. Susan Cowger
Mr. Craig Anthony Harbaugh
Mr. Sean Kevin Kennedy
Honorable Terry R. Means

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Julius Omar Robinson,	§	
Petitioner,	§	
	§	CIVIL NO. 4:05-CV-756-Y
V.	§	(Criminal No. 4:00-CR-260-Y-2)
	§	(death-penalty case)
United States of America,	§	
Plaintiff-Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner Julius Omar Robinson is a federal prisoner under a death sentence who, having been being convicted of capital murder in this Court, has filed a Motion to Vacate his conviction and sentence under 28 U.S.C. § 2255. The Court denies Robinson's motion.

I. PROCEDURAL HISTORY

A jury convicted Robinson of the murders of Johnny Lee Shelton and Juan Reyes and of complicity in an ongoing criminal enterprise resulting in the death of a third person, Rudolfo Resendez. After a subsequent punishment hearing, the jury, on March 28, 2002, recommended that Robinson's punishment for the murders of Shelton and Reyes be death by lethal injection, and recommended that life in prison be his punishment for the death of Resendez. This Court imposed that sentence on June 5, 2002. On April 14, 2004, the United States Court of Appeals for the Fifth Circuit affirmed Robinson's conviction and sentence on direct appeal. *See U.S. v. Robinson*, 367 F.3d 278 (5th Cir. 2004). The U.S. Supreme Court denied Robinson's petition for writ of certiorari on November 29, 2004. *See Robinson v. U.S.*, 543 U.S. 1005 (2004).

Robinson filed the instant Motion to Vacate on November 29, 2005. (Doc. #2279.) The government filed its response on April 28, 2006. (Doc. #2365.) Robinson filed a reply on August

28, 2006. (Doc. #2380.) On July 2, 2007, Robinson moved to amend his motion to vacate. (Doc. #2422.) This Court granted Robinson's motion in part and denied it in part, and Robinson filed a supplemental pleading on January 17, 2008. (Doc. #2432.) The government filed its response to Robinson's supplemental pleading on March 6, 2008 (Doc. # 2439), and Robinson filed his reply in support of his supplemental pleading on March 26, 2008 (Doc. #2443).

II. FACTUAL BACKGROUND

A. Guilt/Innocence Phase

The Fifth Circuit recited the following factual background in its opinion on direct appeal:

> A.
>
> Proving true to his Hollywood namesake, Robinson, also known by names such as "Scarface," entangled himself in a sadistic world of narcotics and violence in which he personally committed at least two senseless murders. In December 1998, Robinson – a wholesale drug dealer then operating in five states – killed a man he mistakenly believed responsible for an armed hijacking that cost him $30,000. In May 1999, angered by a fraudulent drug transaction in which he paid $17,000 for a block of wood covered in sheetrock, Robinson retaliated by killing a man whose only connection to the fraud was that he was the brother-in-law of the fraudulent seller.
>
> For these murders and his complicity in an ongoing criminal enterprise resulting in the murder of a third man, Robinson was convicted and sentenced to death on three separate counts, to life imprisonment on two others, and to a consecutive 300-month sentence on another. With one limited exception, Robinson challenges neither the sufficiency nor the admissibility of the evidence.
>
> B.
>
> The murder of Johnny Lee Shelton is a case of mistaken identity. Shelton was similar in appearance to a man named "Big Friday," whom Robinson blamed for a hijacking in a McDonald's restaurant parking lot several months before. On the night he was murdered, Shelton and a friend, Jerell Gardner, spent the evening at a Dallas night club, where they were spotted by two of Robinson's associates who mistook Shelton for Big Friday and called Robinson to tell him what they had seen.
>
> Robinson quickly arrived at the club, whereupon he and two other men sat in a nearby parking lot, waiting for the man they thought was Big Friday to leave. They

spotted Shelton and Gardner leaving the club in a car similar to the one Big Friday drove, and followed them onto a local highway. As they caught up to the car, Robinson yelled “that's him,” leaned out the window, and opened fire with an AK-47 assault rifle. One of Robinson's companions, L.J. Britt, also known as “Capone,” did the same. Although most of the bullets missed their mark, Shelton was struck in the stomach and later died.[FN1]

FN1. Those facts form part of the basis for Robinson's conviction and death sentence on counts 3 and 7, which charged violations of 21 U.S.C. § 848 and 18 U.S.C. § 924(j), respectively. The jury unanimously recommended a death sentence on both counts.

C.

Juan Reyes was shot to death at close range on the driveway in front of his home. He and two companions, Isaac Rodriguez and Nicholas Marques, arrived there on the day of the murder, not suspecting that in a car parked across the street were three men--including Robinson and Angelo Harris--who were upset that they had been sold a $17,000 block of wood instead of narcotics. Robinson and Harris approached Reyes carrying automatic weapons, said something to him--the record is unclear whether it was a demand for money--then shot him in the foot. Rodriguez, who had been standing nearby, turned to flee and was shot three times, in the back and leg.

Reyes fell to the ground and lay there as Robinson and Harris shot him at least nine times. An autopsy revealed fragments of concrete in several of Reyes wounds, suggesting he was shot from a distance of less than five feet, causing the bullets to pass through his body, ricochet off the pavement, and re-enter his back. Before leaving, Robinson and Harris also fired several shots at Marques, who was still seated behind the wheel in the car in which he, Reyes and Rodriguez had just arrived. Marques managed to drive around the corner to safety, but his car was riddled with bullets.[FN2]

FN2. Those facts form part of the basis for Robinson's conviction and death sentence on counts 3 and 11, which charged violations of 21 U.S.C. § 848 and 18 U.S.C. § 924(j), respectively. The jury unanimously recommended a death sentence on both counts.

D.

> Robinson also was convicted for involvement in a broad conspiracy that led to the murder of Rudolfo Resendez at the hands of Britt and Hendrick Tunstall. While engaged in this conspiracy, Robinson and other conspirators possessed more than five kilograms of cocaine and various firearms.[FN3] Robinson was further convicted of possessing three firearms in furtherance of a drug trafficking crime: a 9mm UZI pistol, a .357 caliber Smith & Wesson pistol, and an SKS 7.62x39 semi-automatic assault rifle.[FN4] Finally, he was convicted on several other drug and weapons charges that the district court treated as lesser included offenses and for which no independent sentence was imposed.
>
> FN3. Those facts form part of the basis for Robinson's conviction on count 3 and his conviction and life sentences on counts 12 and 15, which charged violations of 21 U.S.C. §§ 848 and 841(a)(1) and 18 U.S.C. § 924(j), respectively. The jury – having separately recommended a death sentence for the portions of count 3 relating to the Shelton and Reyes murders – unanimously recommended a life sentence on the portion of count 3 related to Resendez and two other life sentences on counts 12 and 15.
>
> FN4. Those facts form the basis of Robinson's conviction and 300-month sentence on count 17, which charges a violation of 18 U.S.C. § 924(c)(1)(A).

Robinson, 367 F.3d at 282-283.

B. Penalty Phase

In its opinion on direct appeal, the court of appeals observed the following about the penalty phase of Robinson's trial:

> The jury's sentencing recommendation was based in part on (in addition to the aforementioned convictions) Robinson's criminal history. The jury learned of an incident in 1995 in which Robinson fired several shots from a handgun at a woman who had failed to pay him $120 for crack cocaine. This was used to show that Robinson had a violent record before the events charged in the indictment. The jury also was told of an incident, described in more detail in part IV, in which Robinson,

> acting from his jail cell after his arrest in this case, arranged to have a government informant murdered. This was used to show that Robinson had a propensity to commit future acts of violence.

Id., 367 F.3d at 283.

During the penalty phase of his trial, both sides introduced evidence from numerous witnesses regarding mitigation and future dangerousness.

1. Prosecution's Case

In addition to the facts of the underlying convictions introduced during the guilt/innocence phase of Robinson's trial, the government also relied on evidence introduced through witnesses during the penalty phase of trial to bolster its position regarding Robinson's likelihood of future dangerousness.

a. Attempted Murder of Sarah Tucker

As noted by the court of appeals, part of the evidence the jury relied on in making its sentencing decision was evidence introduced by the government that Robinson had attempted to kill a former high-school classmate, Sarah Michelle Tucker, because she did not pay him $120 that she owed him for crack cocaine. (R20/14-15, 17.) Tucker testified that Robinson fired several bullets into her truck while she was sitting in it parked in front of her parents' apartment. (*Id.*/17-19, 36-37.) Tucker also testified that Robinson shot bullets "through the walls and the windows" of her parents' apartment, and that bullets were found in her parents' couch as well as in a closet and in some toys that were in the closet. (*Id.*) Robinson ultimately was convicted of the Texas offense of deadly conduct and was sentenced on March 11, 1996, to five years' probation. (GX 295.)

b. The "Hit" Ordered on Michael Williams, a/k/a "One Love"

The government bolstered its position on future dangerousness by introducing evidence about a "hit" Robinson allegedly ordered on the life of Michael Williams, also known as "One Love," while in prison awaiting his murder trial because Robinson believed Williams was "snitching" on him. Williams, like Robinson, was born and raised in Dermott, Arkansas. (R17/183-84.) Williams was a drug dealer who had purchased cocaine and marijuana from Robinson. (*Id.*/186.) During the investigation of Robinson's case, Williams testified against Robinson before the grand jury and also gave information to the Drug Enforcement Agency. (R20/94-96.)

Nathan Henderson, one of Robinson's co-defendants, testified at Robinson's trial that while he and Robinson were in prison together, Robinson told Henderson that Williams was "arrested on another case, and he was just telling on everybody trying to get his time down." (R20/114.) Henderson further testified that Robinson told him that he hoped somebody would "get" Williams. (*Id.*) On December 28, 2000, Robinson called his brother, Marcus, who set up a three-way call with Robinson's aunt, Josephine Dotson. During that phone call, Robinson told his aunt, "That dude One Love, man that dude right there go hard, Joe." Robinson later told Henderson that the "youngsters" in Dermott "got" One Love, dragging him behind a car. (*Id.*/113-16, 130; GX 929a.)

Also during Robinson's trial, Williams testified that he was accosted by three men, one of whom pointed a .38 long-barrelled pistol at him and got into his car, hitting him in the jaw with the gun. (*Id.*/138-45.) He identified the people who accosted him as "Cracker" or Kendal Pitts, "Black" or Keith Eddington, and "Little Wayne" or Wayne Jordan. (*Id.*/140.) Williams testified that Pitts told Williams that they were going to kill him for snitching on Pitts's "OG" down in Texas. Henderson had already explained to the jury that an OG is "like a leader" in a gang, and that the young gang members in Arkansas saw Robinson as an OG, calling him "Face" or "Scar Face." (*Id.*/116.) Williams testified that they searched him for money and that he told them that he could pay them what they were being paid to kill him. (*Id.*/143.) Ultimately, they went by Williams's grandparents' house, where Williams told them that only one of them could come in with him to get some money he had hidden there. At that point, Pitts and Williams went inside together. (*Id.*/142-43.) Williams testified that one of the young men told him that if he was dead they needed to make a phone call to Texas "around 3 o'clock" for their money. (*Id.*/148.) Williams testified that after a struggle between himself and Pitts in which Williams's grandfather and another man intervened, Pitts ran off. Thereafter, and that Williams contacted the local police and also tried to move his sentencing date forward so that he could get into police custody sooner. (*Id.*/143, 147.)

2. Robinson's Defense

On Robinson's behalf, defense counsel presented numerous fact witnesses and an expert witness during the penalty phase. The first group of witnesses were fact witnesses who knew Robinson during his time at Arlington's Lamar High School, where he played football, and post-graduation, when he attended computer-training courses. The defense called Eddie Peach, the head football coach and athletic coordinator at Lamar High School in Arlington, who testified that Robinson had played football at Lamar for three years, and that he was "always polite," that he was well liked, and obedient, both on the field and in the classroom. (R21/2-6.) The defense also called another Lamar High School coach, football assistant coach and track coach Mike Nelson, who testified that Robinson had once turned in a wallet containing $120 cash that Robinson had found in the locker room, noting that Robinson had not taken the money. (*Id.*/43-45.) The defense also called Lamar coach and teacher Elvin Jones, who had known Robinson since coaching him on his son's basketball team when Julius was in approximately the sixth grade. (*Id.*/47-48.) Jones testified that Robinson was "reasonably quiet," but "very respectful" to his coaches and teammates, and noted that Robinson had never given the coaches "any problem whatsoever," and that he "was always willing and excited about working." (*Id.*/49.) Jones further testified that Robinson was self-disciplined and could stay focused and accept responsibility. (*Id.*/51-52.) Lamar assistant coach David York also testified on Robinson's behalf, stating that he had worked closely with Robinson and that Robinson played hard, "was very coachable," was easy to get along with, and did not have confrontations with other players. (*Id.*/77, 79.) The final member of this group to testify was Landry Burdine, a teammate of Robinson at Lamar, who stated that Robinson's teammates liked playing with him and got along well with him and that he was a good friend to everyone. Burdine asked the jury, based on his knowledge of Robinson, to spare Robinson's life. (*Id.*/15-18.)

In addition to testimony from witnesses associated with Robinson through his tenure at Lamar High School, the jury heard testimony from Debbie Wesson, an employee of the CCI Training Center, the computer training school Robinson attended, who testified that Robinson attended classes at the school four nights a week, missing only twelve of the 212 hours scheduled for him before he was arrested in November 2000. (*Id.*/121, 126, 130.) She testified that Robinson was succeeding at his course work which was intended to lead to certification as a Microsoft Certified Systems Engineer. (*Id.*/123-24.)

The defense also called numerous witnesses from the Federal Medical Center ("FMC") in Fort Worth, Texas, where Robinson was incarcerated before and during his trial, to testify on his behalf. The first to testify was FMC employee Stanley Gibson, who explained the prison structure to the jury and also testified that Robinson was "one of the better inmates [he had] seen in administrative detention or in the housing units. . . . " (*Id.*/29.) Gibson stated that Robinson was courteous and respectful toward officers, counselors and inmates alike. (*Id.*/28-29.) Gibson also testified that Robinson was earnest and knowledgeable about the Bible, a topic that Gibson and Robinson had discussed. (*Id.*, 24-25, 28-31.)

