No. 07-6395

IN THE SUPREME COURT OF THE UNITED STATES

SHERMAN LAMONT FIELDS, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause bars the admission of testimonial hearsay in a federal capital sentencing proceeding when the hearsay bears solely on the jury's selection determination -- i.e., the decision whether or not to impose a capital sentence on a defendant already found to be statutorily eligible for a death sentence.

2. Whether Ring v. Arizona, 536 U.S. 584 (2002), requires that the jury in a federal capital case make its ultimate determination of sentence -- that the aggravating circumstances sufficiently outweigh the mitigating factors to justify a sentence of death -- beyond a reasonable doubt.

3. Whether 18 U.S.C. 3593(c), which provides that evidence in the penalty phase of a federal capital case "is admissible regardless of its admissibility under" the Federal Rules of Evidence, required the district court to conduct the same analysis of expert testimony as would be required under Rule 702 of the Federal Rules of Evidence, as interpreted in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 483 F.3d 313.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2007. A petition for rehearing was denied on June 6, 2007. The petition for a writ of certiorari was filed on September 4, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for

the Western District of Texas, petitioner was found guilty of conspiring to escape from federal custody, in violation of 18 U.S.C. 371; escaping from federal custody, in violation of 18 U.S.C. 751; using and carrying a firearm during and in relation to his escape from federal custody, resulting in intentional murder, in violation of 18 U.S.C. 924(c)(1) & (j); carjacking, in violation of 18 U.S.C. 2119; using and carrying a firearm during and in relation to the carjacking offense, in violation of 18 U.S.C. 924(c)(1)(A)(ii); possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1); and using and carrying a Ruger .22 caliber firearm during and in relation to his escape, in violation of 18 U.S.C. 924(c)(1). Pet. App. A2. After a separate penalty-phase hearing conducted pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591-3598, the jury unanimously recommended that petitioner be sentenced to death on the murder count, and the district court sentenced him to death. Pet. App. A3. The court sentenced petitioner to 715 months of imprisonment on the remaining counts. Id. at A3 n.3. The court of appeals affirmed. Id. at A1-A58.

1. The FDPA provides that when a defendant is convicted of a capital crime and the government seeks the death penalty, the court is to convene a separate sentencing proceeding before the same jury. 18 U.S.C. 3593(b). Evidence at the sentencing hearing "is admissible regardless of its admissibility under" the Federal Rules

of Evidence, "except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. 3593(c). The government bears the burden of establishing any aggravating factors beyond a reasonable doubt. Ibid. The defendant bears the burden of establishing any mitigating factors by a preponderance. Ibid.

After the hearing, the jury decides whether the government has established at least one of the mental states specified in 18 U.S.C. 3591(a)(2) and at least one of the aggravating factors specifically enumerated in the FDPA beyond a reasonable doubt. 18 U.S.C. 3593(d). If so, then the defendant is eligible for the death penalty, and the jury then considers "whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death," and recommends a sentence by unanimous vote. 18 U.S.C. 3593(e).

2. In September 2001, petitioner was arrested on federal firearms charges and placed in federal custody in the McLennan County Detention Center in Waco, Texas. Pet. App. A2. In November 2001, petitioner bribed a corrections officer, promising to pay the officer $5,000 in exchange for a key to a fire-escape door. Ibid. Using the key, petitioner escaped. Ibid.

Petitioner obtained a car and a .32 caliber revolver from a

crack-dealer friend. Pet. App. A2; Gov't C.A. Br. 6. That evening, petitioner visited his ex-girlfriend, Suncerey Coleman, at Hillcrest Hospital in Waco, where she was attending to her newborn baby. Pet. App. A2. Petitioner was angry with Coleman for seeing other men and, while in custody, had repeatedly threatened to shoot her. Gov't C.A. Br. 5-6. After convincing Coleman to leave the hospital with him, petitioner drove Coleman to Downsville, Texas, a small town nearby. Pet. App. A2. There, the two had sexual intercourse, after which petitioner shot Coleman twice in the head, killing her. Ibid. Petitioner dragged Coleman's half-naked body away from the road and into a brushy area, where it was found on a trash heap about two weeks later. Ibid.; Gov't C.A. Br. 8.

About two weeks after the murder, petitioner was apprehended, but only after he had committed an armed carjacking and additional firearms offenses. Pet. App. A2; Gov't C.A. Br. 10. Both before and after his re-arrest, petitioner bragged to acquaintances and fellow inmates that he had murdered Coleman. Gov't C.A. Br. 9-10, 11-12.

