Capital Defense Journal

Volume 16 | Issue 2 Article 10

Spring 3-1-2004

United States v. Higgs 353 F.3d 281 (4th Cir. 2003)

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Recommended Citation

United States v. Higgs 353 F.3d 281 (4th Cir. 2003), 16 Cap. DEF J. 499 (2004).
Available at: https://scholarlycommons.law.wlu.edu/wlucdj/vol16/iss2/10

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United States v. Higgs
353 F.3d 281 (4th Cir. 2003)

I. Facts

On January 26, 1996, Dustin John Higgs ("Higgs"), Willie Mark Haynes ("Haynes"), and Victor Gloria picked up Tanji Jackson ("Jackson"), Tamika Black, and Mishann Chinn in Higgs's blue Mazda MPV van in Washington, D.C. and drove to Higgs's home in Laurel, Maryland. Once there, they drank alcohol, which they stopped to purchase en route, and listened to music. After midnight, Higgs and Jackson started to fight. They argued, and Jackson grabbed a knife from the kitchen. Although Haynes eventually convinced Jackson to relinquish the blade, the three women left the apartment in bitter spirits.[1]

As Jackson departed, she threatened the men with the prospect that her friends would exact vengeance, either by robbing or assaulting Higgs and his two friends. Higgs, who knew Jackson, lent some credence to the threat. He became more disturbed when, through his apartment window, he saw her writing down the license plate number of his van. Higgs grabbed his coat and a .38-caliber handgun and left the apartment. Followed by his two friends, Higgs boarded the van and drove it to where the women were walking along the side of the road sometime after 3:30 a.m.. Haynes, per Higgs's instructions, got out of the van and convinced the three women to ride with them. Believing they were receiving a ride home, the three acquiesced. Rather than taking them back to Washington, D.C., however, Higgs drove them to Patuxent National Park. Higgs stopped the van in a secluded location, and when the women asked if they would be forced to walk home from the park, "Higgs responded, 'something like that.' "[2]

The three women exited the van, and Higgs gave the gun to Haynes. With the weapon hidden behind his back, Haynes left the van and shot each of the three women. The men drove away from the scene and threw the gun into the Anacostia River. They then proceeded to throw away all of the items in Higgs's apartment that the women may have touched that evening in hopes of eradicating any evidence that the female visitors had been in the apartment.[3]

After a lengthy investigation, the grand jury finally indicted Higgs on December 21, 1998, "for three counts each of first-degree premeditated murder, first-degree murder committed in the perpetration or attempted perpetration of

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1. United States v. Higgs, 353 F.3d 281, 289–90 (4th Cir. 2003). One possible reason for the meeting and falling out was that Higgs believed Jackson was "snitching" regarding an unrelated credit card crime. *Id.* at 292.

2. *Id.* at 290 (quoting J.A. 482).

3. *Id.*

a kidnapping, [and] kidnapping resulting in death."[4] The Government then filed its notice to seek the death penalty on all nine counts.[5] Subsequently, the grand jury returned a superseding indictment and the Government amended its earlier death notice.[6] The petit jury found Higgs guilty on all nine charges and found that each charge warranted a death sentence.[7] The judge sentenced Higgs to nine death sentences.[8] On appeal, Higgs argued, inter alia, that the indictment was insufficient to support his capital conviction because it did not allege the aggravating and intent factors required by statute for capital cases.[9]

II. Holding

The United States Court of Appeals for the Fourth Circuit conducted a de novo examination of the sufficiency of the indictment.[10] The court held that the indictment must allege at least one statutory aggravating and intent factor but need not allege nonstatutory aggravating factors.[11] The court found that the intent factors were clearly alleged in the indictment.[12] Additionally, the court decided that the indictment was sufficient for the six murder charges because it alleged that the victim died in the course of another crime, which is a statutory

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4. *Id.* at 291, 294 (internal citations omitted); *see* 18 U.S.C. § 1111(a) (2000) (stating that premeditated murder is murder in the first degree, as is murder committed in the course of a kidnapping or an attempted kidnapping); 18 U.S.C. § 1201(a) (2000) (providing that a kidnapping which results in the death of the victim is a capital offense).

