No. 03-30077

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff - Appellant - Cross-Appellee

v.

LEN DAVIS,

Defendant - Appellee - Cross-Appellant

and

PAUL HARDY, also known as P, also known as Cool,

Defendant - Appellee

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

---

# REPLY BRIEF FOR THE UNITED STATES AS APPELLANT - CROSS-APPELLEE

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## STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument, and believes that it would be helpful to the Court.

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## SUMMARY OF ARGUMENT

This Court has jurisdiction pursuant to 18 U.S.C. 3731. This Court and other circuits have found jurisdiction under Section 3731 when the United States has appealed a district court's order to dismiss death eligibility from an indictment, as occurred here. *United States* v. *Woolard*, 981 F.2d 756, 757 (5th Cir. 1993); see, *e.g.*, *United States* v. *Quinones*, 313 F.3d 49 (2d Cir. 2002), cert. denied, 124 S. Ct.

807 (2003). Jurisdiction pursuant to 18 U.S.C. 3731 is independent of 28 U.S.C. 1291. See *United States* v. *Wilson*, 420 U.S. 332, 337 (1975).

Under *de novo* review, the Indictment gives sufficient notice to the defendants of the United States' allegations that the defendants acted with the requisite intent and substantial planning and premeditation to establish their eligibility for death under the Federal Death Penalty Act, 18 U.S.C. 3591-3592. Given prejudice to the United States because defendants' challenge to the sufficiency of the Indictment was raised after trial, and the absence of prejudice to defendants due to actual notice of the United States' intent to seek the death penalty, it is appropriate for this Court to read the Indictment with maximum liberality. Cf. *United States* v. *Henry*, 288 F.3d 657 (5th Cir.), cert. denied, 537 U.S. 902 (2002). Such a reading gives further support to the conclusion that the Indictment is sufficient.

## ARGUMENT

### I

### THIS COURT HAS JURISDICTION PURSUANT TO 18 U.S.C. 3731 FOR THE UNITED STATES' APPEAL

Hardy (Br. 13-14) asserts that this Court currently does not have jurisdiction to hear the United States' challenge to the district court's December 2002, opinion because it is not a final order (defendants have not been sentenced), and the basis

for this challenge does not fall within the collateral order doctrine.[1] Hardy also asserts that the United States must satisfy both 18 U.S.C. 3731 and 28 U.S.C. 1291 for this Court to exercise jurisdiction. Both of Hardy's claims are without merit. First, the United States does not assert jurisdiction pursuant to the collateral order doctrine. Second, 18 U.S.C. 3731 provides a basis for jurisdiction that is distinct from and independent of 28 U.S.C. 1291. Consistent with this Court's precedent, this Court currently has jurisdiction to consider the United States' appeal of the district court's dismissal of defendants' death eligibility. See *United States* v. *Woolard*, 981 F.2d 756, 757 (5th Cir. 1993).

By its terms, 18 U.S.C. 3731 authorizes the United States to take an appeal (except where double jeopardy principles are implicated) from any order of a district court, *inter alia*, "dismissing an indictment or information." Section 3731 further states that its "provisions * * * shall be liberally construed" to effectuate the statute's purposes. In construing the scope of appellate jurisdiction conferred by this provision, the Supreme Court repeatedly has held that "Congress intended to remove *all statutory barriers* to Government appeals and to allow appeals

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[1] "Br. __" refers to the page of the identified party's brief. If it is not clear from the context, the particular brief will be designated by the party: "D. Br." refers to Davis's brief, "H. Br." refers to Hardy's brief, and "U.S. Br." refers to the United States' opening brief.

While Davis (Br. 9) generally adopted Hardy's arguments, Davis also took "no position" on Hardy's challenge to this Court's current jurisdiction for the United States' appeal (Br. 10). Given this ambiguity and for simplicity, the United States will only refer to Hardy's claims on this issue.

wherever the Constitution would permit." *United States* v. *Wilson*, 420 U.S. 332, 337 (1975) (emphasis added); see also *United States* v. *Loud Hawk*, 474 U.S. 302, 313 (1986); *United States* v. *DiFrancesco*, 449 U.S. 117, 131 (1980); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977).