3. A grand jury charged petitioner with using and carrying a firearm during and in relation to his escape, resulting in intentional murder, and with six other offenses relating to his escape and crime spree while at large. Pet. App. 2a. The maximum sentence on the murder count is death, see 18 U.S.C. 924(j)(1), and the government provided notice of its intent to seek the death

penalty. Notice of Intent to Seek a Sentence of Death 1-4. The jury found petitioner guilty on all seven counts, including the capital-eligible offense. Pet. App. A2.

The district court convened a separate capital sentencing proceeding pursuant to the FDPA. Pet. App. A3. On the threshold grounds that determine eligibility for the death penalty, petitioner stipulated to one statutory aggravator, i.e., that he had previously been convicted of a felony involving "the use or attempted or threatened use of a firearm * * * against another person," 18 U.S.C. 3592(c)(2). See Pet. App. A4 n.5. In addition, the government presented evidence that petitioner committed the murder during his escape, another statutory aggravator, see 18 U.S.C. 3593(c)(1). See also Pet. 2 (acknowledging that the statutory aggravating factors were "essentially undisputed").

The government also presented a lengthy case to demonstrate why the death penalty should be imposed, adducing evidence of non-statutory aggravating factors such as petitioner's history of violence and likely future dangerousness.[1] For example, petitioner's ex-wife testified that petitioner had raped, beaten, and threatened her, even taking her to a wooded area and

[1] "The term 'nonstatutory aggravating factor' is used to refer to any aggravating factor that is not specifically described in 18 U.S.C. § 3592. Section 3592(c) provides that the jury may consider 'whether any other aggravating factor for which notice has been given exists.'" Jones v. United States, 527 U.S. 373, 378 n.2 (1999).

threatening to kill her while brandishing a handgun. The government's case on the non-statutory aggravators included documentary evidence, such as petitioner's previous guilty-plea conviction for attempted murder and his probation, juvenile, and prison-discipline records, which included numerous incidents of violence and threats of violence. The government also presented some out-of-court statements, such as the report of a deceased police officer who had investigated the drive-by shooting to which petitioner pleaded guilty. Petitioner, through counsel, objected to the introduction of some, but not all, of the documentary evidence and out-of-court statements on Sixth Amendment grounds. See generally Gov't C.A. Br. 19-24.

The government also presented expert testimony from a forensic psychiatrist, Dr. Richard Coons. Petitioner sought and was granted leave to examine Dr. Coons outside the jury's presence; the district court then overruled petitioner's objection to the expert's reliability. Pet. App. A20. Dr. Coons testified that the facts of the murder and aspects of petitioner's background and criminal history suggested a "probability of future violence." Ibid.

The jury determined that petitioner was eligible for a death sentence by unanimously finding, beyond a reasonable doubt, that he was 18 years old at the time of the murder, 18 U.S.C. 3591(a); that he had the requisite intent, 18 U.S.C. 3592(a); and that the

government had proved at least one statutory aggravating factor, 18 U.S.C. 3592(c).

Turning to the selection of the appropriate sentence, the jury unanimously found beyond a reasonable doubt the existence of three nonstatutory aggravating factors -- that petitioner caused "injury, harm, and loss" to Coleman's family and friends; previously participated in "other serious acts of violence"; and was "likely to commit serious acts of violence in the future." Special Findings Form 6-7. At least one juror found 16 of the 19 mitigating factors that petitioner proposed. Id. at 8-10. Finally, the jury unanimously found that the "aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death." Id. at 15. The district court sentenced petitioner to death in accordance with the jury's recommendation. Pet. App. A3.

3. The court of appeals affirmed. Pet. App. A1-A58.

a. The court rejected (Pet. App. A3-A17) petitioner's claim that the district court had violated his rights under the Confrontation Clause by admitting testimonial hearsay in the penalty phase. At the outset, the court made clear that the challenged hearsay statements were "relevant only to the jury's selection of an appropriate punishment from within an authorized range and not to the establishment of his eligibility for the death penalty." Pet. App. A4. On that issue, the court of appeals held

that "[n]either the text of the Sixth Amendment nor the history of murder trials supports the extension of the Confrontation Clause to testimony relevant only to penalty selection in a capital case." Id. at A14. In so holding, the court relied largely on the "logic" (id. at A5) of Williams v. New York, 337 U.S. 241 (1949), which held that the Due Process Clause did not bar the imposition of a death sentence "based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal." Id. at 243. The court of appeals concluded that "caselaw definitively maintains the Williams principle and establishes that the [confrontation] right does not apply at sentencing," whether capital or noncapital. Pet. App. A10. The court did not determine whether the Clause makes any distinction between evidence "that is relevant only to death eligibility or to both eligibility and selection." Id. at A4 n.7; see id. at A10 n.18; see also id. at A6 n.9 (noting that there is a "constitutionally significant difference between statutory aggravating factors necessary to establish death-eligibility and nonstatutory aggravating factors that may be considered only after a defendant has been determined to be death eligible" and distinguishing Specht v. Patterson, 386 U.S. 605 (1967), on that basis). Nor did it decide whether any of the evidence presented at petitioner's sentencing was the type of testimonial hearsay that would be barred by the Confrontation Clause as interpreted in