The jury also heard testimony from Frederick Wagner, another FMC employee, who testified similarly about Robinson's behavior there, noting that Robinson was "respectful and quiet" and that he did "a lot of reading." (*Id.*/57-58, 64.) Another FMC employee, Stephen Sabolchick, testified that Robinson was a "cooperative inmate," and that he "followed the rules" of the prison. (*Id.*/71.) Frank Logan, leader of the FMC special housing unit day shift, testified that Robinson had "adjusted quite well" to life at FMC and stated that Robinson's behavior was "above average." (*Id.*/85.) Finally, Dan McCauley, the FMC jail-unit manager, testified on Robinson's behalf. McCauley had worked for the Federal Bureau of Prisons for 21 years and had been manager of the jail unit of the FMC since 1999. (R32/87-92.) McCauley explained the prison security measures as well as the type of work convicts are required to perform while incarcerated. (R21/119-20.) While McCauley testified on direct that Robinson had not had any disciplinary problems during his time at FMC, he admitted on cross-examination that Robinson had broken the prison's rules by participating in a three-way telephone call. (*Id.*/107-109.)

The defense also called two members of Robinson's family to testify on his behalf: his uncle, John Hollimon Jr., and his mother, Rose Hollimon. Robinson's uncle testified that Robinson's grandparents, although poor, had raised Robinson in a loving environment during his younger years and had made sure he and his brother went to school and church. (*Id.*/134-35, 138-39, 142, 151.) He further testified that his sister, Rose, had left her children with his parents when they were young, but took them back to live with her in Arlington, Texas, during the boys' adolescent years. (*Id.*/140-42.) Hollimon also told the jury that while in Arlington, the boys lived in a dangerous environment and that Robinson was basically on his own and was forced to act as the man of the house. (*Id.*/ 142-44.) He also testified that Robinson was excited about the computer course he was taking and how he had explained to Hollimon that he wanted to open his own marketing business. (*Id.*/144-45.) Hollimon further testified that Robinson was respectful to his family and grandparents and mentioned that Robinson had sent his grandparents money when they needed it. (*Id.*/146-47.) Robinson's uncle also asked the jury to spare his nephew's life. (*Id.*/148-49.)

Next, Robinson's mother, Rose Hollimon, testified on her son's behalf, stating that she had married his father when she was only 15 and that she was forced to take care of her two children when her husband left her, which occurred when the brothers were four and five years old. (*Id.*/156, 159, 160, 162.) She testified that she thought she was doing the best thing for her children by leaving them with their grandparents to raise them when they were young. (*Id.*/156, 160, 162.) She swore that after she moved the boys with her to Texas, she continued to drink too much alcohol and smoke crack-laced marijuana joints. (*Id.*/167-68.) She described Robinson as an average student who made Bs and some Cs in high school and said he attended Tyler Junior College for a short time on a football scholarship. (*Id.*/164-65.)

Finally, the defense called expert witness Dr. Mark Cunningham, a board-certified forensic psychologist, who testified as a 'teaching witness' rather than a witness specifically evaluating Robinson as an individual, regarding risk assessment of future dangerousness. (R22/22, 26-30.) Cunningham testified about the likelihood of violence in a prison setting because Robinson would not be released with the sentencing options he had. (*Id.*/41.) According to Cunningham, research indicates that violence in the community, severity of current offenses and severity of prior offenses are not good predictors of violence in prison. (*Id.*/41-42, 66.) He testified that, based on a study of 533 inmates commuted from death sentences that had been imposed before the decision in *Furman v. Georgia*, 408 U.S. 238 (1972), there were low rates of serious violence. (R22/50-52, 56-57.) Cunningham attributed the low rates to the structure of the prison community, including such factors as less access to weapons and drugs, intensive supervision, and inmates' informing on one another, as well as the fact that inmates knew that losing privileges because of bad behavior would make their prison time less bearable. (*Id.*/53, 60-62.)

Cunningham also reviewed other studies demonstrating low rates of violent behavior by those with death sentences commuted to life in prison and by those who had been convicted of capital sentences but not sentenced to death, noting that in one study only 1% of inmates in each group killed another inmate. (R22/62-64.) Ultimately, Cunningham concluded that there is a 20-30% chance that a capital inmate will be involved in serious violence in prison, a 70-80% chance he will not, a 10% chance of repetitive violence, and about a 1% chance that he will commit murder in prison. (*Id./*64.) Cunningham concluded by describing the Bureau of Prisons's classification system, and explaining the arrangements made for the safety of inmates and staff. (*Id.*/70-72, 75-79.) The defense also submitted an exhibit from the Bureau of Prisons reflecting the judgment of psychologists there that Robinson presented a low risk of causing harm to others. (*Id.*/10-11; DX 2.)

The government called another witness, Peter M. Carlson, who provided further description of the various security levels in prison. (*Id.*/108-11.) Carlson, an associate professor at Christopher Newport University, spent 32 years in corrections, thirty of which were spent with the Federal

Bureau of Prisons. (*Id.*/106.) Carlson opined that the two main predictors of prison violence were past violence and young age (*Id.*/108-112.) Finally, he noted that, in the type of facility in which Robinson would likely be housed, he would spend a lot of time interacting with the other inmates and staff and would have access to telephones. (*Id.*/115-17.)

Finally, the parties introduced a stipulation stating that there were a number of people involved in the conspiracy as to whom the government did not intend to seek the death penalty, including Nathan Henderson, Jason Gehring, Angelo Harris, and several persons involved in the Resendez murder.

III. STANDARD OF REVIEW

Title 28, United States Code section 2255 provides that a federal prisoner may move the convicting court to vacate, set aside, or correct a conviction or sentence based on its being imposed in violation of the Constitution or the laws of the United States. *See* 28 U.S.C. § 2255. A petition under § 2255 "may not do service for an appeal," and it is presumed that a defendant stands fairly and finally convicted. *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir.1991) (en banc), *citing United States v. Frady*, 456 U.S. 152, 164 (1982). Therefore a defendant may not raise even constitutional or jurisdictional issues for the first time on collateral appeal without establishing both cause for failing to raise the issue on direct appeal and actual prejudice resulting from the failure. *Id.* A defendant must meet this cause-and-prejudice standard even where he alleges a fundamental constitutional error. *Id., citing Murray v. Carrier*, 477 U.S. 478, 493 (1986). Other types of error may be raised for the first time under § 2255 only if the defendant establishes that the error could not have been raised on direct appeal *and*, if the error were condoned, it would result in a complete miscarriage of justice. *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir.1992).

Moreover, claims that were also raised, and rejected, on direct appeal are also barred from federal habeas review. *United States v. Rocha*, 109 F.3d 225, 229 (5th Cir. 1997). A federal habeas petitioner cannot, however, be expected to have raised a claim based on a Supreme Court case before that case was handed down. *Id.* Furthermore, suffering ineffective assistance of counsel on appeal does satisfy the cause-and-prejudice standard. *Id.* And, finally, the Supreme Court has recently held that claims that counsel was ineffective at trial can be raised on habeas review under § 2255 regardless of whether or not the claims were previously raised on direct appeal. *See United States v. Massaro*, 538 U.S. 500 (2003).

IV. **ISSUES PRESENTED**

In his motion to vacate, Robinson raises a number of issues in various claims for relief. The Court construes those claims as follows:

A. The Court should vacate the death sentence based his having received ineffective assistance of counsel ("Ground I").

B. The Court should vacate Robinson's convictions because they were obtained in violation of Robinson's equal-protection rights ("Ground II").

C. The Court should vacate Robinson's convictions because the federal death-penalty act, as applied in Texas, violates Robinson's equal-protection rights ("Ground III").

D. The Court should vacate Robinson's convictions because Robinson received ineffective assistance of appellate counsel ("Ground IV").

E. The Court should vacate Robinson's convictions because the prosecution pursued fundamentally inconsistent theories at seriatim capital trials ("Ground V").

F. The Court should vacate Robinson's convictions because the prosecution knowingly used false and misleading testimony to secure Robinson's death sentence ("Ground VI").

See Mot. to Vacate (Doc. #2279.) Each of these grounds will be discussed separately below.

A. Ineffective-Assistance-of-Counsel Claims – Ground I.

Robinson claims that his trial counsel were ineffective in several respects. (Mot. to Vacate (Doc. #2279) at 17-53.) The Court will address each allegation of deficiency on the part of Robinson's trial counsel separately, but first the Court addresses Robinson's cursory assertion that the district court failed to adopt a plan that would insure high-quality representation, thereby prejudicing Robinson. (*Id.* at 11, 28.) Robinson alleges that "the Northern District of Texas has no plan that achieves the standards of the ABA; it requires only that counsel be qualified." The government argues that this claim, if indeed it is properly plead as such, is procedurally barred because Robinson did not raise it on direct appeal, thus barring the claim from collateral review. (Resp. Br. (Doc. #2365) at 27 (citing *Massaro*, *supra* at 504).) The Court agrees with the government. Robinson does not seek to establish that he raised such a claim on appeal, nor does he claim that his counsel should have raised such a claim on appeal and were ineffective for failing to do so. Robinson's claim therefore fails as a matter of law. *See Massaro*, 538 U.S. at 504.[1]

The Sixth Amendment to the United States Constitution provides criminal defendants a right to effective assistance of counsel during trial. *See* U.S. Const., art. VI. To successfully state a claim of ineffective assistance of counsel under Supreme Court precedent, a petitioner must demonstrate (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced his

[1] The Court notes that the district's CJA plan, contained in Misc. Order No. 3, states that a capital defendant is entitled to two lawyers, at least one of whom must be knowledgeable in the law applicable to death-penalty cases. Additionally, the plan allows for appointment of additional counsel as "necessary for adequate representation." *Id.* at II.C.2.a. The plan also provides that the Court may appoint other professionals whose services are reasonably necessary to a defense, including investigators, technicians and paralegals. *See* http://www.txnd.uscourts.gov/publications/CJA-Dallas/Chapter7.html at § B.3. The district's plan also adopts the law set forth in 21 U.S.C. § 848(q)(4)(A) and (5), requiring, *inter alia*, that capital defense counsel have at least five years since being admitted to practice and three years' experience trying federal felonies. *Id.* at III.C.3. Moreover, the attorneys must have "demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Sentencing Guidelines, the Bail Reform Act, and local criminal rules." *Id.* at Appendix I, Section III.A.2.

defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A failure to establish either prong of this test requires a finding that counsel's performance was constitutionally effective. *Id.* at 696. To determine whether counsel's performance is constitutionally deficient, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance." *Id.* at 689. To establish prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Robinson alleges several deficiencies on his trial counsel's part, including (1) failure to hire a skilled investigator, (2) failure to adequately investigate and rebut the government's evidence of the penalty-phase aggravating factor of future dangerousness; (3) failure to adequately investigate and present evidence of mitigation at the penalty phase, and (4) failure to properly make a Batson challenge to certain peremptory strikes made by the government during jury selection.

1. Failure to Hire a Skilled Investigator

Robinson begins by making the unsupported assertion that his trial counsel did not employ the services of a skilled investigator. See Mot. to Vacate (Doc. #2279) at 28-29. Robinson's trial counsel employed the services of someone with whom they had worked on several previous occasions, David Bruce Cummings. (Resp. Br., (Doc. #2365), GX B, Affidavit of Jack B. Strickland ("Strickland Aff.").) According to the affidavit of Robinson's lead trial counsel, Jack Strickland, Cummings's work was known to them to be "first rate," and Strickland states that he has always been satisfied with his work. (*Id.*) In Cummings's own affidavit, the investigator explains that he has worked as a licensed investigator since 1989 and has been involved in "hundreds" of criminal-defense investigations, including numerous violent felonies and several capital-murder cases. (*Id.*, GX C, Affidavit of David Bruce Cummings ("Cummings Aff.").)[2] According to Cummings, during the course of his investigation, he spoke directly with Robinson in order to help determine persons "who might make good fact witnesses for him." (*Id*.) Cummings then followed up the leads developed with Robinson by contacting those persons, including his football coaches at Arlington's Lamar High School, Dermott football coach Willie Parker, Robinson's computer course instructor at CCI, a number of prison guards who had supervised Robinson during his pretrial incarceration, and members of Robinson's family. (*Id*.) As set forth in the Court's discussion of the penalty phase, *supra*, Robinson's counsel subsequently presented testimony during the penalty phase from many of the individuals Robinson identified at his trial. In the face of the extensive investigation engaged in by Cummings on Robinson's behalf and the number of witnesses that that investigation produced at his trial, the Court concludes that Robinson has failed to demonstrate that his counsel's choice of investigator fell below an objectively reasonable professional standard. Moreover, Robinson has made no attempt to demonstrate that his counsel's choice of investigator prejudiced his case. Therefore, Robinson's claim that his counsel's choice of investigator deprived him of his right to effective counsel fails as a matter of law.

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[2] The Court notes that while Robinson also asserts that investigator Cummings has a criminal history, this assertion is directly repudiated by a report filed as an exhibit to the government's pleading denoting the criminal history of another David Bruce Cummings, not the person employed by Robinson's trial counsel to investigate his case. (Resp. Brief (Doc. #2365), GX G, NCIC report on another David Bruce Cummings, filed under seal.)

2. Failure to Adequately Investigate and Rebut the Government's Evidence of the Aggravating Factor of Future Dangerousness.