This Court and other circuits have held that pretrial orders striking the death penalty as a potential punishment are immediately appealable by the government under the broad jurisdictional authority conferred by Section 3731. *Woolard*, 981 F.2d at 757; see *United States* v. *Quinones*, 313 F.3d 49 (2d Cir. 2002), cert. denied, 124 S. Ct. (2003); *United States* v. *Bass*, 266 F.3d 532 (6th Cir. 2001), rev'd on other grounds, 536 U.S. 862 (2002); *United States* v. *Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001), cert. denied, 535 U.S. 906 (2002); *United States* v. *Cheely*, 36 F.3d 1439, 1441 (9th Cir. 1994). In *Woolard*, 981 F.2d at 756-757, this Court asserted jurisdiction to review the district court's order that dismissed death as a potential punishment and held 18 U.S.C. 1111 unconstitutional. This Court noted Congress's clear intention that Section 3731 be "liberally construed" to remove all statutory barriers to government appeals. *Woolard*, 981 F.2d at 757. This Court, citing other cases, also noted that Section 3731 conferred appellate jurisdiction not only when the district court issued orders that dismissed an entire count, but also when it "altered it in a significant way from the grand jury's charge." *Woolard*, 981 F.2d at 757; see *United States* v. *Levasseur*, 846 F.2d 786, 788 (1st Cir.), cert. denied, 488 U.S. 894 (1988) (appellate jurisdiction to consider order striking predicate act for RICO indictment). Jurisdiction exists because the

challenged ruling "effectively removed a discrete basis of criminal liability." *Woolard*, 981 F.2d at 757; see *Acosta-Martinez*, 252 F.3d at 17 (quoting *Woolard*).

Since *Woolard*, this Court has exercised jurisdiction based on 18 U.S.C. 3731, without reference to, or consideration of, the final judgment rule of 28 U.S.C. 1291. *United States* v. *Wilson*, 306 F.3d 231 (5th Cir. 2002) (Section 3731 jurisdiction to hear immediate appeal of suppression of evidence), cert. denied, 537 U.S. 1240 (2003); *United States* v. *Smith*, 135 F.3d 963, 966 (5th Cir. 1998). In *Smith*, *ibid.*, this Court held it had jurisdiction based on Section 3731 to hear the government's appeal of a district court order quashing a government subpoena seeking evidence to submit at trial.

Hardy erroneously asserts that 18 U.S.C. 3731 is not an independent or self-executing basis for jurisdiction, and that the government also must satisfy the final order requirement of 28 U.S.C. 1291. Hardy relies upon and quotes (Br. 17) extensively from *Flanagan* v. *United States*, 465 U.S. 259 (1984), regarding the principles underlying the final judgment rule of 28 U.S.C. 1291. That opinion, however, has no bearing on the Court's jurisdiction in this case. In *Flanagan*, 465 U.S. at 265 n.3, the Supreme Court stated 18 U.S.C. 3731 "is not at issue in this case," and distinguished Section 3731's "statutory exception to the final judgment rule for certain orders suppressing or excluding evidence."[2] Moreover, at no point

[2] Moreover, Hardy's reliance on *United States* v. *Martinez*, 763 F.2d 1297 (11th Cir. 1985), *United States* v. *Dior*, 671 F.2d 351 (9th Cir. 1982), and *United States* v. *Sam Goody, Inc.*, 675 F.2d 17 (2d Cir. 1982), is misplaced. First, *Dior*

(continued...)

in the Supreme Court's discussion in *Wilson*, 420 U.S. at 337, of appellate jurisdiction pursuant to Section 3731 did it address or rely upon 28 U.S.C. 1291.[3]