Crawford v. Washington, 541 U.S. 36 (2004). See Pet. App. A4 n.7.

The court likewise rejected (Pet. App. A14-A17) petitioner's related claim that the Eighth Amendment precluded the same hearsay, noting this Court's decisions stressing that the selection determination should be guided by full and complete information about the defendant and that the admission of more, rather than less, evidence increases reliability by allowing for an individualized determination of the appropriate sentence for a particular offender in a particular case. Id. at A15-A16 (citing Gregg v. Georgia, 428 U.S. 153, 203-204 (1976) (joint opinion)). The court of appeals concluded that a capital defendant's right to be heard on sentencing matters is satisfied by the FDPA -- which, among other things, allows a defendant to "rebut any information received at the hearing" and to "present argument as to the adequacy of the information," 18 U.S.C. 3593(c). See Pet. App. A16.

b. The court of appeals found unpersuasive (Pet. App. A19-A24) petitioner's claim that the district court erred by admitting the expert testimony of Dr. Coons. The court recognized that under the FDPA, evidence may be admissible at a capital sentencing "regardless of its admissibility under" the Federal Rules of Evidence. Id. at A21 (quoting 18 U.S.C. 3593(c)). The court accordingly rejected petitioner's attempt to subject Dr. Coons's testimony to review pursuant to Rule 702 of the Federal Rules of

Evidence, as interpreted in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

Applying Section 3593(c)'s rule of admissibility, which permits evidence to be excluded based on a risk of confusion or unfair prejudice, the court found no error. The court of appeals explained that Dr. Coons's testimony was "probative because [petitioner's] jury was required to make an assessment of future dangerousness and because the jury could benefit from the opinion of a psychological expert on that matter." Pet. App. A23. Noting that Dr. Coons was vigorously cross-examined and the defense had the opportunity to offer rebuttal evidence on the issue, the court concluded that "the adversarial system reduces any prejudicial unreliability in future dangerousness expert testimony because it can expose flaws in such testimony." Ibid. (citing Barefoot v. Estelle, 463 U.S. 880 (1983)).

The court also rejected petitioner's contention that Dr. Coons's testimony violated his rights under the Fifth and Eighth Amendments, explaining that Barefoot v. Estelle "forecloses this claim." Pet. App. A24.

c. Finally, the court rejected petitioner's claim that, in light of Ring v. Arizona, 536 U.S. 584 (2002), the jury must apply the reasonable-doubt standard in "consider[ing]," pursuant to 18 U.S.C. 3593(e), whether the aggravating factors "sufficiently outweigh" the mitigating factors "to justify a sentence of death."

Pet. App. A24-A25. In Ring, this Court held that a fact necessary to render a defendant eligible for a death sentence is "the functional equivalent of an element of a greater offense" and therefore must, under the Sixth Amendment, be found by 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)). The court of appeals observed that under the "Apprendi line of cases[,] * * * the reasonable doubt standard is appurtenant to the right to jury trial." Pet. App. A24. The court of appeals explained that the Section 3593(e) weighing is not a factual finding necessary to an eligibility determination; under the FDPA, the jury weighs the relevant factors only after the defendant has already been found eligible for a death sentence. Ibid. Moreover, the court reasoned, the determination mandated by Section 3593(e) "is not a finding of fact" but a "'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves.'" Id. at A24 (quoting Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985)).[2]

b. Judge Benavides, who authored the court's unanimous opinion on all other issues, dissented on the Confrontation Clause question. Pet. App. A40-A58. He would have held that "the Confrontation Clause applies to capital sentencing as it is

[2] The court of appeals also rejected (Pet. App. A17-A19, A25-A40) petitioner's numerous additional claims for relief, none of which is renewed in the petition.

structured under the FDPA and [would have] remand[ed] this case for resentencing." Id. at A58.