Robinson next alleges insufficiency of counsel based on his trial counsel's failure to sufficiently investigate or present evidence or to adequately investigate and rebut the government's aggravating evidence regarding future dangerousness. (Mot. to Vacate (Doc. # 2279) at 18-24.) Robinson analogizes the facts of his case to those in *Rompilla v. Beard*, 545 U.S. 374, 377 (2005). (Mot. to Vacate (Doc. #2279) at 17.) In *Rompilla*, the Supreme Court held that a "lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." The defense counsel in *Rompilla* failed to examine the police file on their client's prior conviction for rape and assault, which they knew the prosecution would use against their client in seeking the death penalty. The Court held that counsel's failure to review the file "fell below the line of reasonable practice" and also prejudiced their client because it was "uncontested they would have found . . . a range of mitigation leads that no other source had opened up," including information about Rompilla's childhood living in the slums, early incarcerations, dropping out of school, problems with alcohol, a likely mental-health disorder, and test scores demonstrating that Rompilla had "a third grade level of cognition after nine years of schooling." *Id.* at 390-91. The Court held that the "accumulated entries" in the prison records "would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense" that his counsel had acquired after conferring with some of his family members and from mental-health expert reports. The Court held that an investigation stemming from the file would likely have uncovered much of the information discovered post-conviction, including evidence that both of Rompilla's parents were alcoholics and that he was severely abused as a child, including being beaten and contained in a dog pen filled with excrement." The Court concluded that the evidence taken as a whole bore no relation to the evidence presented by Rompilla's counsel at trial, which was made up of a "few naked pleas for mercy," and that Rompilla was prejudiced by its omission. *Id.* at 393.

a. Failure to Adequately Investigate and Rebut Evidence Regarding the Attempt on Michael "One Love" Williams's Life

Robinson first alleges that his trial counsel failed to investigate and properly rebut the government's evidence that Robinson was responsible for the attempted "hit" on Michael "One Love" Williams. (Mot. to Vacate (Doc. # 2279) at 18-24); cf Resp. Br. (Doc. #2365) at 49.) While Robinson acknowledges that his trial counsel moved *in limine* to exclude evidence that Robinson had "orchestrated" Williams's abduction, he claims that his trial counsel did not investigate the incident and thus had no means of rebutting the prosecution's claim that it would "link the kidnaping of Michael Williams to Robinson by virtue of Williams himself together with the testimony of investigating agents." (Mot. to Vacate (Doc. #2279) at 21; R20/10.) According to Robinson, because of his trial counsel's failure to investigate, his attorneys were unaware that, according to Robinson, "everybody involved in the incident, the victim and the perpetrators, denied any connection to a hit ordered by Julius Robinson." (*Id*.) Robinson relies now on the declaration of Michael Williams as well as the persons responsible for his attack, but Robinson does not address the trial testimony of Nathan Henderson that Henderson was told by Robinson that Robinson wanted someone to "get" Williams and that Robinson told Henderson about the attack after it occurred. Moreover, Williams's declaration does not totally contradict his trial court testimony, and each of his assailants has credibility issues as a result of their own criminal histories. (DX 34.)

Williams's own declaration states merely that he personally does not believe that Robinson ordered the assault, but he has not recanted his testimony that his attackers called him a snitch and said they ought to kill him. (*Id*.) Next, Robinson relies on the declaration of Alquantis Pitts, the attacker Williams identified as calling him a snitch. (DX 28.) Pitts denies making the statement and states that it was instead Keith Edington who called Williams a snitch and said that Williams ought to be killed for it. Pitts claims that he only meant to steal from Williams and reclaim a shotgun he lost to Williams while gambling. Edington's declaration, on the other hand, states that Pitts had a different motive for the attack, claiming that Pitts had purchased some bad drugs from Williams and wanted a refund. (DX 8.) He does not mention the shotgun at all, even though according to Pitts the gun was handed to Edington and Jordan in the back of the car. (*Id.*.) Edington also denies Pitts's claim that they went to a bank and attempted to withdraw money from Williams's account. (*Id*.) Finally, Edington denies making any comment about killing Williams. But Edington states that he did not take any orders from Robinson. (*Id*.) Third, Wayne Jordan's declaration likewise corroborates Edington's story that the reason for going after Williams was because of the bad drugs he allegedly sold to Pitts. (DX 21.) In fact, Jordan goes so far as to state that having worked for Williams in the past, he knows that Williams sometimes would cheat buyers by selling them bad drugs. (*Id*.) Jordan includes a fact that no one else discussed in his declaration: that Williams and Pitts went off alone for some time after Williams offered to make good with new drugs or a refund. (*Id*.) Jordan denies hearing anyone discuss killing Williams and denies hearing any comment regarding Williams's snitching on Robinson. Jordan claims that he agreed to plead guilty because "it wasn't worth it to try to fight the case."

Robinson also provides a declaration from Louis Johnson, who claims that he was with Williams the day he was kidnaped and that Williams had sold bad cocaine the day before the assault to Pitts, Edington and Jordan. (DX 19.) Johnson states that the three assailants approached Johnson and asked for their money back, which he relayed to Williams, who laughed. Johnson states that he and Williams were together later in the day when they were flagged down by Pitts, Edington, and Jordan, at which time Williams said to him, "Watch me sell them more cocaine." (*Id.*) At that point, Jordan claims that Pitts approached the car with a gun and demanded the assailants' money back. Johnson then got out of the car and did not hear any more. (*Id.*) He now admits that he told the FBI that he had not been in the car with Williams, but still claims he would have told everything to Robinson's trial counsel had they questioned him. (*Id.*)

The Court agrees with the government that these varying versions of events contained in the new declarations Robinson now relies upon do not mesh well, and certainly do not establish the falsity of corroborating versions of events Williams and Henderson gave at Robinson's trial. Nor do they establish that Robinson's trial counsel acted unreasonably in the way that they handled the prosecution's evidence at trial. Additionally, the jury's answers to the special verdict questions make it unlikely that the punishment assessed would have been different if the jury had been presented with these varied and contradicting new versions of events. While the facts supporting future dangerousness applied to all offenses for which Robinson was tried, the jury did not impose the death penalty for the Resendez murder, an indication that they did not believe the future-dangerousness factor was sufficient to justify a sentence of death for that crime. The Court concludes that Robinson has failed to establish that his trial counsel's performance was insufficient for failing to uncover and present the proffered evidence to the jury. Nor has Robinson established that he was prejudiced by any deficiency on the part of his counsel. Robinson's claim of insufficiency of counsel on this basis is therefore denied. *Cf. Rompilla*, 545 U.S. at 392-93.

b. Failure to Adequately Investigate and Rebut the Government's Evidence Regarding the Alleged Attempted Murder of Sarah

Tucker.

Robinson also claims that his trial counsel failed to adequately investigate and rebut the government's allegations that Robinson attempted to murder Sarah Tucker. (Supp. Pleading (Doc. #2432) at 9-11.) Although Robinson does not deny that he was convicted for his involvement in the shooting of Sarah Tucker's truck and her parents' apartment, Robinson claims that his actions were unfairly characterized by the government as attempted murder and that his trial counsel failed to adequately investigate and rebut the government's evidence. (*Id.*) According to Robinson, the court records pertaining to the offense establish that Tucker's truck had been parked for ten minutes and thus her vehicle would not have been in motion. (*Id.*) (citing DX 79, Tarrant County, Texas, court records re: Sarah Tucker incident, *State of Texas v. Julius O. Robinson*, Case No. 0574361D.) Robinson also points to the fact that the case was initially disposed of by accepting a plea to deadly conduct and ordering Robinson to supervised release. (*Id.*) Finally, Robinson criticizes his defense counsel for failing to investigate the driver of the car Robinson was in during the shooting, who is reflected in the police report as Richard Smart. (*Id.*) (citing DX 78 at 22.) Along with his supplemental pleading, Robinson includes a declaration from Smart explaining that he did not see anyone in Tucker's truck and, attempting to speak on behalf of himself and Robinson, states that "[w]e both believed the truck was empty." (*Id.*, DX 74, Decl. of Richard Smart at ¶3.)

The Court agrees, however, that Robinson's plea to "deadly conduct" is not persuasive, as pleas to lesser offenses are commonplace and do not indicate that the factual basis of the original offense is incorrect. See (Supp. Resp. (Doc. # 2439) at 2.) Additionally, the police reports corroborate the pre-plea charge of attempted murder. (DX 78.) Moreover, Tucker's testimony at trial was that she did not duck down into her vehicle until after Robinson began shooting. Finally, Smart's credibility is questionable, since he has changed his statement from his original statement to police that he and Robinson were elsewhere when the shooting occurred. (*Id.* at 26.) In sum, the Court concludes that Robinson has failed to establish that his trial counsel's performance was insufficient for failing to uncover and present the proffered evidence to the jury. Nor has Robinson established that he was prejudiced by any deficiency on the part of his counsel. Thus, Robinson's claim of insufficiency of counsel on this basis is denied. *Cf. Rompilla,* 545 U.S. at 392-93.

3. Failure to Hire a Mitigation Expert or to Sufficiently Investigate Mitigation Factors.

Robinson next claims that his trial counsel was constitutionally deficient for failure to conduct an adequate investigation of mitigation factors affecting the punishment phase of Robinson's trial, including failure to hire a mitigation expert. (Motion to Vacate (Doc. #2279) at 24-53.)

The Court will first address Robinson's claim that his trial counsel were deficient for failure to employ a mitigation expert. The Constitution does not provide Robinson with an absolute right to the services of a mitigation specialist. As the Fifth Circuit held in *Yohey v. Collins*, 985 F.2d 222 (5th Cir. 1993), an indigent defendant is only entitled to non-psychiatric experts if he has proven that the evidence is "both 'critical' to the conviction and subject to varying expert opinion." *Id.* At 227 (quoting *Scott v. Louisiana*, 934 F.2d 631, 633 (5th Cir. 1991) (citations omitted). The court agreed with the analysis of the Eleventh Circuit, concluding that "[a]n indigent defendant requesting non-psychiatric experts must demonstrate something more than a mere possibility of assistance from a requested expert." *Id.* (citing *Moore v. Kemp,* 809 F.2d 702, 712 (11th Cir. 1987)). According to the affidavits provided by Robinson's trial counsel, Wessley Ball and Jack Strickland, counsel made a strategic decision not to obtain a mitigation specialist given the information they knew about their client and the evidence against him. (Resp. Br. (Doc. #2365), GX A-B, Aff. of Wessley T. Ball ("Ball Aff.") and Jack Strickland ("Strickland Aff.") Robinson has not demonstrated that his counsel's decision was anything but a reasonable strategy, and Robinson's supplemental pleading does not add any weight as he fails to cite any case law to support his argument. Nor has the Court discovered any in its own research.

In addition to their failure to hire a mitigation expert, Robinson claims that his trial counsel were insufficient for failing to adequately investigate or present evidence of several mitigation factors. He argues that his counsel were unreasonable in failing to discover and present to the jury evidence at the sentencing phase that would have caused the jury to return a verdict of life rather than death. See generally, (Mot. to Vacate (Doc. #2279) at 24-53.)

Under Fifth Circuit precedent, Robinson "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial" to prove that his counsel failed to conduct an adequate investigation. *See Lockett v. Anderson*, 230 F.3d 695, 713 (5th Cir. 2000) (quoting *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989)). Trial counsel's decisions "are even less susceptible to judicial second-guessing" in cases such as Robinson's, where a defendant is not alleging a complete failure to present mitigating evidence, but rather a failure to present sufficient mitigating evidence. *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999).

It is clear from the trial record that Robinson's counsel introduced mitigation evidence from numerous witnesses. Essentially, Robinson faults his trial counsel on this point primarily for not presenting additional evidence at the punishment phase, including additional evidence of mental-health issues and additional evidence of negative childhood circumstances. In an effort to identify what an adequate investigation would have revealed, Robinson alleges that his counsel failed to adequately investigate Robinson's mental state as well as his social history, including Robinson's life as a young child and teenager as well as alleged pesticide exposure and *in utero* exposure to dangerous substances. (Mot. to Vacate (Doc. #2279) at 28-87.)[3]

a. Failure to Adequately Investigate Mental State

In support of his claim that his counsel failed to adequately investigate his mental state, Robinson cites his trial counsel's failure to obtain his academic records and their failure to hire a mental-health expert to evaluate him. The record demonstrates, however, that Robinson's trial counsel reviewed his high-school records from Lamar High School in Arlington as well as his academic records from Tyler Junior College. Additionally, the record demonstrates that Robinson's trial counsel reviewed records from the computer school Robinson was attending at the time of his arrest. Finally, Robinson's mother testified that Robinson was an average student, earning Bs and some Cs. (R21/164-65.) All of this evidence demonstrates that Robinson was an average to above-average student in the years preceding the offenses for which he was convicted. (Resp. Br. (Doc. #2365), DX 37.)

Robinson criticizes his trial counsel's failure to review his lower-school records from Arkansas. Robinson has not demonstrated, however, that there was reason for them to do so given the information contained in his high-school and college records as well as the information provided

[3] Robinson also claims that his counsel was deficient for failing to communicate regularly with him prior to his trial. (Supp. Pleading (Doc. #2432) at 14.) Without citing any case law in support of his position, Robinson points to the jail visitation logs maintained by the FMC to demonstrate that his counsel was deficient because the logs show that Robinson's counsel met with him two times following their initial meeting and the investigator, Cummings, met with him once. (*Id.* at 15; DX 80, Bureau of Prison Records, at 2, 8.) The visitation logs, however, do not contain information regarding time spent between counsel and client at the courthouse for hearings or trial, nor do they contain any information about telephone calls between Robinson and his counsel; Robinson has not made any attempt to quantify the amount of time he spent talking with his attorneys over the telephone. The mere accusation of failure to communicate alone without sufficient documentation and a demonstrated effect of prejudice to Robinson's case is insufficient to establish a constitutional violation. *See Strickland*, 466 U.S. 668.

by his educators and coaches. Attempting to liken his case to *Rompilla* and *Wiggins v. Smith*, 539 U.S. 510 (2003), Robinson points to two facts his counsel were aware of which, according to him, should have indicated to them that there were "red flags" in his mental history that they should have explored further. First, Robinson points out that he was held back and had to repeat the third grade. Second, he says he was transferred to an alternative high school.

In its response brief, the government points to the declaration from Robinson's alternative-school teacher stating that Robinson had an excellent attitude and was open to learning. (Resp. Br. (Doc. # 2365), DX 11.) Robinson also graduated from high school and attended college for a period of time. As the Supreme Court explained in *Wiggins*, "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." 539 U.S. at 533. In analyzing whether a strategic decision is reasonable, the Court must ask whether "'reasonable professional judgments support the limitations on investigation.'" *Id.* (citations omitted). "A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances." The Court concludes that Robinson has failed to demonstrate that his counsel's decisions were unreasonable. *Id.* (citations omitted).

Next, the Court will address Robinson's assertion that his trial counsel failed to adequately assess the effect on Robinson's mental state of childhood pesticide exposure and exposure to drugs and alcohol *in utero*. Post trial, Robinson was examined by Dr. Stephen Martin. (DX 2 at 1.) The results of Martin's testing establish, *inter alia*, that Robinson has an average-level verbal IQ of 102, a high-average performance IQ of 113, and a full-scale IQ of 107. (*Id*.) Robinson also demonstrated low-average to very superior skills in the remainder of the tests administered to him by Martin. (*Id*.) The only areas in which he had relatively low scores were reading, spelling, and arithmetic, which were possibly indicative of learning disabilities. (*Id*.) Despite evaluating most of Robinson's skills and abilities as either low average to above average or within normal limits and adequate – with some skills described as mildly impaired – Martin concludes that Robinson's mental profile was "consistent with *subtle* cognitive deficits associated with chronic exposure to organophosphate pesticides combined with general learning disabilities." (Resp. Br. (Doc. # 2365) at 38 (citing DX 2 at page 3) (emphasis added).) Martin does not opine on the likelihood that these subtle cognitive defects would affect Robinson's ability to plan and implement the murder of three individuals.