5. *Higgs*, 353 F.3d at 294; *see* 18 U.S.C. § 3593(a) (2000) (requiring the prosecution to give notice to a defendant when the prosecution believes death is the appropriate sentence and intends to seek it).

6. *Higgs*, 353 F.3d at 294.

7. *Id.* at 295.

8. *Id.*

9. *Id.*; *see* 18 U.S.C. § 3591(a)(2) (2000) (requiring that the sentencer find one of the enumerated intent factors before a defendant may be sentenced to death); 18 U.S.C. § 3592(c) (2000) (setting forth the aggravating factors that must be found by the jury or court to support a sentence of death). Higgs also challenged his sentence on a number of other grounds, including that by denying his motion to change venue, the district court subjected him to an unfair and partial jury, that the district court made various erroneous rulings during the guilt and sentencing phases of his trial, and that enhanced sentences were erroneously imposed on him for other firearm charges related to the murder and kidnapping charges. *Higgs*, 353 F.3d at 307, 309, 314, 333. The United States Court of Appeals for the Fourth Circuit declined to grant relief on any of these claims. *Id.* at 289.

10. *Higgs*, 353 F.3d at 295. In the Fourth Circuit, the appellate court reviews de novo a challenge to the sufficiency of the indictment. *Id.*; *see, e.g.*, United States v. Bolden, 325 F.3d 471, 486 (4th Cir. 2003) (stating that the Fourth Circuit will "review de novo a challenge to the validity of an indictment"); United States v. Loayza, 107 F.3d 257, 260 (4th Cir. 1997) (same).

11. *Higgs*, 353 F.3d at 298.

12. *Id.* at 299.

aggravator.[13] The court also found that all nine capital sentences were supported by the prior conviction aggravators.[14] Although the indictment did not allege that Higgs had prior convictions, the court found that the indictment did not need to allege those statutory aggravators.[15] Moreover, the court decided that even if the indictment was deficient, the error would still be harmless and not subject to reversal.[16]

III. Analysis

A. Whether the Indictment Must Allege the Intent Element and Statutory and Nonstatutory Aggravators

Higgs argued that the United States Supreme Court's holdings in *Apprendi v. New Jersey*[17] and *Ring v. Arizona*[18] mandated that any factor that must be found by a jury must also be in the indictment.[19] In *Apprendi* the Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[20] In *Ring*, the Court applied the *Apprendi* rationale to the aggravating factors necessary to increase a life sentence to a death sentence and found that they were the "functional equivalent of an element of a greater offense" and must be submitted to a jury and proven beyond a reasonable doubt.[21] However, in that case the Court did not consider whether the indictment needed also to allege the aggravating factors necessary to support a death sentence.[22] Nonetheless, the Court had previously stated that the facts that enhanced a sentence beyond the statutory maximum must be alleged in the indictment.[23]

The Fourth Circuit had little difficulty finding that the statutory aggravator and intent factor did enhance a defendant's sentence and therefore must be

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13. *Id.* at 301.

14. *Id.* at 300.

15. *Id.* at 302.

16. *Id.* at 307.

17. 530 U.S. 466 (2000).

18. 536 U.S. 584 (2002).

19. *Higgs*, 353 F.3d at 297; *see* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (declaring that facts that, if found, increase a sentence past the statutory maximum must be found by a jury beyond a reasonable doubt, apart from the fact of a prior conviction); Ring v. Arizona, 536 U.S. 584, 589 (2002) (extending *Apprendi* to include facts that, if found, would increase a sentence from life imprisonment to death).

20. *Apprendi*, 530 U.S. at 490.

21. *Ring*, 536 U.S. at 589, 609 (internal quotation marks omitted).

22. *Id.* at 597 n.4.