ARGUMENT

1. Petitioner renews his contention (Pet. 14-26) that the district court erred under Crawford v. Washington, 541 U.S. 36 (2004), in admitting testimonial hearsay during the penalty phase of his trial. The court of appeals correctly rejected that contention. Further review of this question is not warranted, and petitioner's case presents a poor vehicle in any event.

a. In Crawford, this Court held that the Confrontation Clause bars the admission at trial of "testimonial" out-of-court statements unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. 541 U.S. at 68. Crawford did not hold or suggest that the Confrontation Clause applies at sentencing; indeed, this Court has long since established that sentencing proceedings are not subject to the same Confrontation Clause constraints as trials. See, e.g., United States v. Tucker, 404 U.S. 443, 446 (1972) (at sentencing, a federal district judge is "largely unlimited either as to the kind of information he may consider, or the source from which it may come"); United States v. Bras, 483 F.3d 103, 109 (D.C. Cir. 2007) ("[W]e join our sister circuits in holding that nothing in Crawford or [United States v.] Booker [543 U.S. 220 (2005)] alter[s] the pre-Crawford law that the admission of hearsay

testimony at sentencing does not violate confrontation rights.") (internal quotation marks omitted). Petitioner contends (Pet. 14-17, 23) that capital sentencing proceedings should be treated differently. Although, as the court of appeals explained, this Court upheld the use of hearsay evidence in a capital sentencing proceeding in Williams v. New York, 337 U.S. 241 (1949), petitioner contends that the issue is "unsettled" and warrants this Court's review. Petitioner is incorrect in both respects.

In Williams (which was decided before this Court held the Confrontation Clause to be enforceable against the States, see Pointer v. Texas, 380 U.S. 400, 406 (1965)), this Court rejected a capital defendant's claim that the state trial court, in sentencing him to death, violated the Due Process Clause by considering evidence of unadjudicated crimes contained in a presentence report, as to which the defendant had no opportunity for confrontation or cross-examination. 337 U.S. at 243-244. This Court explained that since well before the Founding, "courts in this country and in England" have "treated the rules of evidence applicable to the trial procedure and the sentencing process differently," and have "exercise[d] a wide discretion in the sources and types of evidence used to assist" in the formulation of a sentence. Id. at 246 & n.4. "Out-of-court affidavits have been used frequently." Id. at 246. This historical practice is supported by "sound practical reasons," including the need for sentencing judges to have "the

fullest information possible concerning the defendant's life and characteristics." Id. at 246, 247. See also Williams v. Oklahoma, 358 U.S. 576, 584 (1959) (reaffirming, in review of a death sentence, that the sentencing judge "is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may * * * consider responsible unsworn or 'out-of-court' information").

This Court has never called into question the core holding of Williams -- that in selecting an appropriate sentence within the range authorized by the jury's verdict, the sentencer may consider evidence that has not been subject to confrontation and cross-examination. In fact, the jury's selection determination under the FDPA closely resembles the sentencing determination made by the trial court in Williams -- the selection of an appropriate sentence within the range authorized by the jury's verdict, "based on the fullest information possible regarding the defendant's life and characteristics." 337 U.S. at 247. The Court's capital-sentencing jurisprudence, developed since Williams, supports that conclusion. As the FDPA reflects, capital sentencing under the Eighth Amendment has two aspects -- an eligibility determination and a selection from among the eligible penalties -- which are given "differing constitutional treatment." Buchanan v. Angelone, 522 U.S. 269, 275 (1998). The selection phase entails "an individualized determination on the basis of the character of the individual and the

circumstances of the crime" whether this defendant should receive a death sentence. Zant v. Stephens, 462 U.S. 862, 879 (1983) (citing cases). Whereas the eligibility phase focuses on discrete aggravating factors that determine whether the defendant falls into the narrow category of homicide defendants who qualify for the maximum penalty of death, the selection phase involves a "broad inquiry" into all evidence relevant to the ultimate decision of what penalty to impose. Buchanan, 522 U.S. at 276. The FDPA contains discrete procedures for the eligibility and selection determinations. See, e.g., Jones v. United States, 527 U.S. 376-377 (1999).

