No. 14-8486

IN THE SUPREME COURT OF THE UNITED STATES

ERIK DIAZ-COLON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner established reversible plain error based on his claim that his indictment did not properly allege aggravating factors pertaining to conspiracy to violate civil rights, in violation of 18 U.S.C. 241, and deprivation of civil rights under color of law, in violation of 18 U.S.C. 242.

2. Whether petitioner established reversible plain error based on his claim that the district court erred in instructions to the jury concerning conspiracy to commit carjacking, in violation of 18 U.S.C. 371 and 2119(3).

3. Whether the district court was required to vacate petitioner's conviction for conspiring to violate civil rights with death resulting, in violation of 18 U.S.C. 241, because the jury did not also convict petitioner of deprivation of civil rights under color of law with death resulting, in violation of 18 U.S.C. 242.

4. Whether petitioner was entitled to specific performance of a plea offer that was withdrawn before petitioner changed his plea or otherwise detrimentally relied on the plea offer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 763 F.3d 89. Opinions of the district court are reported at 794 F. Supp. 2d 353, 865 F. Supp. 2d 201, and 881 F. Supp. 2d 259.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2014. A petition for rehearing was denied on October 10, 2014 (Pet. App. B1). The petition for a writ of certiorari was filed

on December 30, 2014. 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 District of Puerto Rico, petitioner was convicted of conspiracy to commit carjacking, in violation of 18 U.S.C. 371 and 2119(3); conspiracy to violate civil rights with death resulting, in violation of 18 U.S.C. 241; and deprivation of civil rights under color of law, in violation of 18 U.S.C. 242 and 2. Pet. App. A3-A4, A31; Judgment 1. He was sentenced to life imprisonment. Pet. App. A4. The court of appeals affirmed. Id. at A1-A30.

1. Petitioner, a drug dealer, led a conspiracy to abduct, rob, and ultimately kill a rival drug dealer. Pet. App. A2-A3. At petitioner's direction, members of the conspiracy who included current and former police officers conducted stopped the rival dealer, Elis Manuel Andrades-Tellería. Ibid.; D. Ct. Doc. 797, at 4-5 (Mar. 8, 2012); 7/28/11 Tr. 65-66, 69-70; 8/15/11 Tr. 40-43, 50, 54-55, 74-75; 8/16/11 Tr. 167-168. In accordance with petitioner's instructions, these co-conspirators wore law enforcement apparel and displayed firearms to give the impression of a legitimate arrest. Pet. App. A3; 7/27/11 Tr. 77-78, 83-84, 89-90; 7/28/11 Tr. 65-66, 69-70, 89-90, 104; 8/15/11 Tr. 40-43, 50, 54-55, 60-62, 66-67, 74-75, 87-88. One member of the

conspiracy wore a Puerto Rico Police Department uniform and drove a marked police vehicle. Pet. App. A3; 7/27/11 Tr. 77-78.

During the stop, members of the conspiracy handcuffed Andrades-Tellería, read him Miranda warnings, and took approximately 14 kilograms of cocaine from his car. Pet. App. A3. They then drove Andrades-Tellería to an auto-body repair shop that was owned by one of the co-conspirators, in order to interrogate him about the location of additional money and narcotics. Ibid.; 7/28/11 Tr. 117, 127-128; 8/15/11 Tr. 68-70. Once Andrades-Tellería provided the combination to his safe, co-conspirators went to Andrades-Tellería's home where they stole money, watches, passports, and a handgun. Pet. App. A3; 7/28/11 Tr. 157-158, 165; 8/15/11 Tr. 80-81, 86-89.

Members of the conspiracy strangled Andrades-Tellería to death at the auto-body shop, using their arms, hands, and a piece of rope, Pet. App. A3; 7/28/11 Tr. 184-188; 8/15/11 Tr. 91-97, in accordance with petitioner's instruction to kill Andrades-Tellería if necessary to carry out the crime without detection, 7/28/11 Tr. 65-66, 69-70; 8/15/11 Tr. 40-43, 50, 54-55, 74-75; 8/16/11 Tr. 167-168; D. Ct. Doc. 797, at 5. They left Andrades-Tellería's body on a secluded rural road the following morning. Pet. App. A3.