Robinson further claims that his counsel was insufficient for failing to hire a mental-health expert and discover evidence of Robinson's *in utero* exposure to drugs and alcohol during his mother's pregnancy. (Supp. Pleading (Doc. #2432) at 22-23.) Robinson cites to the report of Dr. Kate Allen, who opines that Robinson's mental and social history made him more vulnerable to psychological and emotional problems throughout his life. (*Id.* at 22-23 (DX 77).) But the Court is not persuaded that presentation of such an opinion from Allen or a similar expert would have persuaded the jury, in light of all evidence to the contrary, that Robinson suffered so much and was so damaged by his mother's conduct that he is less culpable for the murder of three people.

Moreover, as the record demonstrates, numerous witnesses testified that Robinson's words and actions demonstrated that he was a person of normal intelligence. Thus, his attorneys' strategic decision not to attempt to portray him as a person with mental deficiencies sufficient to mitigate the murderous behavior he engaged in was a reasonable one. (*Id.*, GX A-C (Ball, Strickland and Cummings Affs.)) Again, the Court concludes that Robinson has failed to demonstrate that his counsel's failure to investigate was unreasonable and in violation of *Strickland*. *See* 466 U.S. at 668.

b. Failure to Adequately Investigate Social History

Robinson also criticizes his trial counsel for failing to sufficiently look for mitigating evidence in Robinson's social history. The evidence Robinson proffers includes, *inter alia*, declarations from his relatives and neighbors during the time he lived in Dermott, Arkansas. Notably, however, much of the substance of these declarations covers periods before Robinson's birth, including much of the declaration of his sister, Josephine Dotson, and the declarations of Mildred Hollimon, Milton Hollimon, John Hollimon Jr., Robert Hollimon, Beotha Moore, and Willie White. (DX 12-15, 24, 33.) Much of the evidence contained in the declarations is cumulative, including evidence cited in these affidavits as well as evidence contained in the affidavit of Robinson's father, Jimmie Lee, who reiterates the testimony given at trial by Robinson's uncle and mother. (DX. 30 at ¶¶ 2-3, 6, 15-16, 18.) Jimmie Lee's declaration briefly suggests that Robinson was touched sexually by a neighborhood boy when he was about five years old and that Robinson was upset by that experience, but, notably, there is no corroborating affidavit from Robinson. (DX 29 at ¶ 36; DX 30 at ¶¶ 9-10.) As to the declarations regarding Robinson's involvement with gangs during his youth in Arkansas, these merely confirm evidence that his trial counsel were already aware of but strategically chose not to emphasize at trial because they feared that evidence would harm Robinson's case more than it would help. (GX A, Ball Aff. at 6.) Ball states in his affidavit that, in his experience, "gang evidence is almost always detrimental to a defendant as jurors are very frightened of gangs," and that Robinson's trial counsel specifically chose "to depict Mr. Robinson's upbringing in Arkansas as largely positive and concentrate on the changes that began to occur when he was living with his drug-abusing mother in Arlington." (*Id*.) As the government correctly argues, trial counsel's informed choice on a strategic matter is entitled to deference, even more so in a situation such as this where the evidence in question is "double-edged." (Resp. Br. (Doc. #2365) at 43 (citing *Boyle v. Johnson*, 93 F.3d 180, 187-88) (5th Cir. 1996); *Mann v. Scott*, 41 F.3d 968, 984 (5th. Cir. 1994); *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999). Notably, Robinson presents the Court with a schizophrenic view of his involvement with the Dermott Crips, simultaneously characterizing his experience as running with a bunch of youngsters who were merely portraying what they saw on television, (Supp. Pleading (Doc. #2432) at 6, DX 59), but also, according to Allen, being a part of his "highly toxic social environment." (DX 77 at 18.)

Robinson analogizes his claim of ineffective assistance of counsel to that of the defendants in three United States Supreme Court decisions holding that defense counsel had unreasonably failed to investigate mitigating circumstances: *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins* and *Rompilla*. The Court has already analyzed Robinson's claims with regard to the decision in *Rompilla* and will now examine *Williams* and *Wiggins.*

In *Williams*, the Supreme Court, reviewing a petition for certiorari, concluded that the defendant's trial counsel failed to investigate and present mitigating evidence during the sentencing phase of his capital murder trial. 529 U.S. 362. The Court found that the record established that Williams' trial counsel had (1) not begun preparation for sentencing until a week beforehand, (2) failed to "uncover extensive records graphically describing Williams' nightmarish childhood," (3) failed to introduce evidence available to them that Williams did not attend school beyond the sixth grade and was found to be "'borderline mentally retarded,'" (4) failed to examine prison records demonstrating Williams's commendations and positive actions in prison, including assistance breaking a prison drug ring and returning a stolen wallet, and (5) failed to elicit testimony from prison officials who "described Williams as among the inmates least likely to act violently, dangerously, or provocatively, and from a prison minister that Williams seemed to thrive in a more regimented environment." *Id.* at 364-65. The Court concluded that Williams's trial counsel's omissions "clearly demonstrate[d] that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Id.* at 396. The Court held that these omissions had prejudiced Williams, concluding that "the graphic description of Williams's childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398 (citing *Boyde v. Cal.*, 494 U.S. 370 (1990)). Based on the entire post-conviction record, the Court concluded that the state trial judge was correct in holding that there was "'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all of the available evidence." *Id.* at 399. (quoting trial court record.)

In *Wiggins*, before the Supreme Court on a writ of certiorari, the Court held that trial counsel's decision not to expand their investigation of their client's life history beyond the presentencing report and records of the department of social services was unreasonable and that counsel's inadequate investigation prejudiced the defendant. 539 U.S. 510. The Court focused on whether counsel's investigation supporting their decision not to introduce mitigating evidence in their client's background "*was itself reasonable*." *Id.* at 523. The Court held that the scope of Wiggins's counsel's investigation was unreasonable in light of what the department of social services's records revealed, including Wiggins's mother's chronic alcoholism and abuse of her children, as well as the fact that Wiggins was "shuttled from foster home to foster home," and had "lengthy absences from school." *Id.* at 526. During his post-conviction appeal, Wiggins's new counsel hired a social worker who testified regarding a social-history report he prepared based on evidence of "severe physical and sexual abuse" Wiggins suffered throughout his childhood. *Id.* at 516. Wiggins was raised by an abusive alcoholic mother until the age of six, and was both severely abused and neglected as demonstrated by her leaving him and his siblings by themselves for days at a time, forcing them to beg for food and to eat garbage. *Id.* at 517. There was evidence that Wiggins's mother beat her children for breaking into the locked kitchen, that she once burned Wiggins's hand on a hot stove so badly he had to be hospitalized, and that she had sex in the same bed in which her children were sleeping. *Id.* There was also evidence that, following his removal from his mother's custody, Wiggins was physically and sexually abused and raped while in foster care and that he ran away at age sixteen and was homeless. He was later placed back into foster care where he was gang-raped by his foster brothers. Finally, he also allegedly was sexually abused by his supervisor in a Job Corp program. *Id.* The Court found that Wiggins's trial counsel were aware of some, but not all, of his history, and that they chose not to present all of the mitigating evidence they had in favor of trying to persuade the jury that Wiggins did not kill the victim by his own hand. The Court found this decision unreasonable and, comparing the case with *Williams*, noted that the mitigating evidence was stronger and the state's evidence in support of the death penalty was "far weaker" than in *Williams*, thus concluding that "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of Wiggins' moral culpability." *Id.* at 537-38 (quoting *Williams*, 529 U.S. at 398).

As is the case with the facts in *Rompilla*, there are a number of important differences between Robinson's case and those of the defendants in *Williams* and *Wiggins*. First, there is no evidence in the record that Robinson suffered the same sort of physical and sexual abuse as Williams and Wiggins. Nor does the evidence demonstrate that Robinson, who graduated from high school and attended some college, suffered from the same sort of mental impairment as Williams, who was identified as borderline mentally retarded. Robinson's counsel employed an experienced investigator and conducted a thorough investigation. And, far from the choice made by Williams's trial counsel not to examine prison records, Robinson's trial counsel presented evidence from no fewer than five prison officials who testified about Robinson's good behavior and positive adjustment to life in prison. Additionally, unlike defense counsel in *Williams* and *Wiggins*, Robinson's trial counsel presented numerous positive character witnesses for Robinson, including Robinson's high-school football coaches and teachers as well as one of his teammates.

Even if the Court assumes, *arguendo*, that Robinson's attorneys failed to adequately investigate factors affecting mitigation, his case is not aligned with *Williams* or *Wiggins* on the prejudice prong of the *Strickland* inquiry. In *Strickland*, the Supreme Court noted that a court should dismiss a claim of ineffective assistance of counsel under the prejudice prong of *Strickland* where it is easier to do so, and such is certainly the case here. *See Strickland*, 466 U.S. at 670. Evidence presented at trial demonstrated that Robinson was raised by his grandparents for much of his youth in a decent home and that he loved and respected them. Even if the new declarations provide evidence that his home life may have been less positive than was portrayed at trial and that he had some difficulty with school, that evidence does not demonstrate prejudice. It is clearly established that in order to prevail on his claim of insufficiency of counsel based on failure to investigate, Robinson "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *See United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989); *see also United States v. Lewis*, 786 F.2d 1278, 1283 (5th Cir. 1986) (same); *Berry v. King*, 765 F.2d 451, 454 (5th Cir. 1985). Robinson must demonstrate that "it is reasonably likely that the jury would have reached a different conclusion absent counsel's unprofessional errors." *See Soria v. Johnson*, 207 F.3d 232, 249 (5th Cir. 2000), quoting *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). As the Court in *Wiggins* held, "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigation evidence." *See* 539 U.S. at 534. When the Court examines all of Robinson's mitigation evidence, including the evidence that was gathered post-conviction, the Court cannon conclude that it is reasonably likely a jury would have reached a different conclusion had the evidence that was discovered post-trial been admitted.

4. Failure to Make a *Batson* Challenge.

Finally, in his last claim for relief based on the alleged insufficiency of his trial counsel, Robinson alleges that he was denied his constitutional rights by his counsel's failure to raise a *Batson* challenge on direct appeal in light of racial discrimination that Robinson alleges took place in the selection of his jury. (Mot. to Vacate (Doc. #2279) at 99 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986).) A criminal defendant is constitutionally entitled to effective assistance of counsel on appeal. *Smith v. Robbins*, 528 U.S. 259 (2000) (applying the same standard to a claim of ineffective assistance of counsel on appeal as to such a claim against trial counsel); *Smith v. Murray*, 477 U.S. 527, 535-36 (1986). In order to establish his claim of insufficiency, Robinson must demonstrate that his counsel's failure to appeal the *Batson* issue fell below an objectively reasonable standard of professionalism, and he must also demonstrate that if his counsel had raised the issue, the appellate court would have granted a new trial. *See Miller-El v. Dretke*, 142 Fed. Appx. 802 (5th Cir. 2002).

Robinson alleges that racial discrimination "permeated" his entire trial, and that the government exercised peremptory challenges during jury selection in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). (Mot. to Vacate (Doc. #2279) at 88-99.) Specifically, Robinson asserts that he was denied equal protection under the law in violation of the Fourteenth Amendment when the government used peremptory challenges to prevent three African-American females, Charline Boulet, Dorothy Jean DeBose, and Marchesia Amarh from sitting on the jury and failed to articulate a credible race-neutral explanation for the challenges.

In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the United States Supreme Court held that when a black defendant has been tried by a jury from which members of his own race have been purposely excluded, he has been denied equal protection of the law. In *Batson*, the Court reaffirmed this holding and further held that the Equal Protection Clause forbids a prosecutor from using his peremptory challenges to challenge potential jurors solely on account of their race. *See* 476 U.S. at 88. The Court also held that, in order to establish a claim of purposeful racial discrimination in the jury- selection process by the prosecutor's use of peremptory challenges, a criminal defendant must first make out a prima-facie case of purposeful discrimination by first showing that he is a member of a racial group capable of being singled out for differential treatment and that the prosecutor has exercised peremptory challenges to remove from the jury panel members of his race. A defendant must then show that these facts and other circumstances would support an inference that the prosecutor used the practice to exclude venire members based on their race. Once this showing has been made, the burden then shifts to the government to provide a race-neutral explanation for challenging the jurors. *Id.* at 96. If the government presents a racially neutral explanation for a strike, the trial court must decide whether the defendant has carried his burden of proving purposeful racial discrimination. *Id*. at 98; *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

In making the decision as to whether the defendant has met his burden of proof, the truthfulness of the prosecutor's explanation must be determined by assessing the credibility and demeanor of the government's attorney. *Hernandez v. New York*, 500 U.S. 352, 365 (1991). This judgment is one that lies "peculiarly within a trial judge's province." *Id*. The standard of review is "clear error," and a trial court's ruling should not be considered clearly erroneous unless a reviewing court has the firm conviction that a mistake has been committed. *United States v. Cobb*, 975 F.2d 152, 154-56 (5th Cir. 1992), *citing Hernandez*, 500 U.S. at 369.

a. Charline Boulet

First, it is important to note that both the government and Robinson's own counsel exercised a peremptory challenge against venire member Charline Boulet. (RIII/155.) Having struck venire member Boulet on their own, it is not surprising that Robinson's trial counsel did not raise a *Batson* challenge at the trial-court level. Because they did not, however, any claim based on the government's choice to strike her is waived on appellate review. *See Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 561-62 (5th Cir. 2001). Moreover, in his affidavit, prosecutor Fred Schattman also points to the fact that counsel learned from her answers during voir dire that her son frequented the CD shop "That Sounds Good," which the prosecution "knew to be the place where Nathan Henderson, Julius Robinson, John Turner and others gathered and was a front for the drug business they conducted." (Resp. Br. (Doc. #2365), GX D at 2.)

b. Dorothy Jean DeBose

The next venire member at issue is Dorothy Jean DeBose. The prosecutor indicated that he intended to peremptorily strike DuBose, and defense counsel made a *Batson* objection because DuBose is African American. (RIV/ 163-64.) Defense counsel argued that DuBose had not stated any unwillingness to apply the law properly and that there was nothing in her background that would reasonably give rise to the government's motion to strike, so the strike must be racially motivated. (*Id*.) This Court, not yet deciding the question of whether defense counsel had established a prima-facie case of racial motivation, asked the prosecutor to respond. (*Id*.) Prosecutor Fred Schattman informed the Court that, as indicated in DuBose's questionnaire answers, she was known to members of Schattman's family and that he had gained "reputation information" about her. (*Id*., GX D, Schattman Aff.) In his affidavit, Schattman explains that he had spoken with his sister-in-law, who had worked with DeBose at John Peter Smith Hospital, and with his brother, a state district judge, about DuBose, and that his brother said she "made snap judgments and would disregard all evidence to the contrary of that snap judgment." *Id.* Schattman also recalled during his discussion with the Court, that he had reviewed drug cases against DuBose's brother and spouse and that she was perhaps the same age as Robinson's mother and thus would not be a juror acceptable to the state under the circumstances. (*Id*.) DuBose had acknowledged the cases in her questionnaire answers numbered 73 and 80. (*Id*.) After conferring with another prosecutor, Schattman also added that DeBose had an apparent reluctance about the death penalty to a degree that made him uncomfortable. (RIV/167.)