In this case, all of the alleged hearsay evidence admitted against petitioner pertained to the selection of penalty, not to eligibility for a capital sentence. Petitioner stipulated to eligibility by conceding one of the statutory aggravating factors. Petitioner's sentencing proceeding was therefore largely devoted to developing a full record of the factors in aggravation and mitigation -- just as this Court has directed, both in Williams and in its subsequent capital-sentencing cases.

b. No federal court of appeals has held that the Confrontation Clause bars testimonial hearsay from the selection phase of an FDPA sentencing proceeding. Indeed, the decision below appears to be the first appellate decision to confront the applicability of the Clause squarely. See United States v. Higgs,

353 F.3d 281, 324 (4th Cir. 2003) (holding that admission of hearsay at a FDPA sentencing was not plain error, because "[i]t is far from clear that the Confrontation Clause applies to a capital sentencing proceeding"), cert. denied, 543 U.S. 1004 (2004); see also United States v. Mitchell, 502 F.3d 931, 966 (9th Cir. 2007) ("[a]ssuming (without deciding) that Crawford applies during a capital sentencing phase," but finding that any Confrontation Clause error was not prejudicial); United States v. Johnson, 495 F.3d 951, 976 & n. 23 (8th Cir. 2007) ("We need not address this issue, * * * because the statements fall outside the scope of [testimonial hearsay]."); United States v. Brown, 441 F.3d 1330, 1361 & n.12 (11th Cir. 2006) (same). As the Eleventh Circuit noted in Brown, and as petitioner acknowledges, a few federal district courts have held that the Confrontation Clause applies to the eligibility phase of an FDPA proceeding, but none has applied it to the selection phase. 441 F.3d at 1361 n.12. In this case, the allegedly inadmissible evidence was admitted purely in support of the selection determination; indeed, petitioner stipulated to eligibility. Pet. App. A4 n.5; Pet. 2 (statutory aggravating factors were "essentially undisputed").

Although, as petitioner states, a few cases have applied the Confrontation Clause to state-court capital sentencing proceedings, those cases do not warrant review here. Significantly, every state supreme court to have addressed the question anew since this

Court's decisions in Crawford and Ring v. Arizona, 536 U.S. 584 (2002), has held that the Confrontation Clause does not apply to the selection phase of a capital sentencing. See Summers v. State, 148 P.3d 778, 779 (Nev. 2006); State v. McGill, 140 P.3d 930, 941 (Ariz. 2006). Several federal courts have reached similar conclusions on habeas review. See, e.g., Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002); Bassette v. Thompson, 915 F.2d 932, 939 (4th Cir. 1990).

Two decisions predating Crawford and Ring have held that capital defendants in Florida have a right to confrontation during Florida's somewhat unusual sentencing phase, which uses an advisory jury and does not necessarily include an eligibility determination. See Proffitt v. Wainwright, 685 F.2d 1227, 1251-1255 (11th Cir. 1982); Engle v. State, 438 So. 2d 803, 813-814 (Fla. 1983); see also, e.g., Patton v. State, 878 So. 2d 368, 377 (Fla. 2004) (no eligibility finding by sentencing jury is required when eligibility is established by a prior violent felony). The Florida Supreme Court has continued to adhere to this holding even after Crawford and Ring. See, e.g., Rodgers v. State, 948 So. 2d 655, 663 (Fla. 2006), cert. denied, 128 S. Ct. 59 (2007); id. at 675 (Cantero, J., concurring) (noting the binding Florida precedent). The Eleventh Circuit, however, has suggested a willingness to reconsider the view expressed in Proffitt if the question were presented. See Brown, 441 F.3d at 1361 n.12.

The other cases that petitioner cites to support his assertion of a split do not justify review here. Indeed, one does not even discuss the Confrontation Clause's applicability at sentencing, but merely applies the Clause without analysis. Russeau v. State, 171 S.W.3d 871, 880-881 (Tex. Crim. App. 2005), cert. denied, 126 S. Ct. 2982 (2006). Another applies state precedent that traces back to a similarly unreasoned decision. State v. Bell, 603 S.E.2d 93, 116 (N.C. 2004).[3] A third merely cites the Eleventh Circuit's decision in Proffitt and relies in part on the state constitution. Commonwealth v. Green, 581 A.2d 544, 564 (Pa. 1990). Finally, the court in Ball v. State, 699 A.2d 1170 (Md. 1997), did not uphold a confrontation claim; rather, it held the issue waived, because the defendant forwent the opportunity to cross-examine declarants who gave victim-impact statements, and took pains to note a long line of Maryland cases holding that "the right of confrontation poses no obstacle to the admission of [a presentence] report itself, notwithstanding the fact that the report is drafted by individuals whom the defendant is unable to cross-examine." Id. at 1191.