2. a. A grand jury returned a superseding indictment against petitioner and 11 other participants in the conspiracy.

Superseding Indictment 1-2. Petitioner was charged in three of the indictment's counts.[1] Count 1 charged petitioner and others with conspiracy to commit carjacking in violation of 18 U.S.C. 371 and 2119(3). Superseding Indictment 2. The charge specifically alleged that petitioner and others had engaged in the conspiracy with intent to cause death and serious bodily injury and that the carjacking conspiracy had "resulted in [Andrades-Tellería's] death." Ibid. In addition, the charge listed overt acts in furtherance of the carjacking conspiracy establishing that members of the conspiracy inflicted injury and death. These included allegations that particular co-conspirators "caused the death of Elis Manuel Andrades-Tellería," discussed how to dispose of his body, and left the body on a secluded road. Id. at 7-8.[2]

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[1] The additional counts charged other participants in the conspiracy with carjacking, in violation of 18 U.S.C. 2119(3) and 2 (Count 2); using, carrying, and brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2 (Count 3); accessory after the fact in violation of 18 U.S.C. 3 and 2 (Count 4); false statements in violation of 18 U.S.C. 1001 (Count 7); and being a felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (Count 8). Superseding Indictment 8, 13-14, 22-23.

[2] The superseding indictment also discussed the conspiracy's infliction of injury and death on Andrades-Tellería in counts and special findings charging other defendants. Superseding Indictment 9, 11 (alleging that co-conspirators "intentionally and specifically engaged in an act of violence" toward Andrades-Tellería that caused Andrades-Tellería's death); id. at 10, 12 (alleging that co-conspirators "intentionally inflicted serious

Similarly, the charge alleged that it was part of the manner and means of the conspiracy for petitioner and co-conspirators to dispose of the victim's body in a secluded location to delay detection of the crime. Id. at 2, 4.

Two additional counts charged civil-rights violations. Count 5 charged petitioner and others with conspiring to deprive Andrades-Tellería of civil rights, in violation of 18 U.S.C. 241, through the conduct of the carjacking conspiracy. Superseding Indictment 14-21. And Count 6 charged petitioner and others with depriving Andrades-Tellería of his civil rights under color of law, in violation of 18 U.S.C. 242 and 2. Superseding Indictment 21-22. The sections dedicated to these counts made clear that the charges arose from the same conduct described in the carjacking count. But they did not explicitly discuss Andrades-Tellería's death, id. at 15-22, as relevant to the statutory maximum for both offenses, see 18 U.S.C. 241 (increasing maximum sentence from ten years of imprisonment to life imprisonment or a sentence of death, when death results); 18 U.S.C. 242 (increasing maximum sentence from not more than one year of imprisonment to life imprisonment or a sentence of death, when death results); see also Pet. App. A15. Nor did Count 6 discuss bodily injury to Andrades-Tellería,

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bodily injury that resulted in the death of the victim, Elis Manuel Andrades Telleria").

as relevant to the statutory maximum for that charge. Superseding Indictment 21-22; see 18 U.S.C. 242 (increasing maximum sentence from one year to ten years of imprisonment if "bodily injury results from the acts committed in violation of this [S]ection").

b. Approximately six weeks before trial, the government submitted to the district court a proposed plea agreement. Under the proposed agreement, petitioner would plead guilty to depriving Andrades-Tellería of civil rights under color of law as charged in Count 6, and the remaining charges would be dismissed. D. Ct. Doc. 510-1, at 1-2, 5 (June 2, 2011) (proposed plea agreement); see D. Ct. Doc. 544, at 1 (June 28, 2011). The proposed plea agreement stated that the maximum applicable penalty for Count 6 was life imprisonment -- the statutory maximum applicable when death results from the crime. D. Ct. Doc. 510-1, at 2; see 18 U.S.C. 242; Pet. App. A15.