Defense counsel responded that it wasn't established that relatives of DeBose had been the subjects of the federal cases Schattman recalled, and the court responded that it did not have to be established so long as the prosecutor believed it to be true. (*Id*./167-68.) Moreover, defense counsel Ball recalled that he might have represented DeBose's husband before a grand jury, adding credence to Schattman's recollection. (*Id*./168.)

This Court concluded that Robinson had failed to establish a *Batson* violation because the explanations for the peremptory strike given by the prosecution were race-neutral and because

Petitioner had failed to meet his burden of establishing that the government's reasons for the strike were pretextual in nature. (*Id.*/169) (noting that DuBose's husband's conviction for drug trafficking was "certainly sufficient" for the prosecution to exercise a peremptory challenge).)

The Court agrees with the government that, in light of the facts surrounding the government's decision to peremptorily strike DuBose, it would not have benefitted defense counsel to appeal the government's choice to strike DuBose on *Batson* grounds. Additionally, as this Court noted at the time, there was no similarly situated non-black venire member whom the government chose not to strike. Thus, Robinson has not demonstrated that his counsel committed error in choosing not to raise this issue on appeal. *See United States v. Montgomery*, 210 F.3d 446, 453 (5th Cir. 2000), quoting *United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993)) (noting that deference to the trial court is highly warranted where the government's reasons are plausible and not fantastic or inconsistent with its treatment of non-minority jurors).

c. Marchesia Amarh

The third peremptory strike at issue was against venire member Marchesia Amarh. Upon questioning during voir dire, Amarh indicated that she was generally not in favor of the death penalty, commenting that she just did not "agree with it." (R7/87.) Her questionnaire also indicated that she had mixed feelings about the death penalty. (Questions 45, 46, 47, 49, 52, and 52a.) But she indicated when questioned that she believed that there are some circumstances that warrant the death penalty. (*Id.*/88.) When asked by the prosecutor if she likened her position to that of a conscientious objector who sees the need for war but chooses not to participate in a way that would result in killing (*Id.*/88-89), Amarh responded:

> It's kind of hard to say. If I have to do it, you know, as a duty, I will do it. But I just don't like, you know, the death penalty. I don't know exactly how

> to say it, but I feel strongly against the death penalty. But if for some – it depends on the circumstances. The circumstances would have to be very strong if I have to do jury duty.

(R7/89).

Although the prosecution did not believe that Amarh's answers gave rise to a reason to strike Amarh for cause, they chose to exercise a peremptory strike against her, and defense counsel objected under *Batson*. (*Id.*/101.) Defense counsel Strickland argued that the government's choice to strike Amarh was racially motivated because her answers indicated that she could vote for the death penalty in the right circumstances. The Court did not decide whether a prima-facie case of discrimination had been established, but asked the prosecutor to provide a race-neutral reason for striking her, and the prosecutor responded that she had "expressed great reluctance concerning the death penalty" and pointed out that the prosecution had earlier struck a white venire member with similar views on the death penalty (venire member Broadwell.) (*Id.*/103.) Accepting the prosecutor's explanation as valid, the Court overruled the *Batson* challenge. A later review of the questions posed to Broadwell reveals that she did not have similar views to Amarh, but Schattman was apparently reviewing the wrong questionnaire when interviewing her. (*Id.*/70-72.) Regardless of that mistake, however, this Court accepted Schattman's race-neutral explanation for striking Amarh based on her answers in her questionnaire and voir dire regarding the death penalty.

Robinson has not demonstrated that his counsel would have had a reasonable likelihood of success in raising a *Batson* claim before the Fifth Circuit. Robinson likens his case to *Miller-El II*, but the two cases have very little in common. First, the Court in *Miller-El II* found that the state prosecutor's office had an institutional policy of trying to keep

African Americans from serving on juries. *Miller-El II*, 125 S.Ct. at 2338-39. Robinson does not even suggest that such a policy existed in the United States attorney's office. Second, the inconsistencies present in *Miller-El II* do not exist in Robinson's case. As the Court discussed previously, the prosecution's decision to strike DeBose was based on her husband's conviction for federal drug trafficking in a case in which the prosecuting attorney had some involvement. As for Amarh, the Court does not accept Robinson's argument that white jurors with similar backgrounds were not struck. The prosecution struck a number of white venire members with similar views. First, the prosecution struck William Watson (RII/6-26) who, like Amarh, varied on his opposition to the death penalty. The prosecution also struck Martinets, a white juror who indicated on her questionnaire that she was strongly against the death penalty, but who revealed in her answers that she could follow the law. (RIII/27-39.) Robinson charges that the government chose to keep venireman Broome, a white juror whom Robinson claims shared Amarh's views. Broome's questionnaire and answers in court, however, revealed that he was consistently in favor of the death penalty in spite of the fact that he would have difficulty making the decision. (RII/75-80, 91.) Likewise, white venirewoman Mills stated that she could impose the death penalty, but noted that it would be a hard decision. (RIII/136-39, 145-46, 148.) And, unlike Amarh, she did not provide any answers in her questionnaire indicating that she opposed the death penalty. Robinson also points to the answers in questionnaires submitted by venire members Tribout and Banser. Tribout, however, both in his questionnaire and in his voir-dire answers, indicated that he was not opposed to the death penalty and that he could impose it, albeit with extreme care. (RIV/5, 7-8, 13-14.) Banser's questionnaire answers likewise revealed that she was in favor of the death penalty. She did state, however, that if a sentence of life without release was available, she could not recommend a death sentence, but she wrote a note on her questionnaire explaining that "It would be a very hard decision. Not truely [sic] certain about this." (*Id.*/109-11 (Question 52a).) When asked about her answer during voir dire, she clarified that if the facts justified a sentence of death that she could impose it. (*Id.*/111-14, 117.) Thus, none of the jurors Robinson points to have views similar to Amarh's. Nor does Robinson's suggestion that the government questioned Amarh more aggressively have merit. *Cf. Miller-El II*, 125 S.Ct. at 2333-37. Robinson points specifically to the prosecutor's question to Amarh regarding whether she felt like a conscientious objector regarding the death penalty. But the prosecution also questioned venire member Watson, a white venire member, about whether he would personally be able to participate in a decision leading to Robinson's death. (*Cf.* RII/13-14 with R7/88-91.) Similarly, the prosecutor asked the same of venire member James, also white. The Court finds no merit to Robinson's claim that the government chose to ask difficult questions only of black venire members.

In sum, the Court concludes that Robinson has failed to demonstrate that his counsel performed below a reasonable professional standard in choosing not to raise *Batson* as a ground in Robinson's appeal. His claim of ineffective assistance of counsel on this basis is therefore denied.

The Court notes that Robinson also attempts to make a collateral *Batson* challenge, but this claim is procedurally barred because it was not raised on direct appeal but could have been. *See Massaro v. United States*, 538 U.S. 500 (2003); *United States v. Shaid*, 937

F.2d 228 (5th Cir. 1992). The Court agrees with the government that the alleged ineffectiveness of Robinson's counsel cannot serve as the requisite cause for his failure to raise the *Batson* issue on direct appeal as there was no meritorious *Batson* issue to be raised. Moreover, Robinson has not demonstrated the requisite prejudice. His claim is therefore denied.

B. Equal Protection Violations--Grounds II and III.

In addition to claims regarding the sufficiency of his counsel, Robinson alleges violations of his equal-protection rights. The first of these alleged violations is essentially a selective-prosecution claim. (Mot. to Vacate (Doc. #2279) at 97-99.) Specifically, Robinson contends that the government violated his constitutional rights because it used ethnicity as a basis for seeking the death penalty against African-Americans like himself. Robinson bases his claim on statistics that purport to show that the government has sought the death penalty against African-American defendants with disproportionate frequency as compared to defendants of other races. Robinson also claims that his equal-protection rights were violated by the discriminatory application of the Federal Death Penalty Act ("FDPA").

Robinson claims, pursuant to the Supreme Court's opinion in *McClesky v. Kemp,* 481 U.S. 279 (1987), that he was purposefully discriminated against in the manner in which the FDPA was applied to him. (Mot. to Vacate (Doc. #2279) at 97-99.) Robinson made a pretrial motion to dismiss the government's notice of its intent to seek the death penalty on the ground of racial discrimination. *See* (Mot. to Dismiss (Doc. #1404), filed December 21, 2001). He also filed a subsequent motion partially on this same topic, along with a survey purporting to demonstrate racial discrimination by the Department of Justice. See (Mot.

Regarding Government's Intent to Seek the Death Penalty and Special App. (Docs. #1443 and 1444), filed January 10, 2002).) The Court denied relief. (Order Denying Mot. Regarding Government's Intent to Seek the Death Penalty (Doc. #1575), filed February 19, 2002).) Robinson did not pursue the claim on appeal, although he could have, and therefore may not now raise the claim collaterally because it is procedurally barred. *See, e.g.*, *Massaro,* 538 U.S. at 504; *Shaid*, 937 F.2d at 231-32 .

Even assuming that Robinson's selective-prosecution claims are not procedurally barred, they nevertheless fail on the merits. In *United States v. Armstrong*, 517 U.S. 456 (1996), the Supreme Court addressed the appropriate standard for establishing a selective-prosecution claim. In *Armstrong*, the Court first noted that, absent clear evidence to the contrary, there is a presumption that prosecutors have properly discharged their duties. The Court then stated that, in order to dispel this presumption and establish that a criminal defendant has been selectively prosecuted on the basis of his race, he must show that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. And, in order to establish a discriminatory effect, the defendant must show that similarly situated individuals of a different race were not prosecuted. *Id.* at 464-65.

Robinson argues that the statistical evidence he has produced in the form of the department-of-justice survey, combined with his *Batson* challenges, is sufficient to establish a prima-facie selective-prosecution case. As previously mentioned, however, without meritorious *Batson* challenges to rely upon, Robinson is left only with statistics to support his argument. In *United States v. Jones*, 287 F.3d 325, 333-35 (5th Cir.), *cert. denied*, 537

U.S. 1018 (2002), the Fifth Circuit was presented with a Department of Justice Report, titled "Department of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000)," as support for a selective-prosecution claim and ruled that this evidence was not sufficient to establish a prima-facie case. Robinson simply presents similar and no more compelling statistical evidence – notably without any further citation – to the statistical evidence that the Fifth Circuit has previously held to be insufficient to support a claim of selective prosecution. Thus, Robinson's claim for relief on selective-prosecution grounds is denied.

C. Robinson's Claim that the Prosecution Pursued Fundamentally Inconsistent Theories at Seriatim Capital Trials – Ground IV.

Robinson next claims that his due-process rights have been violated by the prosecution's alleged pursuit of fundamentally inconsistent theories at seriatim capital trials. (Mot. to Vacate (Doc. #2279) at 102.) According to Robinson, the prosecution claimed that Robinson was the leader and the most culpable of the co-defendants during Robinson's trial, but did the opposite at L.J. Britt's trial, which took place after Robinson's. Like Robinson's previous claim, this claim is procedurally defaulted as a result of Robinson's failure to raise it on appeal. L.J. Britt's trial was concluded long before Robinson's appellate brief was filed in July 2003. Thus, Robinson's counsel could have raised the issue on direct appeal but chose not to, and Robinson may not now raise it on collateral review. *Massaro*, 538 U.S. at 504.

Moreover, Robinson's claim, which is without any citation to the record, lacks merit. The author of this opinion, Terry R. Means, presided over both trials and is well aware that Robinson was consistently portrayed as the leader of the group, and that L.J. Britt was not.

D. Robinson's Claim that the Prosecution Knowingly Presented False Evidence Regarding the Penalty Phase Aggravating Factor of Future Dangerousness – Ground V.

Robinson also claims that the prosecution knowingly presented false evidence regarding the penalty-phase aggravating factor of future dangerousness – specifically regarding the alleged "hit" on Michael "One Love" Williams. According to Robinson, the government was aware, because of the FBI's interview with Louis Johnson, that the group attacked Williams due to the alleged bad-drug sale, but nevertheless "made no effort to either correct the misapprehension in front of the jury or to tell defense counsel about Johnson's *perspective*." (Mot. to Vacate (Doc. #2279) at 105.) It should be noted that Robinson has not presented any evidence to this Court that either Williams or Henderson ever stated that they lied at Robinson's trial. Even if Robinson's allegations are true, however, Robinson has shown no due-process violation.

In *Giglio v. U.S.* , 405 U.S. 150 (1972), the United States Supreme Court addressed due process in the context of a claim that the government knowingly used or failed to correct false testimony. *Id.* In order to prove such a violation, Robinson must first demonstrate that there was false testimony. *See United States v. Mason*, 293 F.3d 826, 828 (5th Cir. 2002) (citing *Giglio*, 405 U.S. at 153 and *Napue*, 360 U.S. 264, 271 (1959)). Second, he must show that the government knew the testimony was false. And lastly, Robinson must demonstrate that the false testimony was material to the outcome of his trial. *See id*. "This rule also applies to false statements made during the prosecutor's rebuttal closing." *United States v. Gonzales*, 436 F.3d 560, 580 (5th Cir. 2006); *United States v. Williams*, 343 F.3d 423, 439 (5th Cir. 2003). Robinson has failed even to allege that the government knew that any testimony given by Henderson or Williams was false. The fact that the testimony was challenged by another witness or was inconsistent with prior statements is not sufficient for Robinson to meet his burden. *Id.* Based on the evidence presented, the Court concludes that Robinson has not met his burden.