None of these decisions evidences a sufficiently developed

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[3] Bell relies on State v. Nobles, 584 S.E.2d 765 (N.C. 2003), which states that the confrontation right applies at sentencing, id. at 769, but relies on two cases that merely apply the Confrontation Clause without separate analysis of the penalty-phase question. See ibid.; State v. Holmes, 565 S.E.2d 154, 165 (N.C. 2002) (citing State v. McLaughlin, 462 S.E.2d 1, 19 (N.C. 1995) (stating simply that "we must also address whether the admission of that [evidence] violated defendant's confrontation rights under the federal and state constitutions")).

split to warrant this Court's review at this time. Indeed, as both petitioner and the dissent below acknowledge, the applicability of the Sixth Amendment to capital sentencing proceedings -- or at least to the eligibility determination -- was significantly reshaped by this Court's decision in Ring. At a minimum, further consideration of this issue in the lower courts is warranted in light of Ring, and the significance of Ring to the distinction between eligibility and selection phases. The Eleventh Circuit, in casting doubt on its own prior precedent on the confrontation issue, has expressly noted as much. See Harris, 441 F.3d at 1361 n.12.

c. Even if this issue otherwise warranted review, this case would be an inadequate vehicle for two procedural reasons. Petitioner failed to object in the district court to some of the hearsay evidence that he now complains was unconstitutionally admitted against him. For example, petitioner asserts that exhibits G100 and G104 -- records of petitioner's violent, threatening behavior while in the county jail and the Texas prison -- were among the "highly prejudicial" evidence introduced against him. Pet. 5 & n.7. But petitioner did not object on Confrontation Clause grounds to the admission of these documents, or to the testimony authenticating them. Gov't C.A. Br. 22-24 & n.6. In fact, his counsel told the court that he had "no objections." 19 R. 2196-2197; 20 R. 2297. He therefore would have to establish

that admission of this evidence was not just error, but plain error.[4] Fed. R. Crim. P. 52(b). Even some of the evidence to which he did object may not have been "testimonial" hearsay. Statements made at the scene of a shooting, identifying petitioner as the shooter, may qualify as emergency response rather than investigation. See Davis v. Washington, 126 S. Ct. 2266, 2276 (2006). And prison, probation, and juvenile records may include statements collected for administrative rather than investigative purposes. See generally Gov't C.A. Br. 35-36.

Furthermore, the admission of any or all of the evidence in question was harmless. Contrary to petitioner's suggestion, the hearsay to which he objects was hardly the centerpiece of the government's case on his past violence and future dangerousness. Indeed, the government presented live testimony of numerous witnesses who provided first-hand accounts of attempted and threatened violence by petitioner. See Gov't C.A. Br. 20-22. Petitioner's ex-wife, for instance, provided a detailed description of petitioner's frequent violence against her, including rapes and an armed threat to kill her. Id. at 19-20. Moreover, seven corrections officers provided first-hand accounts of attempted and threatened violence by petitioner while he was incarcerated, and

[4] The government made this argument to the court of appeals; the court did not address which claims petitioner had properly preserved, presumably because it found no Confrontation Clause violation even applying de novo review. Pet. App. A3; see Gov't C.A. Br. 21-25.

two police officers provided similar accounts about violent conduct they witnessed. Gov't C.A. Br. 20-21. (And petitioner concedes that the evidence to which he did not object was "highly prejudicial." Pet. 5.) In light of that overwhelming evidence, which bears directly on petitioner's violent history and his future dangerousness, as well as the proof of the brutal acts underlying petitioner's convictions in this case (Gov't C.A. Br. 6-12), any Confrontation Clause error was harmless beyond a reasonable doubt. See Jones, 527 U.S. at 402-405.

2. Petitioner renews his contention (Pet. 27-28) that, under Ring, when a jury weighs the aggravating and mitigating circumstances in a federal capital case to determine whether aggravating factors outweigh mitigating factors "sufficiently * * * to justify a sentence of death," 18 U.S.C. 3593(e), that finding must be made beyond a reasonable doubt. That claim lacks merit and does not warrant this Court's review.

a. Every circuit to have considered the issue has correctly held that the rule of Ring is inapplicable to a jury's ultimate sentencing determination under the FDPA.[5] Mitchell, 502 F.3d at

[5] Ring itself did not consider whether the reasonable-doubt standard applied to findings on aggravating factors necessary to authorize a death sentence; Arizona law already provided for application of that standard, 536 U.S. at 597, and the Court considered only a Sixth Amendment jury-trial claim, id. at 597 n.4. Nevertheless, in this Court's Apprendi jurisprudence, the jury-trial guaranty and the reasonable-doubt standard are interlinked, see Apprendi v. New Jersey, 530 U.S. at 490, as the court of appeals recognized, Pet. App. A24.