Two weeks after submitting the proposed plea agreement, the government informed the district court that it was withdrawing its plea offer based on the discovery of additional evidence against petitioner. D. Ct. Doc. 542, at 2 (June 24, 2011). Specifically, prosecutors had learned that petitioner had "authorized/approved/ ordered the killing of the victim." Id. at 4. Although petitioner had not changed his plea, he requested that the court order specific performance of the plea agreement. 794 F. Supp. 2d at 354. Following briefing, the court denied petitioner's motion

for specific performance. Ibid. The court noted that the plea agreement did not contain bilateral promises, but instead was a unilateral offer from the government. Ibid. It explained that "until [petitioner] actually perform[ed] by entering his change of plea and the Court accepts such plea, either party, including the government, is free to withdraw from the plea agreement." Ibid. Here, the court found, petitioner had not changed his plea or otherwise detrimentally relied on the plea agreement. Id. at 355. Accordingly, the court held, he was not entitled to specific performance of the agreement. Ibid.

c. Petitioner and two of his co-conspirators proceeded to trial, at which there was no dispute that Andrades-Tellería's death resulted from the charged conspiracies. Pet. App. A20. At the close of trial, the district court instructed the jury on the various charges. Without objection, the court's instructions treated the superseding indictment as having charged that death resulted from the civil-rights offenses. On each of those counts, the court instructed jurors that if they found petitioner guilty, they should then determine if Andrades-Tellería's death resulted from petitioner's participation in the offense. D. Ct. Doc. 727, at 59-61 (Sept. 14, 2011); see Pet. App. A18-A20. The court's verdict sheet also included special interrogatories concerning whether Andrades-Tellería's death resulted from petitioner's role in each civil-rights offense, D. Ct. Doc. 729, at 3-7 (Sept. 19,

2011), again without objection from petitioner, Pet. App. A20. In addition, when charging the jury on Count 6, the court treated causing bodily injury as an element of the substantive civil-rights offense, instructing the jury that it must find bodily injury to return a conviction. D. Ct. Doc. 727, at 50.

The jury found petitioner guilty of conspiring to deprive Andrades-Tellería of civil rights, resulting in death, and it made the special finding that Andrades-Tellería's death was "proximately, naturally, and foreseeably caused by" petitioner's offense. Pet. App. A4; see D. Ct. Doc. 729, at 4-5. The jury also found petitioner guilty of carjacking conspiracy and of depriving Andrades-Tellería of civil rights in violation of Section 242, under instructions that required jurors to find bodily injury in order to convict. Pet. App. A4; D. Ct. Doc. 729, at 2, 6-7; see D. Ct. Doc. 727, at 50. The jury did not find, however, that Andrades-Tellería's death was "proximately, naturally, and foreseeably caused by" that crime. Pet. App. A4; D. Ct. Doc. 729, at 6-7.

d. After the verdict, petitioner for the first time contended that he could not be convicted of conspiring to deprive Andrades-Tellería of civil rights with death resulting, or depriving Andrades-Tellería of civil rights under color of law with bodily injury resulting, on the ground that the superseding indictment had not alleged these aggravating factors. Pet. App.

A14; D. Ct. Doc. 818, at 2-3 (May 2, 2012); D. Ct. Doc. 839, at 2 (June 5, 2012).