II

THIS COURT'S REVIEW OF THE SUFFICIENCY OF THE INDICTMENT UNDER THE PRINCIPLE OF MAXIMUM LIBERALITY IS APPROPRIATE

Both Davis (Br. 28) and Hardy (Br. 22-28) claim that their challenges to the Indictment were raised pretrial and, therefore, are subject to *de novo* review, and that review with maximum liberality is either eliminated by the Supreme Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2002), or that standard otherwise is inapplicable in this case.[4]

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[2](...continued)
and *Sam Goody* were issued before *Flanagan*. Moreover, the Eleventh, Ninth, and Second Circuits have held since these opinions that they have jurisdiction, based on Section 3731, to consider a district court's strike of a death penalty notice or other orders that fall within the scope of Section 3731. See, *e.g.*, *Quinones*, 313 F.3d at 57 (asserting jurisdiction pursuant to Section 3731 to review strike of death penalty notice, citing *Bass*, *Acosta-Martinez*, *Cheely*, and *Woolard*); *United States* v. *Jordan*, 316 F.3d 1215, 1247-1248 (11th Cir.) (appellate jurisdiction exists under Section 3731 for appeal of dismissal of indictment), cert. denied, 124 S. Ct. 133 (2003); *Cheely*, 36 F.3d at 1441.

[3] Davis conceded (Br. 9) that this Court does not have jurisdiction for his cross-appeal at this time because he has not yet been sentenced. For the reasons set forth in its opening brief (Br. 41-44), the United States continues to assert that this Court should dismiss Davis's cross-appeal for lack of jurisdiction.

[4] Davis adopts (Br. 19-20) Hardy's challenge to this Court's review of the Indictment with "maximum liberality." For ease of reference, the United States will refer only to Hardy's claim in this regard.

As the United States acknowledged in its opening brief (Br. 30), since Davis and Hardy challenge the Indictment under *Ring* v. *Arizona*, 536 U.S. 584 (2002), for purposes of sentencing prior to the remand hearing on sentencing, their challenge is timely. To recognize a timely challenge for purposes of sentencing, however, is distinct from agreeing that either defendant raised this issue *pre*trial.

The crux of the United States' argument (Br. 33-41) is that the Indictment satisfies *de novo* review because the Indictment, by the terms of the charges and Overt Acts, gave the defendants fair notice that the United States alleged they killed Ms. Groves with the requisite intent and with substantial planning and premeditation. The United States also argued (Br. 30-33) that, given the unusual posture of this case, prejudice to the United States, and defendants' actual notice of the United States' intent to seek the death penalty, reviewing the Indictment with maximum liberality is consistent with precedent. See, *e.g.*, *United States* v. *Henry*, 288 F.3d 657 (5th Cir.) (an indictment is read with maximum liberality when it is challenged initially on appeal and there is no alleged prejudice for lack of notice; knowledge element inferred in indictment), cert. denied, 537 U.S. 902 (2002); *United States* v. *Richards*, 204 F.3d 177 (5th Cir.) (indictment alleging mail and wire fraud, challenged for the first time on appeal, is upheld under maximum liberality despite its failure to allege that false statements were material), cert. denied, 531 U.S. 826 (2000). Moreover, neither defendant cites to any *pre*trial pleading in which he specifically challenges the sufficiency of the Indictment to

give notice of death eligibility (D. Br. 28; H. Br. 4-5 & n.5).[5] Although not necessary to establish its sufficiency, reading the Indictment with maximum liberality further supports the Indictment's sufficiency. Given that the defendants do not allege prejudice for lack of notice, this Court should give due consideration to these factors in its assessment of the Indictment.

This Court should reject Hardy's claim (Br. 25-28) that the Supreme Court's decision in *Cotton*, 535 U.S. at 634, precludes this Court from considering the Indictment with maximum liberality. In *Cotton*, *ibid.*, the Supreme Court applied plain error review to the defendant's challenge to an indictment that was raised for the first time on appeal. Given that the United States has conceded that Davis and Hardy have raised a timely challenge to their sentence, *Cotton* is not controlling, nor does it eliminate this Court's consideration of additional factors, such as prejudice to a party.