Robinson has also failed to demonstrate that the allegedly false testimony was material to the outcome of his trial. In order to demonstrate materiality, Robinson must show that there was a reasonable likelihood that the false testimony would have affected the judgment of the jury. *Giglio*, 405 U.S. at 153-54 (quoting *Napue*, 360 U.S. at 271). In addition to the Williams and Tucker incidents, the prosecution presented evidence of Robinson's wanton murders, the facts of which were largely undisputed, as well as voluminous evidence of his drug-dealing activities. In light of all of the evidence in the record, the Court concludes that Robinson has failed to meet his burden of establishing materiality, and his claim is denied.

E. Robinson's Motion for New Trial.

Finally, Robinson's motion is couched, in the alternative, as one for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. This Court, however, is without jurisdiction to entertain such a motion. Federal Rule of Criminal Procedure 33 provides that a motion for new trial based on any ground other than newly discovered evidence must be filed within seven days of the guilty verdict. After that the district court is without authority to act. *See* Fed. R. Crim. P. 33; *Herrera v. Collins*, 506 U.S. 390, 409 (1993) (Rule 33 time limits are strictly construed); *United States v. Cook*, 670 F.2d 46, 48 (5th Cir. 1982); *United States v. Granza*, 427 F.2d 184, 186 (5th Cir. 1970). Moreover, under the law of the Fifth Circuit, a motion for new trial cannot be based on "newly discovered evidence" that trial counsel was ineffective. *United States v. Medina*, 118 F.3d 371, 372 (5th Cir. 1997); *United States v. Ugalde*, 861 F.2d 802, 807-809 (5th Cir. 1988).

F. Motion for Evidentiary Hearing.

Robinson also requests that this Court conduct an evidentiary hearing on the claims he raised in his motion. (Mot. to Vacate (Doc. #2279)at 99, 106.) Section 2255 does not automatically require a hearing to dispose of every motion made under its authority. *Coco v. United States*, 569 F.2d 367, 369 (5th Cir.1976). But § 2255 does require a hearing unless the motion, files, and record of the case conclusively show that no relief is appropriate. *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992). Conclusive, rather than direct evidence, is required in order to deny relief without a hearing. *United States v. Drummond*, 910 F.2d 284, 285 (5th Cir. 1990). Bona fide or contested fact issues must be resolved on the basis of an evidentiary hearing. *Booth v. United States*, 507 F.2d 243 (5th Cir. 1975); *Reagor v. United States*, 488 F.2d 515 (5th Cir. 1973).

Although the government has stated that it would agree to a limited evidentiary hearing on contested issues of fact pertaining to Robinson's claims of insufficiency of counsel (Supp. Resp. (Doc. #2439) at 10), the record before this Court, including the exhibits submitted by Robinson with his motion, do not create any contested fact issues that must be resolved in order to decide Robinson's claims. With regard to the claims for which Robinson has submitted additional evidence, the Court has decided these claims either by assuming that everything Robinson alleges is true or based on legal, not factual, bases. Accordingly, because the record before this Court shows conclusively that Robinson is not entitled to relief, his request for an evidentiary hearing is denied.

Robinson's Motion to Vacate his conviction and sentence under 28 U.S.C. § 2255 is hereby DENIED.

The clerk of the Court shall transmit a copy of this order to Robinson by certified mail, return receipt requested.

SIGNED November 7, 2008.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
Fifth Circuit
F I L E D
April 14, 2004

Charles R. Fulbruge III
Clerk

REVISED MAY, 17, 2004

In the
United States Court of Appeals
for the Fifth Circuit

m 02-10717

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JULIUS OMAR ROBINSON,
ALSO KNOWN AS FACE, ALSO KNOWN AS SCAR, ALSO KNOWN AS SCARFACE,

Defendant-Appellant.

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

Before HIGGINBOTHAM, SMITH, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Julius Robinson challenges his conviction and death sentence on several grounds, the most salient of which is that he was deprived of the Fifth Amendment right to stand trial only on crimes set forth in an indictment issued by a grand jury. The government concedes that the indictment is constitutionally deficient inasmuch as it fails specifically to charge the aggravating factors that render Robinson eligible for the death penalty. The government contends, however, that the error is harmless.

Robinson also avers that the Federal Death Penalty Act ("FDPA"), 18 U.S.C. § 3591 *et seq*., is facially unconstitutional in three respects, that the district court abused its discretion in admitting evidence under the co-conspirator exception to the hearsay rule, and that his death sentence is predicated on improper aggravating factors. Agreeing with the government that the error in the indictment is susceptible to harmless error review, that on the facts of this case the error is harmless, and that none of Robinson's other claims has merit, we affirm.

I.

A.

Proving true to his Hollywood namesake, Robinson, also known by names such as "Scarface," entangled himself in a sadistic world of narcotics and violence in which he personally committed at least two senseless murders. In December 1998, RobinsonSSa wholesale drug dealer then operating in five statesSSkilled a man he mistakenly believed responsible for an armed hijacking that cost him $30,000. In May 1999, angered by a fraudulent drug transaction in which he paid $17,000 for a block of wood covered in sheetrock, Robinson retaliated by killing a man whose only connection to the fraud was that he was the brother-in-law of the fraudulent seller.

For these murders and his complicity in an ongoing criminal enterprise resulting in the murder of a third man, Robinson was convicted and sentenced to death on three separate counts, to life imprisonment on two others, and to a consecutive 300-month sentence on another. With one limited exception, Robinson challenges neither the sufficiency nor the admissibility of the evidence.

B.

The murder of Johnny Lee Shelton is a case of mistaken identity. Shelton was similar in appearance to a man named "Big Friday," whom Robinson blamed for a hijacking in a McDonald's restaurant parking lot several months before. On the night he was murdered, Shelton and a friend, Jerell Gardner, spent the evening at a Dallas night club, where they were spotted by two of Robinson's associates who mistook Shelton for Big Friday and called Robinson to tell him what they had seen.

Robinson quickly arrived at the club, whereupon he and two other men sat in a nearby parking lot, waiting for the man they thought was Big Friday to leave. They spotted Shelton and Gardner leaving the club in a car similar to the one Big Friday drove, and followed them onto a local highway. As they caught up to the car, Robinson yelled "that's him," leaned out the window, and opened fire with an AK-47 assault rifle. One of Robinson's companions, L.J. Britt, also known as "Capone," did the same. Although most of the bullets missed their mark, Shelton was struck in the stomach and later died.[1]

C.

Juan Reyes was shot to death at close range on the driveway in front of his home. He and two companions, Isaac Rodriguez and Nicholas Marques, arrived there on the day of the

[1] Those facts form part of the basis for Robinson's conviction and death sentence on counts 3 and 7, which charged violations of 21 U.S.C. § 848 and 18 U.S.C. § 924(j), respectively. The jury unanimously recommended a death sentence on both counts.

murder, not suspecting that in a car parked across the street were three menSSincluding Robinson and Angelo HarrisSSwho were upset that they had been sold a $17,000 block of wood instead of narcotics. Robinson and Harris approached Reyes carrying automatic weapons, said something to himSSthe record is unclear whether it was a demand for moneySSthen shot him in the foot. Rodriguez, who had been standing nearby, turned to flee and was shot three times, in the back and leg.

Reyes fell to the ground and lay there as Robinson and Harris shot him at least nine times. An autopsy revealed fragments of concrete in several of Reyes wounds, suggesting he was shot from a distance of less than five feet, causing the bullets to pass through his body, ricochet off the pavement, and re-enter his back. Before leaving, Robinson and Harris also fired several shots at Marques, who was still seated behind the wheel in the car in which he, Reyes and Rodriguez had just arrived. Marques managed to drive around the corner to safety, but his car was riddled with bullets.[2]

D.

Robinson also was convicted for involvement in a broad conspiracy that led to the murder of Rudolfo Resendez at the hands of Britt and Hendrick Tunstall. While engaged in this conspiracy, Robinson and other conspirators possessed more than five kilograms of cocaine and various firearms.[3] Robinson was further convicted of possessing three firearms in furtherance of a drug trafficking crime: a 9mm UZI pistol, a .357 caliber Smith & Wesson pistol, and an SKS 7.62x39 semi-automatic assault rifle.[4] Finally, he was convicted on several other drug and weapons charges that the district court treated as lesser included offenses and for which no independent sentence was imposed.

E.

The jury's sentencing recommendation was based in part on (in addition to the aforementioned convictions) Robinson's criminal history. The jury learned of an incident in 1995 in which Robinson fired several shots from a handgun at a woman who had failed to pay him $120 for crack cocaine. This was used to show that Robinson had a violent record before the events charged in the indictment. The jury also was told of an incident, described in more detail in part IV, in which Robinson, acting from his jail cell after his arrest in this case, arranged to have a government informant murdered. This was used to show that Robinson had a propensity to commit future acts of violence.

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[2] Those facts form part of the basis for Robinson's conviction and death sentence on counts 3 and 11, which charged violations of 21 U.S.C. § 848 and 18 U.S.C. § 924(j), respectively. The jury unanimously recommended a death sentence on both counts.

[3] Those facts form part of the basis for Robinson's conviction on count 3 and his conviction and life sentences on counts 12 and 15, which charged violations of 21 U.S.C. §§ 848 and 841(a)(1) and 18 U.S.C. § 924(j), respectively. The jurySShaving separately recommended a death sentence for the portions of count 3 relating to the Shelton and Reyes murdersSSunanimously recommended a life sentence on the portion of count 3 related to Resendez and two other life sentences on counts 12 and 15.

[4] Those facts form the basis of Robinson's conviction and 300-month sentence on count 17, which charges a violation of 18 U.S.C. § 924(c)(1)(A).

II.

As we have noted, the government concedes the indictment is constitutionally deficient because it fails to allege the statutory aggravating factors that make Robinson eligible for the death penalty. The government argues, however, that the error is harmless. Robinson responds by pointing to a line of cases that stand for the proposition that a conviction under an indictment constructively amended at trial is *per se* reversible error.

A.

The conceded error arose only after the Supreme Court announced *Ring v. Arizona*, 536 U.S. 584 (2002). Before *Ring*, our analysis of the use of sentencing factors in a capital case was controlled by *Walton v. Arizona*, 497 U.S. 639, 648 (1990), wherein the Court determined that aggravating factors are not independent offenses, but only standards used to help a jury decide between death and life imprisonment.

The FDPA, 18 U.S.C. § 3593(d), imposes its own obligation on prosecutors to submit aggravating factors to the unanimous review of a petit jury but, consistent with *Walton*, it does not impose a concomitant obligation to have a grand jury first charge those factors in an indictment. Rather, the statute requires only that the government file a notice stating its intention to seek the death penalty and setting forth the aggravating factors on which it proposes to justify the death sentence. 18 U.S.C. § 3593(a). Here, the government filed such a notice setting forth several aggravating factors it had not presented to a grand jury.

Nineteen days after Robinson was sentenced using those factors, *Ring* was issued, expressly overruling *Walton*. The Court held that where an aggravating factor renders a defendant eligible for death, it is "the functional equivalent of an element of a greater offense" and therefore must be proven to a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)). As a new rule of constitutional criminal procedure, that holding applies to all cases pending on direct review, including Robinson's. *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987).

Ring's Sixth Amendment holding applies with equal force in the context of a Fifth Amendment Indictment Clause challenge, even though the Supreme Court has yet to hold as much in a capital case.[5] As a result, the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty, and its failure to do so in this case is constitutional error.[6]

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[5] *See, e.g., Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (holding that "any fact . . . that increases the maximum penalty for a crime must be charged in an indictment"); *Apprendi*, 530 U.S. at 476 (same); *United States v. Cotton*, 535 U.S. 625, 627 (2002) (same). *See also Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (opinion of Scalia, J.) ("We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and . . . the Fifth Amendment's Double Jeopardy Clause.").

[6] This holding is in accord with that of the other two circuits to have considered the issue. *See United States v. Allen*, 357 F.3d 745, 748 (8th Cir. 2004) (holding, in an FDPA case, that "aggravating factors essential to qualify a particular defendant as death eligible . . . must be alleged in the indictment"); *United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003) (same). At oral argument, the government represented that it became

(continued...)

B.

We must consider whether *Apprendi* errorSShere the failure of an indictment specifically to charge aggravating factors regarded as elements because they increase the maximum available punishmentSSis susceptible to harmless error review. *Cf. Apprendi*, 530 U.S. at 490. The Supreme Court has not yet decided that question. Robinson points to a pre-*Apprendi* case, *Stirone v. United States*, 361 U.S. 212 (1967), to argue that the error is *per se* reversible.

Although *Stirone* deals with the marginally different problem of constructive amendments to an indictment, it contains strong language that informs our understanding of the gravity of the error in this case. In particular, *Stirone* specifies the "rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him" and adds that "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.* at 217.

Stirone notwithstanding, the error here is susceptible to harmless error review. In *Cotton*, 535 U.S. at 631, the Court resolved an analytically similar issue when it held that a defective indictment does not deprive the court of jurisdiction and that plain error review applies if the defendant fails to object. We have interpreted *Cotton* also to require the application of harmless error review where an indictment is defective and the defendant preserves the error by proper objection. *United States v. Baptiste*, 309 F.3d 274, 277 (5th Cir.) (per curiam) (on petition for rehearing), *cert. denied*, 538 U.S. 947 (2003); *United States v. Matthews*, 312 F.3d 652, 665 (5th Cir.), *cert. denied*, 538 U.S. 938 (2003). Several other circuits likewise have concluded that where a defendant preserves an *Apprendi* indictment error, the claim is reviewed for harmless error.[7]

The conclusion that this type of error is susceptible to harmless error review follows from two considerations. First is *Neder v. United States*, 527 U.S. 1, 8 (1999), in which the Court noted that harmless error review applies in all but a limited class of cases involving "structural errors." Such cases "contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* (citation omitted). The Court illustrated the point by providing a list of cases in which a structural error was found; notably, the Court failed either to cite *Stirone* or to mention a defective indictment as being a structural error. *Id.*

Second, although *Cotton* dealt only with

[6](...continued)
the policy of the Department of Justice, post-*Ring*, to seek, in all pending FDPA cases, superseding indictments setting forth the aggravating factors that render the defendant eligible for the death penalty. One of Robinson's co-defendants, Britt, was tried on the basis of one such superseding indictment, but the option was unavailable for Robinson, who was convicted and sentenced pre-*Ring*.

[7] Two circuits have reached this conclusion in FDPA cases. *See Allen*, 357 F.3d at 752; *Higgs*, 353 F.3d at 306. Three others have done so in non-capital cases. *See United States v. Mojica-Baez*, 229 F.3d 292, 311 (1st Cir. 2001); *United States v. Prentiss*, 256 F.3d 971, 984 (10th Cir. 2001) (en banc) (per curiam); *United States v. Anderson*, 289 F.3d 1321, 1327 (11th Cir.), *cert. denied*, 537 U.S. 1195 (2003).

plain error[8] and expressly reserved the question whether a defect in an indictment is structural error,[9] the Court's analysis suggests strongly that such a defect is not the sort of structural error that necessarily escapes harmless error review.