The district court rejected that claim. 865 F. Supp. 2d. at 203-204. It noted that, under United States v. Cotton, 535 U.S. 625 (2002), any fact other than a prior conviction that increases the penalty for a crime beyond the otherwise applicable statutory maximum must be charged in the indictment. 865 F. Supp. 2d at 202-203. But the court reasoned that the indictment adequately alleged that death resulted and bodily injury resulted, providing notice of the relevant enhanced penalties under Sections 241 and 242. Id. at 203. The court noted, in particular, that the superseding indictment charged petitioner and others with conspiring to take Andrades-Tellería's car through force and violence, which resulted in the victim's death. Ibid. And while the indictment did "not include specific language regarding * * * resulting death in the sections describing the Civil Rights Violations Counts," the court wrote, "the indictment as a whole clearly put [petitioner] on notice that he was being charged with crimes where death resulted." Ibid. The court further noted that "the facts triggering the enhanced penalty * * * were treated as elements of the offense during trial and submitted to the jury for their consideration," ibid., and that the evidence that petitioner had participated in the crimes from which death resulted had been

"'overwhelming' and 'essentially uncontroverted,'" id. at 203-204 (quoting Cotton, 535 U.S. at 633).

The district court sentenced petitioner to life imprisonment for conspiring to deprive Andrades-Tellería of civil rights with death resulting. Pet. App. A4. It imposed a concurrent five-year sentence for conspiracy to commit carjacking and a concurrent ten-year sentence for depriving Andrades-Tellería of civil rights under color of law -- the statutory maximum sentence for that crime when bodily injury results. 8/9/12 Tr. 20-22.

3. The court of appeals affirmed. Pet. App. A1-A31. As relevant here, applying plain-error review, the court first rejected petitioner's claim that his sentences must be vacated because the superseding indictment did not adequately specify the death and bodily-injury aggravating factors for the civil-rights offenses. See id. at A14-A21. The court explained that because the statutory maximum for each of the civil-rights offenses was increased because of those aggravating factors, Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), required that the factors be charged in the indictment. Pet. App. A15. The court concluded that the superseding indictment failed to do so, because the paragraphs devoted to the civil-rights charges did not discuss death or bodily injury. Id. at A16-A17. Accordingly, the court concluded that the district court had instructed the jury on crimes not properly set out in the indictment -- an error that it

classified as a form of "constructive amendment" of the indictment. Id. at A17.

The court of appeals concluded that petitioner was not entitled to relief based on that error, however, because he could not satisfy the plain-error standard applicable to forfeited claims. Pet. App. A19-A21. Petitioner's claim, the court explained, was reviewed only under the plain-error standard because petitioner did not raise the claim at trial. Id. at A19-A20. And while the court concluded that the error in petitioner's case was plain, the court found that petitioner could not show he was prejudiced by the district court's actions, as required for plain-error relief. Id. at A20-A21. The court of appeals noted that petitioner had not claimed surprise or prejudice in the preparation of his defense from the indictment's failure to allege the death or bodily-injury aggravating factors in its civil-rights-related sections. Id. at A20. Further, the court found that "the record [wa]s clear that Andrades-Tellería's death indisputably resulted from the conspiracy charged." Ibid. Finally, the court found no reasonable probability of juror confusion -- petitioner's sole "very limited prejudice argument" -- because the jury instructions and verdict forms in petitioner's case were not confusing or ambiguous. Id. at A21. Accordingly, the court held that petitioner was not entitled to relief under a plain-error standard. Ibid.

The court of appeals also rejected petitioner's claim that he was entitled to reversal of his carjacking-conspiracy conviction. Pet. App. A24-A25 & n.8. Petitioner contended that he was entitled to reversal because the jury instructions on that count had not required the jury to find that Andrades-Tellería's death resulted from the carjacking conspiracy, even though the indictment had alleged that petitioner conspired to commit carjacking, with death resulting. Id. at A24. The court explained that because petitioner had not raised that claim at trial, it was reviewed only for plain error. Ibid. The court found no reversible plain error, emphasizing that petitioner had not shown -- or even alleged -- that he was prejudiced by the error at issue. Id. at A24-A25.

Next, the court of appeals held that the government had not violated petitioner's rights when it withdrew a plea offer to petitioner after discovering new evidence. Pet. App. A25-A29. The court explained that, under its precedents, petitioner had no constitutional or contractual right to plead guilty pursuant to an offer that had been withdrawn before petitioner changed his plea or otherwise detrimentally relied on the offer. Id. at A26-A28. The court noted that this holding was consistent with the holdings of other circuits, id. at A28, and that petitioner had "point[ed] to no case" supporting a contrary view, id. at A29. In light of "the absence of any detrimental reliance at all" in petitioner's

case, the court found no error in the district court's conclusion that the government could withdraw its plea offer. Ibid.

