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Appellate Section - PHB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

May 19, 2004

By Hand

Hon. Charles R. Fulbruge, III
Clerk, U.S. Court of Appeals
for the Fifth Circuit
102 U.S. Courthouse
600 Camp Street
New Orleans, LA 70130

Re: *United States* v. *Len Davis*, No. 03-30077

Dear Mr. Fulbruge:

Pursuant to this Court's (Judge Emilio Garza, Barksdale, and Stewart) directive at oral argument on May 4, 2004, the United States submits this letter brief addressing how *United States* v. *Robinson*, No. 02-10717, 2004 WL 790307 (5th Cir. Apr. 14, 2004), applies to this case. This Court held in *Robinson* that the failure to allege a statutory aggravating factor in an indictment to establish death eligibility under the Federal Death Penalty Act, 18 U.S.C. 3591 *et seq*. (FDPA), was harmless error.

As stated in its briefs and at oral argument, the United States believes that maximum liberality is the most appropriate standard to assess the Third Superceding Indictment ("Indictment").[1] This is because, in the United States' view, the potential error occurs at the time of sentencing, and not at the time of Indictment. See *United States* v. *Stewart*, 306 F.3d 295, 310 (6th Cir. 2002), cert. denied, 587 U.S. 1138 (2003). Accordingly, because the asserted error – that is, a jury's consideration of a death sentence – has not yet occurred, harmless error analysis does not apply directly to this case. Nevertheless, we believe that *Robinson* has some application to this case.

Given that *Ring* v. *Arizona*, 536 U.S. 584 (2002), imposed a new requirement that did not exist at the time the Indictment was issued, the United States has argued that this Court's analysis of the Indictment's sufficiency should extend beyond its terms. A more expansive review that considers the procedural history and trial evidence of this case would give full regard to the integrity and fairness of these proceedings. While maximum liberality and harmless error each has a different focus, both assess the presence of an alleged defect or error and further consider, implicitly or explicitly, what impact, if any, that defect or error has on the integrity of the

[1] The United States asserts, however, the Indictment is also sufficient on *de novo* review.

proceedings. Thus, although *Robinson*'s harmless error analysis does not apply directly here, it should guide this Court's review in several respects:

1. This Court in *Robinson*, 2004 WL 790307, at *3, held that *Ring*, which addresses the Sixth Amendment requirement that a petit jury find all elements of the crime charged, applies equally to the Fifth Amendment's requirement that an indictment allege all elements of the crime charged. Thus, an indictment alleging a capital offense must allege the eligibility requirements under the FDPA. See *United States* v. *Higgs*, 353 F.3d 281, 298 (4th Cir. 2003).

2. In *Robinson*, 2004 WL 790307, at *3-*4, this Court held, after reviewing *Neder* v. *United States*, 527 U.S. 1 (1999), and *United States* v. *Cotton*, 535 U.S. 625 (2002), that the failure to allege a statutory aggravating factor is reviewed for harmless error. See *Higgs*, 353 F.3d at 299, 301, 304-307 (indictment valid on *de novo* and harmless error review).[2] By applying harmless error in a capital case, this Court determined that, for purposes of reviewing an indictment, the potential consequence of a death sentence does not warrant a different standard. *Robinson*, 2004 WL 790307, at *3-*5; cf. *Mitchell* v. *Esparza*, 124 S. Ct. 7, 11 (2003) (reversing grant of habeas relief since application of harmless error to capital indictment was not contrary to precedent). Accordingly, this Court should reject Davis' claim that the potential for a death sentence prohibits consideration of the Indictment by the applicable standard – maximum liberality.

3. In *Robinson*, 2004 WL 790307, at *5, this Court stated that one of the two "primary functions of an indictment" is to give the defendant sufficient notice of the allegations in order to prepare a defense. This Court held that the government's notice under the FDPA provided Robinson with "*adequate independent notice*" of the government's intent to pursue a capital offense, and fulfilled the notice function of the indictment. *Ibid.* (emphasis added). Similarly, the government's FDPA notice to Davis and Hardy provides adequate notice of the government's intent to seek the death penalty.