In applying the plain error test of *United States v. Olano*, 507 U.S. 725 (1993), the Court in *Cotton*, 535 U.S. at 631-32, was called on to consider whether the error affected substantial rights and whether it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Rather than determine whether the defendant's substantial rights were affectedSSan inquiry consisting of determining whether the error affected the outcome of the proceedingsSSi.e., whether the error harmed the defendantSSthe Court held that "even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 632-33.

Given that conclusion, it is difficult to accept that the same error simultaneously could be the sort of "structural error" discussed in *Neder*, one that necessarily "deprive[s] defendants of basic protections without which . . . no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 8-9. In addition, although *Cotton* acknowledges that "the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power," it also recognizes "that is surely no less true of the Sixth Amendment right to a petit jury, which, unlike the grand jury, must find guilt beyond a reasonable doubt." *Cotton*, 535 U.S. at 634.

We need not diminish the importance of the Fifth Amendment right to a grand jury indictment to conclude that the error at issue in *Neder*SSthe failure to include an element of the crime in petit jury instructionsSSis difficult to distinguish from the present one, and we find no compelling reason to carve out an exception to *Neder*'s harmless error rule for such an analytically similar claim.[10] As a result, 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.[11] *See Baptiste*, 309 F.3d at 277.

[8] And indeed, the Court specifically distinguished *Stirone* on the ground that defendant had preserved error by objecting. *Cotton*, 535 U.S. at 632.

[9] *Id.* (acknowledging defendant's argument that indictment errors are "structural errors," but deciding it need not resolve that claim).

[10] *See also Prentiss*, 256 F.3d at 984 ("[A] defendant's right to have a petit jury find each element of the charged offense beyond a reasonable doubt is no less important than a defendant's right to have each element of the same offense presented to the grand jury. If denial of the former right is subject to harmless error analysis, we believe denial of the latter right must be as well.").

[11] Robinson also argues for *per se* reversal by pointing to *United States v. Fletcher*, 121 F.3d 187 (5th Cir. 1997). Reliance on *Fletcher* is misplaced. As we explained in *United States v. Longoria*, 298 F.3d 367, 373-74 & n.9 (5th Cir.) (en banc) (per curiam), *cert. denied*, 537 U.S. 1038 (2002), *Fletcher* applied an analytical framework that the court "must change" post-*Cotton*. Rather than regarding the defendant as having been improperly sentenced under a valid conviction, as the court did in *Fletcher*, the correct approach in such cases is to treat the defendant as having been properly sentenced pursuant to an invalid conviction, and to determine only whether the use of an

(continued...)

C.

To decide whether the error is harmless on the facts of this case, we use the test announced in *Chapman v. California*, 386 U.S. 18 (1967), because it is constitutional error. *See Neder*, 527 U.S. at 15. The question is whether the error affects substantial rights. FED. R. CRIM. P. 52(a). That is to say, we inquire whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 23. "An otherwise valid conviction will not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Relevant to the inquiry in the present case, the two primary functions of an indictment are that it (1) provides notice of the crime for which the defendant has been charged, allowing him the opportunity to prepare a defense, *see Russell v. United States*, 369 U.S. 749, 763-64 (1967); and (2) interposes the public into the charging decision, such that a defendant is not subject to jeopardy for a crime alleged only by the prosecution, *see Stirone*, 361 U.S. at 218. Robinson received adequate independent notice of the intention to pursue a death sentence using the aggravating factors that were ultimately presented to the jury. The FDPA requires the government

> a reasonable time before the trial . . . [to] sign and file with the court, and serve on the defendant, a noticeSS (1) stating that the government believes that the circumstances of the offense are such that . . . the government will seek the sentence of death; and (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

18 U.S.C. § 3593(a). The government complied by filing notice four months before trial, and Robinson does not contend that the content or timing of the notice left him unable to prepare a defense.

More difficult is the question whether Robinson was harmed by losing the right to have the public determine whether there existed probable cause to charge the aggravating factors used to sentence him to death. The courts have long recognized the significant value the public adds to our system of justice through its involvement in grand jury proceedings.[12] Once a trial takes place, however, there is little a court of appeals can do to restore to a defendant that which was lost: the right not to face a prosecution initiated solely at the government's behest. *United States v. Mechanik*, 475 U.S. 66, 71 (1986).[13]

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[11](...continued)
incomplete indictment requires reversal. *Id.*

[12] *See, e.g.,Wood v. Georgia*, 370 U.S. 375, 390 (1962) ("Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.")

[13] "[T]here is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial. He will already have suffered whatever inconvenience, expense, and opprobrium
(continued...)

As a result, meaningful enforcement of this right always will depend, in the main, on the vigilance of the trial court and on its willingness to require that a defective indictment be amended before trial.[14] The error in this case lasted as long as it has only because the district court properly relied on the then-binding *Walton* decision. On appeal, our inquiry focuses solely on the question whether, on the basis of the evidence that would have been available to the grand jury, any rational grand jury presented with a proper indictment would have charged that Robinson committed the offense in question. *Matthews*, 312 F.3d at 665.

The government asks us to embrace a categorical rule premised on *Mechanik*, to the effect that the petit jury's unanimous finding that the aggravating factors applied to Robinson beyond a reasonable doubt conclusively establishes that the grand jurySSwhich operates *ex parte*, by majority vote, and without evidentiary restrictionsSSwould have found probable cause to charge the aggravating factors as well.

In *Mechanik*, 475 U.S. at 70, the Court provided substantial support for the government's rule, inasmuch as it stated that although a procedural error before the grand jury

> had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged . . .[,] [t]he petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

At oral argument, Robinson responded by arguing that the logic of *Mechanik*SSwhich essentially posits that the citizens on the grand jury are interchangeable with those on the petit jurySShas less force in a capital case, where the petit jury is subject to death qualification.[15]

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[13](...continued)
that a proper indictment may have spared him." *Id.*

[14] In this respect, our view apparently differs from that of the Eighth Circuit in *Allen*. Though it ostensibly agreed that the harmless error rule applies, that court also expressed its concern that application of the harmless error doctrine would invite intentional government action to evade the Fifth Amendment's Indictment Clause, because it would render "indictment by information in all cases . . . constitutionally harmless error." *Allen*, 357 F.3d at 755.

To the contrary, an equally competent district court would catch such a glaringly obvious error as the failure to indict any defendant at all, so we do not subscribe to this doomsday prophesy. The Eighth Circuit's rebuttal to our positionSSthat "there will be instances where errors occur or objections are not timely made," *id.* at 756SSis unpersuasive. The same can be said of any instance in which harmless or plain error review applies, and it hardly describes a world in which the Fifth Amendment has no meaning. Harmless error is used only where objections are made but "errors occur," *see* FED. R. CRIM. P. 52(a); the failure to object timely causes the plain error doctrine to be invoked, *see* FED R. CRIM. P. 52(b); *Cotton*, 535 U.S. at 631.

[15] Robinson has not substantiated this claim with anything more than the conventional wisdom
(continued...)

No categorical rule is needed to convince us that any rational grand jury would find probable cause to charge Robinson with at least one of the statutory aggravating factors omitted from his indictment.[16] In addition to the petit jury's unanimous findingsSSwhich we consider to be, at a minimum, persuasive evidence of how a grand jury would findSSthe evidence overwhelmingly shows that there existed probable cause to charge Robinson with the aggravating factors used in his sentencing.

All three death sentences involved the aggravating factor that in the killings of Shelton and Reyes, Robinson "knowingly created a grave risk of death to one or more persons in addition to . . . the victim." *Cf.* 18 U.S.C. § 3592(c)(5). Robinson killed Shelton by firing an AK-47 assault rifle from the window of a moving vehicle on a public highway, directly endangering Shelton's passenger and anyone else in range.[17] The record also shows that in the course of killing Reyes, Robinson and his co-assailant managed to shoot Rodriguez three times and to fire enough times at Marques's car fleeing the scene to leave it riddled with bullets. All this took place in a residential neighborhood in close proximity to at least two adolescent eyewitnesses playing on a nearby porch, and across the street from a barbecue attended by at least ten people.

No rational grand jury would fail to find that this evidence constituted anything less than probable cause to believe that, in the course of committing each murder, Robinson created a grave risk of death to someone other than the victim. As a result, and beyond a reasonable doubt, the failure to charge those factors in an indictment did not contribute to Robinson's conviction or death sentence.[18] *Cf.*

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[15](...continued)
that a death-qualified jury is more apt to convict than is a random jury, a finding the Supreme Court has repeatedly disavowed in cases involving far greater evidence than we have before us. *See Lockhart v. McCree*, 476 U.S. 162, 168-73 (1986) (criticizing studies that purported to show a connection between death qualification and guilty verdicts, before concluding that even a "somewhat more 'conviction-prone'" jury would not violate the Sixth Amendment); *Witherspoon v. Illinois*, 391 U.S. 510, 517-18 (1968) (finding the evidence of the effect of death qualification to be "too tentative and fragmentary" to support the view that such jurors are more apt to convict).

[16] We agree with the Fourth and Eighth Circuits that it is only the statutory aggravating factors that trigger the Fifth Amendment's Indictment Clause, because they are the only factors that render the defendant eligible for death. *See Higgs*, 353 F.3d at 298; *Allen*, 357 F.3d at 749; 18 U.S.C. § 3593(e)(2).

[17] That evidence came in the form of testimony by Jason Gehring, the man driving the assailants' truck as they pursued Shelton. Gehring stated that Shelton's car accelerated rapidly moments before the shooting started and that Gehring could see a large number of bullets ricocheting off the road and adjoining concrete wall. This created an obvious risk of death to other motorists who could have been hit by a stray bullet or involved in an accident with Shelton's fast-moving vehicle.

[18] Although it suffices that the grand jury would have charged one statutory aggravating factor, there also is overwhelming evidence to support the remaining factors. For example, the Reyes and Shelton murders were committed after substantial planning and premeditation, a factor also used to impose the death penalty on counts 3, 7, and 11. *Cf.* 18 U.S.C. § 3592(c)(9). Witnesses testified that Robinson had repeated discussions over several weeks about getting even with Big Friday, the man he thought responsible for the hijacking. This was further evidenced by the fact that
(continued...)

Chapman, 386 U.S. at 23.

III.

Robinson challenges the constitutionality of the FDPA on three grounds. First, he argues that the statute is facially unconstitutional under the Fifth Amendment's Indictment Clause because it does not require prosecutors to charge aggravating factors in an indictment; second, he reasons that the FDPA violates the Fifth Amendment's guarantee of due process of law; and he contends that the FDPA violates the Eighth Amendment's ban on cruel and unusual punishment. None of these claims has merit.

The constitutionality of a federal statute is a question of law reviewed *de novo*. *United States v. Ho*, 311 F.3d 589, 601 (5th Cir. 2002). "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (internal quotations omitted). "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Id.*; *see also United States v. Bird*, 124 F.3d 667, 678-79 (5th Cir. 1997).

A.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.*

The FDPA is not facially unconstitutional under the Indictment Clause. Although Robinson is correct to point out that nothing in the FDPA requires prosecutors to charge aggravating factors in an indictment, he fails to note that there is nothing in that law inhibiting such a charge. The government can easily comply with both its constitutional obligations (by first going to the grand jury) and its statutory obligations (by later filing a § 3593(a) notice of intention to seek the death penalty). As a result, the statute is not facially unconstitutional.

B.

Robinson's due process claim fails, as well. He argues, citing *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y.), *reversed*, 313 F.3d 49 (2d Cir. 2002), *cert. denied*, 124

[18](...continued)
Robinson's associates knew to call him as soon as they thought they saw Big Friday, and by Robinson's immediate response to that phone call. The Reyes murder occurred only after Robinson's co-assailant drove from Oklahoma to Dallas to participate in the shooting, and witnesses testified that the pair waited outside Reyes's house for up to twenty minutes before the victim arrived.

In addition, the evidence that Robinson riddled Reyes's body with bullets after he was on the ground provides probable cause to believe that the murder was committed in an especially heinous, cruel, or depraved manner, as used to support the death sentence for count 11. *Cf.* 18 U.S.C. § 3592(c)(6). Finally, the evidence that Robinson and his co-assailant fired on two other people at Reyes's home points overwhelmingly in favor of a finding that Robinson attempted to kill more than one person in a single criminal episode, as used to support the death sentence for count 11. *Cf.* 18 U.S.C. § 3592(c)(16).

S. Ct. 807 (2003), that the FDPA violates the substantive and procedural components of the Due Process Clause. The substantive due process claim is premised on the idea that all capital defendants share a liberty interest in not being executed for crimes they did not commit. This shared liberty interest, it is argued, entitles a guilty defendant facially to invalidate a law that could be used in some other case to execute an innocent man.

This argument has no merit. Whatever the risk that another person will be wrongfully convicted, Robinson has not even attempted to show, on appeal, that his conviction is erroneous, and he has presented no evidence to suggest that the FDPA is unconstitutional as applied to his case. So, he cannot invalidate the statute on the ground that it might conceivably be applied to reach an unconstitutional result in some other defendant's case. *Salerno*, 481 U.S. at 745.

Robinson does not elaborate on the specific manner in which he believes the FDPA deprives him of procedural due process. We presume, however, from his frequent citations to the district court opinion in *Quinones,* that he agrees with that court that the problem is that execution "arbitrarily eliminate[s] any possibility of exoneration after a certain point in time." *Quinones*, 205 F. Supp. 2d at 265.

On that theory, all executions would violate the Due Process Clause, because they render the defendant unable further to challenge his conviction. That argument is belied by the plain text of the Fifth Amendment, which unambiguously provides that some measure of process is sufficient to permit imposition of the death penalty, and there is nothing arbitrary in choosing, for the execution, a point in time after a full and fair trial, direct appeal, and the opportunity to pursue relief in the form of a petition for a writ of certiorari and petition for a writ of habeas corpus.

C.