Finally, the court of appeals rejected petitioner's claim that he was entitled to reversal of his civil-rights conspiracy conviction based on purportedly inconsistent verdicts. Pet. App. A29-A30. Petitioner asserted that reversal of that conviction was warranted because, while jurors had found that death resulted from petitioner's participation in a conspiracy to deprive Andrades-Tellería of civil rights, in connection with Count 5 of the superseding indictment, jurors had not found that death resulted from petitioner's participation in the substantive offense of depriving Andrades-Tellería of civil rights under color of law, as charged in Count 6. Id. at A29. The court explained, however, that even if petitioner were correct to claim these verdicts were inconsistent, "inconsistent jury verdicts on multiple counts are not grounds for reversing a conviction." Id. at A30 (citing United States v. Powell, 469 U.S. 57, 68-69 (1984)).

ARGUMENT

Petitioner renews (1) a forfeited claim that he was erroneously convicted of aggravated offenses not properly charged in the superseding indictment (Pet. 8-17, 19-23); (2) a forfeited claim of error in jury instructions concerning carjacking conspiracy (Pet. 17-18); (3) a claim based on inconsistent jury verdicts (Pet. 18-19); and (4) a claim that he was entitled to

specific performance of a withdrawn plea offer (Pet. 23-26). The court of appeals correctly rejected each of these claims. Further review is unwarranted.

1. a. Petitioner first seeks (Pet. 8-17, 19-23) review of his claim that his convictions for civil-rights conspiracy resulting in death and for deprivation of civil rights resulting in bodily injury should be reversed because the relevant aggravating factors were not properly charged in the superseding indictment. The court of appeals correctly rejected that claim. A defendant who fails to timely challenge an indictment's omission of a fact necessary to support the sentence can obtain reversal only if he satisfies the requirements of plain-error review. See United States v. Cotton, 535 U.S. 625, 631-633 (2002) (applying plain-error review to claim that indictment failed to allege penalty-enhancing fact); cf. Johnson v. United States, 520 U.S. 461, 465-470 (1997) (applying plain-error review where court failed to submit element of charged offense to petit jury). To obtain relief under that standard, a defendant must show (1) "an error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected the appellant's substantial rights," and (4) that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation and internal quotation marks omitted).

Petitioner cannot make any of the four required showings. Petitioner cannot show error, because the indictment adequately alleged the relevant aggravating factors, when it is construed in the manner appropriate for a challenge brought only after trial. While an indictment must set out any aggravating factors that increase the maximum possible sentence, see Cotton, 535 U.S. at 627, an indictment challenged only after a jury verdict must be read with maximum liberality in favor of sufficiency, see, e.g., United States v. Nkansah, 699 F.3d 743, 752 (2d Cir. 2012); United States v. Schaffer, 586 F.3d 414, 421 (6th Cir. 2009), cert. denied, 559 U.S. 1021 (2010); United States v. Gama-Bastidas, 222 F.3d 779, 786 (10th Cir. 2000); United States v. Lucas, 932 F.2d 1210, 1218-1219 (8th Cir.), cert. denied, 502 U.S. 869, 502 U.S. 929, 502 U.S. 949, and 502 U.S. 991 (1991), and 502 U.S. 1100 (1992); Finn v. United States, 256 F.2d 304, 307-308 (4th Cir. 1958).