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[5] Hardy presents an extensive list of pleadings he claims "were expressly directed to the legality and adequacy of the indictment, and the Notices of Intent to Seek the Death Penalty." His summary of those pleadings (*ibid.*), however, identifies challenges to the constitutionality of the charging statutes (18 U.S.C. 241 and 242) and the Federal Death Penalty Act (FDPA), 18 U.S.C. 3591 *et seq.*, on various grounds, and not a challenge to the sufficiency of the Indictment to give notice of eligibility for death.

## III

## THE INDICTMENT GIVES SUFFICIENT NOTICE OF THE REQUISITE INTENT AND SUBSTANTIAL PLANNING AND PREMEDITATION

None of Davis and Hardy's various challenges to the sufficiency of the Indictment warrants affirmance of the district court's dismissal of death eligibility. Davis and Hardy do not refute that they had notice prior to trial of the government's intent to seek the death penalty. This Court should reject their claims that the Indictment does not meet the constitutional standard to "fairly inform[]" them of capital offenses. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

Neither Davis (Br. 21-22) nor Hardy successfully challenges the analysis set forth in Judge Niemeyer's concurring opinion in *United States* v. *Jackson*, 327 F.3d 273, 287 (4th Cir.) (indictment issued pre-*Ring* sufficiently alleged an aggravating factor for death eligibility despite its failure to cite or quote the Federal Death Penalty Act (FDPA), 18 U.S.C. 3591 *et seq.*), cert. denied, 124 S. Ct. 566 (2003).[6] Moreover, the Fourth Circuit's recent opinion in *United States* v. *Higgs*, No. 01-3, 2003 WL 22992273, at *9 (Dec. 22, 2003), further supports the United States' claim that an indictment can give sufficient notice of death eligibility despite the absence of citation to or quotation of text from the FDPA. First, the Fourth Circuit held that the principles of *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), require that the requisite intent and at least one

[6] Jackson's petition for certiorari was pending at the time the United States filed its opening brief.

statutory aggravating factor (other than a prior conviction) under the FDPA be charged in the indictment. *Higgs*, 2003 WL 22992273, at *8-*9 (See U.S. Br. 19-24). The indictment in *Higgs* alleged first degree murder, murder committed in perpetration of kidnaping, and kidnaping resulting in death. *Id*. at *5. Second, the *Higgs* indictment gave sufficient notice of death eligibility by alleging intentional acts to take a life or create a grave risk of death, which proves the requisite intent, and death in the course of committing another felony, which satisfies the requirement that there be one statutory aggravating factor. *Id*. at *10.[7] The absence of citation to or quotation from the FDPA did not render that Indictment insufficient. See *ibid*.

Finally, the Fourth Circuit held that even if the Indictment was considered defective for failing to sufficiently allege death eligibility, the error was harmless. *Id*. at *15-*18. The "primary function" of an indictment is to give a defendant notice of the charges and an opportunity to plead double jeopardy. *Id*. at *17. Given the Indictment's references to statutes that specifically identify death as a maximum penalty *and* the government's FDPA notice that identified all

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[7] More specifically, the Fourth Circuit held that the indictment in *Higgs* sufficiently alleged intentional acts to take a life and intentional acts of violence creating a grave risk of death to satisfy 18 U.S.C. 3591(a)(2) by alleging that Higgs killed the victims "by shooting them with a firearm, willfully, deliberately, maliciously, and with premeditation" and "in the perpetration of kidnapping." 2003 WL 22992273, at *10. By alleging that the deaths occurred during the commission of another crime (kidnaping), at least one statutory factor was alleged. *Id*. at *12. Since the latter fact was found by a jury with respect to the murder charges (but not the kidnapping charges), the principles of *Ring* were satisfied. *Higgs*, 2003 WL 22992273, at *10, *12.