Robinson asks us to invalidate the FDPA on the ground that the death penalty is cruel and unusual punishment, in violation of the Eighth Amendment. He recognizes that this claim is foreclosed by *Gregg v. Georgia*, 428 U.S. 153 (1976), but he argues that societal standards of decency have evolved to the point at which imposing the death penalty against an adult murderer has become an intolerably cruel act. *Cf. Trop v. Dulles,* 356 U.S. 86, 101 (1958). We note, however, that it is uncertain whether this court is even empowered to recognize such an evolution in the law, or must instead reserve that question for the Supreme Court.[19] Even assuming we had such a power, Robinson presents no evidence of an evolution in societal standards of decency, and we see no reason to believe that there has emerged a national consensus against capital punishment for defendants who commit crimes that are as depraved as Robinson's. The FDPA is not facially unconstitutional under any of these theories.

IV.

Robinson challenges, as hearsay, the admission of certain testimony at his sentencing hearing. The government counters that the

[19] Recently, the Supreme Court granted *certiorari* in *Roper v. Simmons,* No. 03-633, in which the first question it certified for review is as follows: "Once this court holds that a particular punishment is not 'cruel and unusual,' and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?" *Roper*, 124 S. Ct. 1171 (2004).

district court properly admitted the evidence as the testimony of a co-conspirator under rule 801(d)(2)(E) of the Federal Rules of Evidence, and on the ground that the FDPA explicitly provides that the rules of evidence do not apply at sentencing hearings. *See* 18 U.S.C. § 3593(c); *see generally* 5 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 1101.02[2], at 1101-5; 1101.03)[6][d] (LexisNexis 2003).

We "review the admission of hearsay evidence under the non-hearsay definition of Rule 801(d)(2)(E) for abuse of discretion." *United States v. Solis*, 299 F.3d 420, 443 (5th Cir.) (internal quotations omitted), *cert. denied*, 537 U.S. 1060, *and cert. denied*, 537 U.S. 1094 (2002). "Under our precedent, the proponent of admittance under Rule 801(d)(2)(E) must prove by a preponderance of the evidence (1) the existence of a conspiracy, (2) the statement was made by a co-conspirator of the party, (3) the statement was made during the course of the conspiracy, and (4) the statement was made in furtherance of the conspiracy." *Id.*

The evidence was admissible as a co-conspirator's statement, so we need not consider whether the FDPA's blanket exception to the hearsay rule is constitutional under *Ring*.[20] *See generally* 5 SALTZBURG ET AL., *supra*, § 801.03[10]; *cf.* U.S. CONST. amend. VI. The objection was made to a portion of the testimony of Michael Williams, also known as "One Love," a government informant whose testimony was used to prove the non-statutory aggravating factor that Robinson posed a future danger to the lives and safety of other persons, as evidenced by a lack of remorse during or soon after the murder of Reyes.

At the sentencing hearing, Williams testified to the effect that, after aiding the investigation of Robinson, he was approached by three men, one of whom was armed with a .38 caliber firearm, who then kidnaped, assaulted, and threatened him with death. Over Robinson's objection, Williams testified that one of these men, Kendall Pitts, also known as "Cracker," told him the men were going to kill him because he had "snitched" on a gang leader.[21] This testimony easily fits the first three prongs of the rule 801(d)(2)(E) exception, because the government made a competent showing that Robinson initiated a conspiracy to have Williams murdered, that the declarant Pitts was involved in this conspiracy, and that the statement was made while Pitts carried out the conspiracy. *Cf. Solis*, 299 F.3d at 443.

As to the fourth requirement, "[t]his Court has consistently held that the in furtherance requirement is not to be construed too strictly lest the purpose of the exception be defeated." *United States v. Phillips*, 219 F.3d 404, 418-19 (5th Cir. 2000). It is sufficient, in this respect, that Pitts's declarationSSwhich was

[20] The constitutionality of rule 801(d)(2)(E) is well established. *See United States v. Inadi*, 475 U.S. 387, 395 (1986); *Bourjaily v. United States*, 483 U.S. 171, 182 (1987). As applied to the present case, this conclusion is not called into doubt by *Crawford v. Washington*, 124 S. Ct. 1354, 1374 (2004), because the statement challenged as hearsay was made during the course of the conspiracy and is non-testimonial in nature.

[21] The government separately linked this testimony to Robinson by introducing an audiotape of a phone conversation in which Robinson was heard, from jail, instructing a relative to "go hard" on Williams, and through testimony showing that outside sources wasted little time in informing Robinson of the attempt on Williams's life.

not only a threat but an explanation of why the threat was legitimateSSput Williams under his immediate control as the three men forced him to go along to the location where they intended to kill him. The district court did not abuse its discretion in admitting this testimony.

V.

Robinson makes two challenges to the aggravating factors used against him. First, he argues that two of the statutory aggravating factors used to support his death sentence under count 11SSfor the murder of Juan ReyesSSare unconstitutionally duplicative. Second, he posits that the FDPA does not authorize the use of non-statutory aggravating factors. Both points are meritless.

A.

There is no legal basis for Robinson's claim that two of the aggravating factors specified by Congress were used in such a way as to be unconstitutionally duplicative. Although our caselaw once framed the issue in those terms, the Supreme Court recently admonished that it does not support that theory of review. *See Jones v. United States,* 527 U.S. 373, 398 (1999). Rejecting the idea that a similarity between two factors could make their combined use invalid, the Court explained that it had only held that "the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor." *Id.* (citing *Stringer v. Black,* 503 U.S. 222, 232 (1992)).

Both factors challenged by Robinson are legitimate. Congress determined, in § 3592-(c)(5), that a murderer is deserving of greater condemnation if he knowingly created a grave risk of death to one or more persons in addition to the victim; and, in § 3592(c)(16), that greater condemnation is warranted if the perpetrator intentionally killed or attempted to kill more than one person in a single episode. We see no reason to second-guess Congress's judgment that murders bearing those attributes are deserving of enhanced punishment, and under *Jones* their use is none the worse in tandem.

B.

Robinson argues that the jury arrived at its recommendation of death by impermissibly weighing aggravating factors that were not specified by the statute. These "non-statutory aggravating factors" are considerations that the prosecution specified in its § 3593(a) notice of intent to seek the death penalty as additional reasons that Robinson should be put to death.[22] The statute provides that the jury may consider such determinations in reaching its decision to recommend death, just as it permits the jury to consider any mitigating factors not specified in the statute.[23]

Robinson's tortured reading of the statute would have us declare that § 3591(a) contradicts, and implicitly invalidates, the provision

[22] The government's notice indicated that it sought to prove that Robinson had committed a previous violent act and had exhibited a lack of remorse that was suggestive of propensity to commit a future violent act. The jury unanimously found beyond a reasonable doubt that those factors applied to Robinson, and presumably weighed them in reaching the recommendation that he be sentenced to death.

[23] *Compare* 18 U.S.C. § 3592(a) (stating that "the finder of fact shall consider any mitigating factor, including the following" eight specified factors); *with* § 3592(c) (stating that "the jury . . . may consider whether any other aggravating factor for which notice has been given exists").

authorizing the use of non-statutory aggravating factors merely because § 3591(a) refers to consideration of the factors "set forth" in § 3592(c). "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (internal quotations omitted). When the statute is read as a coherent whole, the two provisions are not in tension, because § 3592 adequately "sets forth" the non-statutory aggravating factors by providing that the jury may consider them.

For the foregoing reasons, the conviction and sentence are AFFIRMED. The government's motion to supplement the record on appeal is DENIED.

United States District Court

Northern District of Texas
Fort Worth Division

Notice of Orders or Judgments
Fed. R. Civ. P. 77(d)

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Arlington, TX 76013

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ORIGINAL

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

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

ORDER DENYING MOTION REGARDING INTENT TO SEEK DEATH PENALTY

Pending before the Court is Defendant's voluminous Motion and Brief Regarding Government's Intent to Seek the Death Penalty, which was filed in this cause on January 10, 2002 [document number 1443-1]. In the motion, Defendant raises eleven different points attacking the government's attempt to seek the death penalty against him. The government filed a response to Defendant's motion on January 16. After review of the foregoing documents, the evidence submitted in support, and the applicable law, the Court concludes that Defendant's motion should be and is hereby DENIED, for the reasons urged in the government's thorough response. Specifically, with respect to each of Defendant's points, the Court concludes as follows:

(1) Point One is denied because Defendant has wholly failed to present any evidence tending to demonstrate that the government has engaged in purposeful racial or geographical discrimination in deciding to seek the death penalty in this particular case. *See McCleskey v. Kemp*, 481 U.S. 279 (1987). The DOJ study Defendant relies upon is exactly the type of statistical evidence that was rejected in *McCleskey*. Furthermore, that study rebuts, rather than supports, Defendant's claims of racial discrimination, inasmuch as

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it demonstrates that since the implementation of the Attorney General's Protocol in 1995, the death-penalty has been sought against more white defendants than black defendants.

(2) Point Two is denied because Defendant has failed to demonstrate that, before he may be subjected to capital proceedings, he is entitled to grand-jury findings in the indictment that particular aggravating factors exist or that he acted with a particular mental state that would justify the imposition of the death penalty. As noted in *Jones v. United States*, 526 U.S. 227, 251 (1999), the Supreme Court has "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and lesser penalty, not as a process of raising the ceiling of the sentencing range available." Here, the grand jury's indictment charges Robinson with all of the elements of each capital offense, including the fact that death resulted from Robinson's actions. The death penalty is thus a punishment authorized by the charges in the grand jury's indictment, and the intent and aggravating factors about which Defendant complains are merely sentencing factors, rather than facts that would enhance his punishment beyond that contemplated by the grand jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 494 & n. 19 (2000) (discussing difference between a sentencing factor and a sentencing enhancement that increases the sentence beyond the maximum authorized statutory sentence). As a result, the Court concludes that the indictment in this cause is constitutionally sufficient.

(3) Point Three is denied for the reasons articulated in *United*

States v. Frank, 8 F. Supp. 253, 278 (S.D.N.Y. 1998).

(4) Point Four is denied because Defendant has failed to demonstrate that any one of the four allegedly duplicative aggravating factors "'necessarily subsumes' [any of] the other[s]." *Jones v. United States*, 527 U.S. 373, 398 n.13 (quoting *Cooks v. Ward*, 162 F.3d 1283, 1289 (10th Cir. 1998)). Indeed, it appears clear to the Court that they do not. Furthermore, Defendant's complaints about the "future dangerousness" aggravating factor and the government's intent to present evidence of Defendant's alleged low rehabilitative potential and lack of remorse to demonstrate the existence of this factor also lack merit. *See United States v. Davis*, 912 F. Supp. 938, 945-46 (E.D. La. 1996).

(5) Point Five is denied because a complete reading of the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.* ("FDPA") makes clear that Congress not only contemplated but actually authorized the use of non-statutory aggravating factors. *See* 18 U.S.C. § 3592(c); *see also* 18 U.S.C. § 3593(d).

(6) Point Six is denied for the reasons articulated in *United States v. Jones*, 132 F.3d 232, 239-40 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999).

(7) Point Seven is denied for the reasons articulated in *United States v. Jones*, 132 F.3d at 240.

(8) Point Eight is denied for the reasons articulated in *United States v. Jones*, 132 F.3d at 241-42.

(9) Point Nine is denied for the reasons articulated in *United States v. Nguyen*, 928 F. Supp. 1525, 1548 (1996). *See also Jones*

v. United States, 527 U.S. at 388-89 (applying plain-error review in an appeal under the FDPA).

(10) Point Ten is denied because Defendant has received, by way of the Indictment and the government's Notice of Intent to Seek the Death Penalty, sufficient information from which he can prepare his defense, avoid prejudicial surprise at trial, and bar the risk of double jeopardy. *See United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980). The government is not required to provide "a detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial." *Id.* Defendant's request for a bill of particulars regarding "[t]he factual components of the victim-impact evidence," (Def.'s Mot. at 93), seeks exactly that--evidentiary detail regarding the government's case.

(11) Point Eleven is denied for the reasons stated in *United States v. Jones*, 132 F.3d at 242.

SIGNED February 19, 2002.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

ORIGINAL

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 19 2001
CLERK, U.S. DISTRICT COURT
By ______ Deputy

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

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THE GRAND JURY CHARGES:

Count One

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

Manner and Means

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Overt Acts

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

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

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

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

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

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

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

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

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

i. On or about March 2, 1999, a package containing approximately 20 pounds of marijuana was transported from the Northern District of Texas to the Eastern District of Arkansas, addressed to "Mrs. Freeman, 2840 Dave Ward Dr., Conway, Arkansas".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

gg. On or about November 8, 2000, **Nathan Deshawn Henderson, a.k.a. "Cash", a.k.a. "Nate"**, defendant, possessed two firearms, to wit: one BFI .223 caliber semi-automatic assault rifle, serial number P05130; and one 45 caliber UZI pistol, serial number UP52637.

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

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

Criminal Forfeiture

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

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

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

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

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

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

Count Two

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

Manner and Means

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

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

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

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

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

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

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

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

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

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

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

Overt Acts

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

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

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

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

d. On or about May 8, 1999, defendant **Angelo Harris, a.k.a. "Step"** and defendant **Julius Omar Robinson, a.k.a. "Scarface", a.k.a. "Scar" a.k.a. "Face",** obtained what they believed to be one kilogram of cocaine from **Dakari Warner, a.k.a. "Dakari Sells, a.k.a. "DK"**, and another.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Count Three

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

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

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

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

Tyrone Bryant, Christhian Morales,

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

Leon Jenkins,.

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

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

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

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

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

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

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

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

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

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

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

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

xii. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 104 pounds of marijuana on or about June 2, 2000;

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

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

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

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

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

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

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

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

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

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

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

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

xxv. The knowing and intentional use of a communications facility, namely a telephone, in committing, and in causing and facilitating the commission of acts constituting a felony under the provisions of subchapter I of chapter 13 of Title 21, United States Code, namely the distribution of approximately 2 pounds of marijuana on or about June 16, 2000;

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

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

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

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

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

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

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

Count Four

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

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

Count Five

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

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

Count Six

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

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

Count Seven

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

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

Count Eight

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

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

Count Nine

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

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

Count Ten

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

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

Count Eleven

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

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

Count Twelve

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

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

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

Count Thirteen

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

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

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

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

Count Fourteen

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

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

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

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

Count Fifteen

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

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

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

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

Count Sixteen

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

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

Count Seventeen

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

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

A TRUE BILL

Foreman of the Grand Jury

PAUL E. COGGINS
UNITED STATES ATTORNEY

FREDERICK M. SCHATTMAN
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A True bill,

FORT WORTH Foreman

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

Clerk

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

UNITED STATES MAGISTRATE JUDGE

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

THE UNITED STATES OF AMERICA

VS.

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

INDICTMENT

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

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

(17 COUNTS)