"Under this liberal review," the court undertakes "a practical, non-technical reading of the indictment as a whole, and an indictment will be held sufficient unless no reasonable construction of the indictment would charge the offense for which the defendant has been convicted." United States v. Cluck, 143 F.3d 174, 178 (5th Cir. 1998) (citation and internal quotation marks omitted), cert. denied, 525 U.S. 1073 (1999). "[I]t is only required that the necessary facts appear in any form or by fair

construction can be found within the terms of the indictment." United States v. James, 980 F.2d 1314, 1317 (9th Cir. 1992) (citation and internal quotation marks omitted), cert. denied, 510 U.S. 838 (1993). An indictment is sufficient if the facts alleged "warrant an inference that the [grand] jury found probable cause to support all the necessary elements of the charge," even if they are "inferred from other allegations in the indictment." United States v. Seher, 562 F.3d 1344, 1356 (11th Cir. 2009) (citations omitted).

Petitioner cannot show indictment error -- much less plain error -- under that standard, because when read liberally, the superseding indictment provided fair notice that death and bodily injury resulted from petitioner's participation in the charged conduct. Although the sections of the superseding indictment devoted to the civil-rights counts did not allege that death and bodily injury had resulted, the carjacking-conspiracy count based on the same conduct alleged that the co-conspirators acted with force, violence, and intent to cause death and serious bodily harm, and that the co-conspirators had in fact caused Andrades-Tellería's death. Superseding Indictment 2-8, 14-22; see 865 F. Supp. 2d at 203 (noting that while "the indictment does not include specific language regarding * * * resulting death in the sections describing the Civil Rights Violations Counts * * *, the indictment as a whole clearly puts [petitioner] on notice that

he was being charged with crimes where death resulted"). The allegations that death resulted from the charged civil-rights offenses can thus "by fair construction," "in any form * * * be found within the terms of the indictment." James, 980 F.2d at 1317 (emphases omitted).[3] And because death by violent force is not possible without injury, the indictment by fair construction alleges the aggravating factor of bodily injury as well. Further, even were the indictment deficient, petitioner could not show that the error was plain, i.e., clear or obvious, because it is at least reasonably debatable that the indictment as a whole put petitioner on notice of the relevant aggravating factors. See Marcus, 560 U.S. at 262 (noting that, to be plain, error must be "clear or obvious, rather than subject to reasonable dispute") (citation omitted).

In any event, petitioner cannot make the additional showings needed to obtain relief under the plain-error standard. As the court of appeals found, petitioner has not shown that any error affected his substantial rights. Pet. App. A20-A21; see Marcus, 560 U.S. at 263 (noting that to show that an error affected

[3] Although the government relied on a different argument below, see Gov't C.A. Br. 21-23 (asserting that indictment alleged all necessary facts because indictment was not required to allege that death resulted), it is entitled to defend the judgment on the alternative ground developed in the text, see Schiro v. Farley, 510 U.S. 222, 228-229 (1994).

substantial rights, defendant must ordinarily show "that the error affected the outcome of the district court proceedings") (citation and internal quotation marks omitted). The court of appeals correctly held that petitioner failed to make that showing, because "death clearly resulted from the charged acts"; petitioner claimed no surprise or other harm to his defense from the asserted omissions; and petitioner's sole claim of prejudice, that the jury's instructions posed a risk of confusion, lacked merit. Pet. App. A20; see id. at A20-A21.

Finally, petitioner cannot meet the requirement that the forfeited error have "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," Marcus, 560 U.S. at 262 (citation omitted), because a defendant cannot make that showing when the evidence establishing a fact omitted from the indictment was "overwhelming" and "essentially uncontroverted," Cotton, 535 U.S. at 633 (citation omitted); see Johnson, 520 U.S. at 469-470. This was such a case, because, as the court of appeals found, Andrades-Tellería's "death indisputably resulted from the conspiracy charged." Pet. App. A20; see 881 F. Supp. 2d at 261 (district court's findings that evidence of death resulting was "overwhelming" and "essentially uncontroverted") (citations omitted). Moreover, since the undisputed evidence on that point established that Andrades-Tellería's death resulted from strangulation, 7/28/11 Tr. 184-188;

8/15/11 Tr. 91-96, the evidence relevant to the bodily-injury factor was equally undisputed.