aggravating factors, including the mental intent and statutory aggravating factors that define eligibility for the death penalty, the defendants had "fair notice" of the charges and the government's intent to seek the death penalty. *Ibid*. Moreover, the petit jury's findings demonstrate that Higgs "was not prejudiced by the lack of an independent judgment of the grand jury." *Id*. at *18.[8]

*A. The Indictment Sufficiently Alleges All Elements Of The Capital Offenses*

Throughout his brief, Davis asserts (Br. 11-13, 15-16, 23-27, 32-34) that the Indictment failed to sufficiently allege the essential elements of a capital violation of 18 U.S.C. 241 and 242, including repeated claims that "death resulting" was not sufficiently alleged. No extended discussion is needed to refute Davis's claim beyond quoting the text of the Indictment. Count One charged that the defendants conspired to

> injure, oppress, threaten and intimidate Kim Marie Groves * * * in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States, which include

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[8] Just as the Supreme Court and this Court's analysis have evolved in light of the Supreme Court's opinions from *Jones* v. *United States*, 526 U.S. 227 (1999), to *Ring*, so too has the government's position been modified in certain respects to remain in accordance with constitutional requirements. See, *e.g.*, *United States* v. *Matthews*, 312 F.3d 652, 656-662 (5th Cir. 2002) (*Matthews II*), cert. denied, 123 S. Ct. 1604 (2003); *United States* v. *Longoria*, 298 F.3d 367 (5th Cir.), cert. denied, 537 U.S. 1038 (2002). For example, the United States advocated a position post-*Apprendi* and pre-*Ring* that an indictment did not need to incorporate the elements of the FDPA to render a defendant death eligible (10 R. 3411-3427/D. Doc. 1019). In light of *Ring*, and as discussed in the United States' opening brief (Br. 19-24), that is no longer the United States' position. To the extent that the government's earlier position could be viewed as asserting that intent for purposes of the FDPA was not sufficiently alleged in the Indictment, or could not constitutionally be so asserted, that is not the United States' current view.

> (1) the right not to be deprived of liberty without due process of law, that is, the right to be free from the use of unreasonable force by one acting under color of law * * * resulting in the death of Kim Marie Groves.
>
> It was part of the plan and purpose of this conspiracy that Kim Marie Groves * * * would be killed because a civil rights complaint had been made * * * (2 R. 289-290/RE 8:289-290).[9]

Count Two similarly charged that defendants

> willfully deprive[d] Kim Marie Groves * * * of the rights and privileges which are secured and protected by the Constitution and laws of the United States, namely, the right not to be deprived of liberty without due process of law, which includes the right to be free from the use of unreasonable force by one acting under color of law, by shooting Kim Marie Groves in the head with a firearm, resulting in her death.[10] (RE 8:292).

Thus, the resulting death of Ms. Groves due to defendants' intentional actions, an element of the capital offense, is clearly stated in the Indictment.

Davis's reliance (Br. 11-13) on this Court's ruling in *United States* v. *Matthews*, 178 F.3d 295 (5th Cir.) (*Matthews I*), cert. denied, 528 U.S. 944 (1999), is misguided. In *Matthews I*, *id*. at 298, this Court vacated the defendant's sentence for violating the carjacking statute, which was based on the district court's finding of serious bodily injury, due to the Supreme Court's intervening decision in *Jones* v. *United States*, 526 U.S. 227 (1999). Davis's effort to compare the indictment in

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[9] Subsequent citations to the Indictment will refer only to the Record Excerpts. The indictment may also be found, at these same page cites, in Volume 2 of the record.

[10] The Overt Acts for Count One are set forth in the United States' opening brief (Br. 4) (RE 8:290-291).