993-994; United States v. Sampson, 486 U.S. 13, 31-32 (1st Cir. 2007); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005), cert. denied, 127 S. Ct. 433 (2006); see also United States v. Barrett, 496 F.3d 1079, 1107 (10th Cir. 2007) (reaching same conclusion with respect to similar weighing determination required by the recently repealed capital sentencing provisions of 18 U.S.C. 848), pet. for cert. filed (Oct. 12, 2007) (No. 07-7066). By the time the jury reaches the Section 3593(e) weighing, it has "already * * * found beyond a reasonable doubt the facts needed to support a sentence of death -- the presence of aggravating factors and the requisite intent." Sampson, 486 F.3d at 32. The weighing "constitutes a process, not a fact to be found." Ibid. (citing Purkey, 428 F.3d at 750 (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination)). "The outcome of the weighing process is not an objective truth that is susceptible to (further) proof by either party. Hence, the weighing of aggravators and mitigators does not need to be 'found.'" Sampson, 486 F.3d at 32.

The unanimous refusal of the courts of appeals to extend the rule of Apprendi and Ring to the jury's determination under Section 3593(e) whether a death sentence is justified based on its weighing of aggravating and mitigating circumstances finds strong support in this Court's decisions. The holding of Ring was "tightly

delineated," and the Court specifically left undisturbed its prior holdings that the Constitution permits a court, acting alone, to assess the proven aggravating and mitigating circumstances and to make the ultimate determination whether to impose the death penalty, even after a jury has recommended a life sentence. 536 U.S. at 598 n.4 (citing Proffitt v. Florida, 428 U.S. 242, 252 (1976) (plurality opinion)); see also Spaziano v. Florida, 468 U.S. 447, 457-470 (1984); Harris v. Alabama, 513 U.S. 504, 515 (1995); McCleskey v. Kemp, 481 U.S. 279, 303-304 n.25 (1987); Clemons v. Mississippi, 494 U.S. 738, 745 (1990).[6] If petitioner has no Sixth Amendment right to have a jury determine the sentence once it has made the eligibility determination, it follows that he has no right to have it do so beyond a reasonable doubt. Indeed, to the extent that petitioner relies on general Sixth Amendment principles as described in United States v. Booker, 543 U.S. 220 (2005), it is apparent that the Court does not regard the "weighing" that occurs in a court's decision about what sentence is "sufficient, but not greater than necessary," 18 U.S.C. 3553(a), as a "fact" triggering Sixth Amendment rights. See Gall v. United States, No. 06-7949 (Dec. 10, 2007). The same is true of the jury's binary decision at the selection phase of a capital sentencing hearing.

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[6] Of course, the FDPA itself requires that the selection decision be made by the jury (with limited exceptions), and that the government prove the existence of any non-statutory aggravating circumstances beyond a reasonable doubt. 18 U.S.C. 3593(b) and (c).

Recently, in Kansas v. Marsh, 126 S. Ct. 2516 (2006), this Court reaffirmed that the Constitution requires no particular method of considering aggravating and mitigating circumstances and held "that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances." Id. at 2524-2525. In a concurring opinion, Justice Scalia explained that "the State could * * * [adopt a] scheme requiring the State to prove by a mere preponderance of the evidence that the aggravators outweigh the mitigators." Id. at 2532 n.2.

b. Although there is no disagreement among the federal courts of appeals with respect to whether Ring applies to the determination mandated by Section 3593(e), petitioner asserts (Pet. 27-28) that the decision below conflicts with the decisions of three state courts. But the Missouri and Colorado decisions cited by petitioner considered capital-sentencing schemes that are distinguishable from the FDPA: the weighing of aggravating and mitigating circumstances in those States was a separate step that occurred before the jury was asked to make the ultimate sentencing determination. The state courts therefore viewed the weighing determination as a factual one. State v. Whitfield, 107 S.W.3d 253, 260-261 (Mo. 2003); Woldt v. People, 64 P.3d 256, 265 (Colo.), cert. denied, 540 U.S. 938 (2003). By contrast, during the FDPA's selection phase, the jury makes the ultimate decision whether the

sentence of death is justified without making a distinct prior determination on the weighing of aggravating and mitigating factors. If mitigating factors are present, the jury decides whether the aggravating factors "sufficiently outweigh all the mitigating factor or factors * * * to justify a sentence of death"; even if there are no mitigating factors, the jury decides "whether the aggravating factor or factors alone are sufficient to justify a sentence of death." 18 U.S.C. 3593(e). Thus, under the FDPA, while the jury's selection decision incorporates a weighing of aggravation against mitigation, it is not the sort of threshold and independent analysis that led the Missouri and Colorado courts to treat it as a factual determination in their States' procedures. See, e.g., Mitchell, 502 F.3d at 993.