b. While petitioner argues that this Court should grant review in his case to address some variation in courts' approaches to the substantial-rights prong of plain-error analysis in cases involving indictment errors, petitioner's case would not be an appropriate vehicle for considering that variation. Most courts of appeals to consider the question now hold that a defendant may establish that an indictment error affected his substantial rights only by showing that the error affected the outcome of proceedings in his case. Pet. App. A20-A21; see United States v. Bohuchot, 625 F.3d 892, 899 (5th Cir. 2010); United States v. Brandao, 539 F.3d 44, 58 (1st Cir. 2008); United States v. Hugs, 384 F.3d 762, 768 (9th Cir. 2004), cert. denied, 544 U.S. 933 (2005); United States v. Remsza, 77 F.3d 1039, 1044 (7th Cir. 1996). The Third Circuit, however, employs a rebuttable presumption of prejudice with respect to at least some indictment errors. United States v. Syme, 276 F.3d 131, 154-156, cert. denied, 537 U.S. 1050 (2002); see United States v. McKee, 506 F.3d 225, 229-230 (2007). And while the Fourth Circuit has not considered plain-error review of indictment deficiencies since this Court's decision in Cotton, it previously suggested that it regarded some indictment errors as "structural defects" that "always 'affect[] substantial rights.'" United States v. Floresca, 38 F.3d 706, 712-713 (1994) (en banc);

see United States v. Whitfield, 695 F.3d 288, 309 (4th Cir. 2012) (relying on Floresca to conclude that constructive-amendment claims cannot be reviewed for harmless error), cert. denied, 133 S. Ct. 1461 (2013); cf. United States v. Higgs, 353 F.3d 281, 304-307 (4th Cir. 2003) (stating that failure of indictment to charge an element would be subject to harmless-error review), cert. denied, 543 U.S. 999 (2004).[4]

Petitioner's case would be an inappropriate vehicle for addressing any variation, however, because petitioner's failure to satisfy other plain-error requirements makes it unnecessary to reach the substantial-rights question. This Court has found it unnecessary to address the substantial-rights portion of plain-error analysis when defendants failed to show that an error seriously affected the fairness, integrity, or reputation of a

[4] Floresca further held, before this Court's decision in Cotton, that any violation of the Grand Jury Clause triggers reversal under the plain-error standard if the error is plain because, in addition to constituting structural error, such violations categorically affect the fairness, integrity, or public reputation of judicial proceedings. 38 F.3d at 712-714. That aspect of Floresca, however, cannot survive this Court's decision in Cotton, which established that the failure to present an element to the grand jury does not "seriously affect the fairness, integrity, or public reputation of judicial proceedings" when evidence as to that element was "overwhelming" and "essentially uncontroverted." Cotton, 535 U.S. at 632-633 (citation omitted). The Fourth Circuit has not reversed a conviction based on Floresca's approach to plain error since Cotton.

proceeding, as required for plain-error relief. See Cotton, 535 U.S. at 632-633 (declining to "resolve whether respondents satisfy [the substantial-rights] element of the plain-error inquiry, because even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings"); Johnson, 520 U.S. at 470 (same). That approach would apply in this case, because both courts below found no dispute that death resulted from the offense at issue. Pet. App. A20; 881 F. Supp. 2d at 261. That uncontroverted finding forecloses any claim that omission of the death and injury allegations from the indictment rendered proceedings fundamentally unfair. See Cotton, 535 U.S. at 633 (no fundamental unfairness when evidence about omitted fact was "'overwhelming, and 'essentially uncontroverted'") (citation omitted); cf. Johnson, 520 U.S. at 470. This case therefore presents no appropriate opportunity to consider the substantial-rights aspect of plain-error review.