*Matthews I* with the Indictment here ignores the significant difference. In *Matthews I*, the indictment solely alleged the defendant acted with the intent to cause serious bodily injury.[11] The Indictment in *Matthews I*, 178 F.3d at 298, did not specifically allege, nor did the jury find, that the victim suffered serious bodily injury. Here, Counts One and Two specifically state that Ms. Groves was killed as a result of the defendants' actions, thus identifying a requisite element of the elevated offenses under Sections 241 and 242 (RE 8:289-290).

Moreover, nothing in *Matthews I* or this Court's precedent supports Davis's bald assertion (Br. 12; see 11-13) that it is "absolutely mandatory that the indictment" cite the statutory text verbatim, and the failure to do so renders Counts One and Two insufficient. As noted, Count Two states that Davis, Hardy, and Causey deprived Ms. Groves of the "right to liberty without due process," including the right to be free of unreasonable force, by "*shooting Kim Marie Groves in the head with a firearm, resulting in her death*" (RE 8:282) (emphasis added). Verbatim statutory text is not required. *United States* v. *Hernandez*, 891 F.2d 521, 524 (5th Cir. 1989), cert. denied, 495 U.S. 909 (1990). There is no tangible or discernible difference between the quoted text of Count Two, particularly the italicized phrase, and the statutory phrase "death resulting."

In addition, Davis's citation to and reliance (Br. 14-15) on *United States* v. *Calhoun*, 726 F.2d 162, 163 (4th Cir. 1984), *Catala Fonfrias* v. *United States*, 951

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[11] Davis attached a copy of the indictment for *Matthews I* as an addendum to his brief.

F.2d 423, 427 (1st Cir. 1991), cert. denied, 506 U.S. 834 (1992), and the legislative history of 18 U.S.C. 242 are of no significance. Congress amended 18 U.S.C. 242 to impose increased sentences for violations of civil rights that result in bodily injury or death. Legislative history that suggests Congress's focus on amending the statute for purposes of punishment (see D. Br. 14-15), and not identifying additional elements of the crime, is no longer controlling in light of *Apprendi*, 530 U.S. at 494, and its progeny. As the Supreme Court explained, a legislature's labels or distinctions between "sentencing factors" or "elements" is not determinative. *Ibid.* "[T]he relevant inquiry is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Ibid.*

Moreover, there is no basis for Davis's claim (Br. 25-26) that the Indictment's reference to the constitutional right not to be deprived of liberty resulting in death, as opposed to the deprivation of life or liberty, fails to give Davis sufficient notice of the constitutional right he violated. Any distinction between a deprivation of liberty or life when it is alleged that death results is inconsequential. Cf. *United States* v. *Daniels*, 281 F.3d 168, 178-179 (5th Cir.) (factual predicate establishing a Fourteenth Amendment due process claim supports conviction under Section 242 even though the indictment described the offense in terms of an Eighth Amendment violation), cert. denied, 535 U.S. 1105 (2002). Moreover, Davis's reliance (Br. 25-26) on *United States* v. *Lanier*, 520 U.S. 259 (1997), is misplaced. *Lanier, id.* at 268-272, addressed the degree of specificity or notice, through statute

or precedent, that placed a defendant on notice that his conduct was illegal. Nothing in *Lanier* addressed the sufficiency of an indictment to allege the elements of an offense.

*B. The Grand Jury Findings, Petit Jury Verdict And Findings, And Jury Instructions*

As part of his challenge to the sufficiency of the Indictment, Davis asserts that the jury instructions were faulty, and the petit jury did not make the requisite findings of the elements to support death eligibility.[12]

Davis claims, by wholly misrepresenting the text of the jury instructions, (Br. 15-16) that the jury instructions for Counts One and Two failed to include "death resulting" as an element of the offense. Davis quotes (Br. 15) the district court's introductory statement on Count Two, but ignores the district court's explanation of the *four* elements of the offense of Count Two (5 R. 1452). The district court instructed the fourth element was "[t]hat Kim Marie Groves *died as a result of defendant's conduct*" (*ibid.*) (emphasis added). Similarly, the court explained the third element for Count One was "[t]hat Kim Marie Groves *died as a result of acts committed in furtherance of the conspiracy*" (5 R. 1450) (emphasis added). The district court further instructed the jury that Ms. Groves' death was a "foreseeable result of the defendant's conduct" (*ibid.*; see 5 R. 1453).