As for the Nevada decision, it did not discuss the burden of proof at all; rather, it addressed Ring's impact on the allocation to judges rather than juries of the responsibility to weigh aggravation against mitigation. Johnson v. State, 59 P.3d 450, 460 (Nev. 2002). While that question is related (see n.5, supra), it is distinct from the burden-of-proof issue petitioner presents. Cf. Summerlin v. Stewart, 542 U.S. 348, 355-358 (2004); id. at 361 (Breyer, J., dissenting). The FDPA, which assigns the responsibility for the entire death-penalty process to juries, does not implicate the jury-trial question. And this Court has repeatedly declined to review it. See, e.g., Lee v. Alabama, 543

U.S. 924 (2004); Arizona v. Canez, 540 U.S. 1141 (2004); Waldrop v. Alabama, 540 U.S. 968 (2003).

Furthermore, each of these three decisions predates the decision in Marsh, which numerous courts have agreed is a significant factor in the analysis. See, e.g., Mitchell, 502 F.3d at 993; Barrett, 496 F.3d at 1107-1108; Kubsch v. State, 866 N.E.2d 726, 739 (Ind. 2007); Rogers v. State, 957 So. 2d 538, 554 (Fla. 2007). Even if Marsh does not squarely resolve the issue, at a minimum it calls for further percolation.

Accordingly, petitioner raises no disagreement warranting this Court's review in this case.

3. Petitioner renews his contention (Pet. 21-26) that 18 U.S.C. 3593(c) requires a district court to determine the admissibility of expert testimony in the penalty phase under the standard adopted by this Court in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 588-589 (1993), or its "functional equivalent." Pet. 33. Under that standard, petitioner claims (Pet. 31-35) that Dr. Coons's testimony on future dangerousness should have been excluded. Petitioner's Daubert claim lacks merit and does not warrant further review.

To begin with, no court of appeals has required the application of Daubert in the penalty phase of a federal capital trial. Accordingly, petitioner's claim implicates no disagreement justifying this Court's intervention. Furthermore, the court of

appeals' decision is correct. Section 3593(c) provides that "[i]nformation is admissible" in the penalty phase "regardless of its admissibility under the rules governing admission of evidence at criminal trials." Because the Daubert standard is the product of this Court's construction of the Federal Rules of Evidence, the court of appeals correctly concluded (Pet. App. A21) that Daubert is not strictly applicable in the penalty phase of a federal capital trial.

Petitioner nevertheless contends (Pet. 32) that Daubert should apply pursuant to Section 3593(c)'s additional language stating that "information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." As petitioner notes (ibid.), that language generally tracks the wording of Federal Rule of Evidence 403, which is discussed in Daubert. But contrary to petitioner's suggestion, the four-factor Daubert test reflects this Court's construction of Rule 702, not Rule 403; Daubert described Rule 403 as one of several "other applicable rules" about which a court "should also be mindful" in deciding whether to admit expert testimony. 509 U.S. at 592-595. For that reason, and because Section 3593(c) expressly states that the rules governing the admission of evidence in criminal trials do not apply, petitioner's reading of Section 3593(c) is unsound.

Moreover, as the court of appeals explained (Pet. App. A23),

petitioner's claim is foreclosed by the reasoning of Barefoot v. Estelle, 463 U.S. 880 (1983). In Barefoot, this Court rejected a capital defendant's claim that the unreliability of psychiatric predictions of future dangerousness should render them inadmissible under the Fifth and Eighth Amendments. The Court explained:

> If the likelihood of a defendant committing future crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, Jurek v. Texas, 428 U.S. 262 (1976), and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify.

463 U.S. at 896-897; see also id. at 898 (citing Gregg and noting the Court's preference for "plac[ing] as much information before the jury as possible"). The Court further stated that the reliability of this expert testimony can be tested through adversarial examination. Id. at 899-901. Although petitioner frames his claim as arising under the FDPA rather than the Constitution, his arguments, which stress the need for heightened reliability, are "similar in substance to the ones rejected in Barefoot," and they fail for the same reasons. Pet. App. A23. So too petitioner's claim (Pet. 35-36 & n. 43) that the Court should overrule Barefoot outright, based on subsequent publications purportedly stating that expert testimony on future dangerousness is unreliable. The Court in Barefoot was fully aware of the possibility of scientific controversy about expert predictions of

this sort, and determined to allow any "shortcomings" to be hashed out before the jury. See 463 U.S. at 899, 901.

The district court correctly applied the admissibility standards of Section 3593(c) to Dr. Coons's testimony. No further review of the fact-bound application of those standards is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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