Similarly, petitioner's case would be a poor vehicle to address any substantial-rights question because it can be resolved on the ground that petitioner cannot demonstrate error, let alone plain error, from the asserted omission. This Court has noted that it prefers not "to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." United States v. Resendiz-Ponce, 549 U.S. 102, 104 (2007) (quoting

Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Applying that principle in Resendiz-Ponce, this Court declined to resolve the harmless-error question on which it granted review, because it concluded (after requesting and receiving supplemental briefing) that the case could be resolved on the alternative ground that the indictment had been adequate. Ibid. The same alternative ground would be available in petitioner's case, because, as noted above, compelling arguments exist that the indictment here was adequate under the liberal standards applicable to post-trial challenges. This alternative ground enhances the likelihood that, as in Resendiz-Ponce, if this Court granted review, it would resolve the case without reaching the question on which a division among courts was asserted.

2. Petitioner next contends (Pet. 17-18) that he is entitled to reversal of his conviction for conspiracy to commit carjacking because the district court's instructions to the jury did not require the jury to find, as charged in the indictment, that death resulted from the carjacking conspiracy. The court of appeals correctly rejected that forfeited claim. Pet. App. A24. As that court explained, petitioner was not entitled to reversal under a plain-error standard because he did not establish -- or even allege -- that he suffered prejudice from the instructional error he asserted. Id. at A23-A24. The petition offers no

argument that this analysis was incorrect, for it neither asserts prejudice nor argues that application of plain-error review was erroneous. In any event, the court's fact-bound determinations on prejudice and forfeiture in this case would not warrant this Court's review.

3. Petitioner next argues (Pet. 18-19) that his Section 241 conviction should be vacated because the jury rendered inconsistent verdicts on whether death resulted from petitioner's participation in the civil-rights offenses. The court of appeals correctly rejected that claim. Because the jury reached differing results on crimes with different elements, the jury's verdicts are not inconsistent. See, e.g., United States v. Cortés-Cabán, 691 F.3d 1, 15-16 (1st Cir. 2012) ("[V]erdicts are not inconsistent if the elements of the two charged counts are not identical") (citation omitted), cert. denied, 133 S. Ct. 2765 (2013); see also United States v. Southwest Bus Sales, Inc., 20 F.3d 1449, 1458 (8th Cir. 1994); United States v. Stozek, 783 F.2d 891, 894 (9th Cir.), cert. denied, 479 U.S. 888 (1986); United States v. Guajardo, 508 F.2d 1093, 1095-1096 (5th Cir.) (per curiam), cert. dismissed, 423 U.S. 801, and cert. denied, 423 U.S. 847 (1975). And in any event, inconsistent jury verdicts are not a basis on which to set aside a conviction. United States v. Powell, 469 U.S. 57, 64-69 (1984); Dunn v. United States, 284 U.S. 390, 393 (1932). Indeed, this Court has "explicitly criticized appeals

courts which had announced exceptions to that rule, holding that Dunn should remain 'without exception.'" Pet. App. A30 (quoting Powell, 469 U.S. at 69). Petitioner cites no decision of this Court contravening that longstanding principle, nor does he identify any current disagreement concerning its application in the courts of appeals. Accordingly, no further review is warranted.

4. Finally, petitioner argues (Pet. 23-26) that the district court erred in denying his motion to compel performance of a plea agreement that the government withdrew before petitioner changed his plea or otherwise detrimentally relied on the offer. The courts below correctly rejected that claim. This Court has held that a defendant has no constitutional right to enforcement of a plea offer before entry of a guilty plea. Mabry v. Johnson, 467 U.S. 504, 507-508 (1984), disapproved of on other grounds, Puckett v. United States, 556 U.S. 129, 138 n.1 (2009). Similarly, courts applying contract principles have adhered to "the general rule that the court must have accepted a guilty plea before the parties may be bound to an associated plea agreement." United States v. Norris, 486 F.3d 1045, 1051 (8th Cir. 2007) (en banc), cert. denied, 552 U.S. 1105 (2008). Under these principles, petitioner was not entitled to compel performance of the government's plea offer because he had not changed his plea or otherwise detrimentally relied on the offer before it was

withdrawn. And he identifies no legal authority that supports his claim to the enforcement of a plea offer in the absence of such reliance. Accordingly, this claim does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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