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[12] Davis's opportunity to challenge the district court's jury instructions on the merits has lapsed, and therefore the United States will not address those claims.

In addition, Davis's effort (Br. 32-33) to distinguish the district court's jury instructions on foreseeable death versus intentional death for purposes of the FDPA has no merit. The FDPA sets forth four means to establish intent. 18 U.S.C. 3591(a)(2)(A)-(D). As the United States explained (Br. 33-36), the text of Counts One and Two, individually and in conjunction with various Overt Acts set forth in Count One, establish Davis and Hardy's intent for purposes of Section 3591(a)(2)(A)-(C), which encompasses intentional killing and acts intending to result in death. Moreover, the district court's jury instruction that an element of both Counts One and Two was that Ms. Groves' death was a foreseeable result of the defendants' actions is akin to FDPA Section 3591(a)(2)(C) (5 R. 1450, 1453).

Hardy (Br. 31-34) and Davis (Br. 34-35) assert that it is speculative and inappropriate for this Court to consider the petit jury's findings in assessing what the grand jury determined, or would have determined, if asked specifically. However, because all essential elements must be determined by a jury beyond a reasonable doubt, a jury's verdict or finding on the allegedly missing element is a factor that can establish the sufficiency of the indictment. See *Higgs*, 2003 WL 22992273, at *10. Similarly, in the plain error context, courts consider whether overwhelming evidence supports a jury's verdict to conclude that the grand jury, if asked, would find the allegedly missing element. See *United States* v. *Cotton*, 535 U.S. 625, 633 (2002) ("[s]urely, *the grand jury, having found that the conspiracy existed, would have also found* that the conspiracy involved at least 50 grams of cocaine base") (emphasis added); see also *United States* v. *Matthews*, 312 F.3d

652, 665 (5th Cir. 2002) (*Matthews II*) (indictment's failure to allege essential element is harmless since "any rational grand jury, when presented with a proper indictment," would have found all elements for the offense), cert. denied, 123 S. Ct. 1604 (2003). If there is overlap between the jury and grand jury's findings, and strong evidence to support the missing element, the failure to allege a particular element in the indictment does not affect the fairness and integrity of the proceedings. See *Cotton*, 535 U.S. at 633; *Matthews II*, 312 F.3d at 665. Thus, the very analysis that Hardy challenges is relevant to this Court's review.

Moreover, there is no merit to Hardy's asserted distinction (Br. 34) between the petit jury and grand jury findings in *Cotton* and *Matthews II*, on one hand, and this case, on the other. Hardy mistakenly claims (Br. 34) that the evidence presented to the petit jury was not what was presented to the grand jury in this case. In fact, the evidence presented at trial tracked, albeit in greater detail, the evidence that was presented to the grand jury, which is outlined in the Overt Acts of the Indictment.

This Court can and should conclude the grand jury would have included the verbatim text of the FDPA regarding intent and the statutory aggravating factor of "substantial planning and premeditation" if specifically asked, because the grand jury approved alternative, equivalent text. As set forth in the United States' brief (Br. 33-41), the text of the charges, including multiple references to death resulting from Davis and Hardy's conspiracy and shooting of Ms. Groves in the head, and the multiple overt acts for Count One reflect the requisite intent and substantial

planning and premeditation to establish Davis and Hardy's eligibility for death under the FDPA, 18 U.S.C. 3591-3592.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order barring the jury's consideration of a death sentence for Davis and Hardy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2004, two copies of the foregoing Reply Brief For The United States As Appellant - Cross-Appellee and a diskette containing the brief were served by Federal Express, overnight mail, on the following counsel of record:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that the foregoing Reply Brief For the United States As Appellant - Cross-Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 4,617 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

January 9, 2004

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