4. In *Robinson*, *id*. at *5-*6, this Court stated that a second function of an indictment is for a grand jury to serve as a check on the fairness of charges presented by the government. Although the Court recognized that the grand jury function cannot be restored to a defendant post-trial, it held that, under those circumstances, its absence did not automatically require reversal. *Id*. at *6. Here, the United States asserts that the grand jury charged a death-eligible offense. Even if this Court rejects the United States' assertion, this Court, consistent with *Robinson*, *ibid*., should reject defendants' claim that the absence of a specific grand jury finding on the FDPA factors precludes their death eligibility.

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[2] In *United States* v. *Allen*, 357 F.3d 745 (2004), the Eighth Circuit held that the failure of an indictment to allege a statutory aggravating factor under the FDPA was not harmless error. On May 11, 2004, the Eighth Circuit granted the United States' petition for rehearing *en banc* and vacated the panel decision (order attached).

5. This Court held in *Robinson* that the issue was whether, if presented available evidence, the grand jury *would have* charged the missing element *if asked*. 2004 WL 790307, at *6 (emphasis added). Considering the evidence at trial, this Court held the evidence supporting the statutory factor of substantial planning and premeditation was "overwhelming." *Id*. at *7 n.18. Robinson stated his desire to kill certain individuals several times; associates knew of his desire and told Robinson when they thought they saw an intended victim; and Robinson immediately went to the scene to kill the apparent target. *Ibid*. Moreover, this Court also noted one co-conspirator's interstate travel and Robinson's lying in wait for 20 minutes for a second victim as additional proof of substantial planning and premeditation. *Ibid*.

The nature of the evidence in *Robinson* is very similar to the allegations set forth in this Indictment, as well as the evidence presented at Davis and Hardy's trial. As described in the Overt Acts, Davis expressed his desire to kill Ms. Kim Marie Groves; Davis arranged a meeting for he, Hardy, and another person to look for Ms. Groves; Davis separately searched for Ms. Groves; and when he later found Ms. Groves, he contacted Hardy, who came quickly to kill her. At trial, there was evidence of more than six telephone calls and pages between Davis and Hardy, and three separate searches of the neighborhood for Ms. Groves.

6. The guiding value of *Robinson*'s harmless error analysis is made clear by noting the similarities of maximum liberality and harmless error. First, maximum liberality and harmless error are not mutually exclusive. See *United States* v. *Moreci*, 283 F.3d 293, 299 (5th Cir. 2002) (maximum liberality review can be utilized on plain error review, although not necessary here given the Indictment's specificity); see *United States* v. *Avery*, 295 F.3d 1158 (10th Cir.) (maximum liberality applied with plain error review; given the indictment's sufficiency, court never reaches plain error), cert. denied, 537 U.S. 1024 (2002). If an indictment is reviewed first under maximum liberality and found sufficient, there is no error to warrant further consideration. See *id*. at 1174-1176.

In addition, both standards consider whether the alleged deficiency in the indictment prejudiced the defendant by lack of notice and the effect of that deficiency on the integrity of the proceedings. Maximum liberality considers the text of the indictment and allows a more flexible reading of an indictment when the defendant has *not* been prejudiced for lack of notice, yet the government *is* prejudiced because the charge is first raised when double jeopardy principles apply. See, *e.g.*, *United States* v. *Henry*, 288 F.3d 657 (5th Cir.), cert. denied, 537 U.S. 902 (2002); *United States* v. *Richards*, 204 F.3d 177, 191 (5th Cir.), cert. denied, 531 U.S. 826 (2000). When it applies maximum liberality, this Court has concluded, in part, that the defendant is not prejudiced by the lack of specific notice of the charges in the indictment and, therefore, has implicitly determined that the verdict is not adversely affected by the lack of such notice. Harmless error assesses whether the alleged error affected the verdict and, in doing so, the court is determining whether substantial rights are affected. For challenges to an indictment, this Court considers whether, based on the evidence at trial, the grand jury would have made the necessary findings. *Robinson*, 2004 WL 790307, at *6.

For the reasons set forth above, this Court should be guided by *Robinson*, *id*. at *5-*7, and consider the sufficiency of the Indictment in light of its terms, the procedural history, and the jury's findings, with due regard to maintaining the integrity of these proceedings.

Respectfully submitted,

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