23. *See* United States v. Cotton, 535 U.S. 625, 627 (2002) (noting that *Apprendi* requires that facts that must be found by a jury must also be in the indictment).

included in the indictment.[24] To support a death sentence, the jury must find one of the intent factors set forth in 18 U.S.C. § 3591(a)(2) and one of the aggravating factors listed in 18 U.S.C. § 3592.[25] Following *Ring* and *Apprendi*, the Fourth Circuit concluded that the aggravating and intent factors acted as functional elements of the crimes charged because a defendant could only be eligible for the death sentence if both were proven.[26] Thus, the Fourth Circuit held that both must be contained in the indictments.[27]

In contrast, the Fourth Circuit decided that nonstatutory aggravators, which are aggravators not listed in § 3592 but are nonetheless considered during sentencing, need not be alleged in the indictment.[28] Rather than render a defendant death-eligible, nonstatutory aggravators merely help the factfinder select among different sentencing options.[29] Because proof of nonstatutory aggravators alone would not suffice to qualify the defendant for a death penalty, the court decided that they did not need to be specified in the indictment.[30]

B. Higgs's Indictment

1. Intent Factors

Before a court may impose a death sentence, the factfinder must find one or more of the intent factors contained in § 3592(a)(2).[31] Two such factors are "intentional acts to take a life and intentional acts of violence creating a grave risk of death."[32] The indictment alleged that Higgs murdered his victims "by shooting [them] with a firearm, willfully, deliberately, maliciously, and with premeditation, and in the perpetration of . . . kidnapping."[33] The court determined that the

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24. *Higgs*, 353 F.3d at 297–98.

25. 18 U.S.C. § 3591(a) (2000) (requiring that the jury find one of several listed intent factors to support a death sentence); 18 U.S.C. § 3592 (2000) (enumerating the aggravating factors); *see* 18 U.S.C. § 3593(e) (2000) (requiring that one of the aggravating factors be found before the judge or jury decides if death is the appropriate punishment); Jones v. United States, 527 U.S. 373, 376–77 (1999) (noting that before a death sentence may be imposed both the intent and statutory aggravating factors must be found).

26. *Higgs*, 353 F.3d at 298.

27. *Id.*

28. *Id.* at 299.

29. *Id.* at 298.

30. *Id.* at 299.

31. *Id.*; *see* 18 U.S.C. § 3591(a)(2) (2000) (stating that the defendant may be sentenced to death only if the prosecution proves one or more of the intent factors).

32. *Higgs*, 353 F.3d at 299; *see* 18 U.S.C. § 3591(a)(2) (2000) (setting forth the statutory intent factors).

33. *Higgs*, 353 F.3d at 299 (internal quotation marks omitted) (alterations in original).

language in the indictment clearly alleged the intent factors necessary to support a death sentence.[34]

2. *Statutory Aggravating Factors*

Ultimately, the petit jury in Higgs's trial found three aggravating factors listed in § 3592(c) for all nine capital counts: (1) multiple killings in one criminal event; (2) a prior conviction involving a firearm in a violent felony; and (3) a prior conviction for a "serious federal drug offense."[35] Additionally, the jury found that the six counts of first-degree murder occurred during another crime, kidnapping, another statutory aggravator.[36] Higgs argued that the indictment was defective for failing to allege each of the statutory aggravating factors that the jury found.[37] The court rejected this argument and noted that because only one statutory aggravator was necessary to support a death sentence, only one must be alleged in the indictment.[38] Therefore, the court concluded that if the one statutory aggravator contained in the indictment is also found by the petit jury, then no defect exists in the indictment with respect to the charge of a death-eligible offense.[39] Aggravating factors, statutory or otherwise, in excess of those charged in the indictment but found by the jury are merely "sentencing considerations."[40]

a. The "Multiple Killings" Aggravator

The Government argued that the indictment was not defective with respect to any of the nine charges because it alleged that multiple killings occurred in a sole criminal episode, which is a statutory aggravator.[41] This aggravator was not added to the statute until April of 1996, after the murders had already occurred.[42]

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34. *Id.*

35. *Id.* at 300; *see* 18 U.S.C. § 3592(c)(16) (2000) (listing multiple killings as an aggravating factor); § 3592(c)(2) (enumerating a prior conviction for a violent felony with a firearm as an aggravating factor); § 3592(c)(12) (stating that a prior conviction for a federal drug offense of a serious nature constitutes an aggravating circumstance).

36. *Higgs*, 353 F.3d at 300; *see* § 3592(c)(1) (stating that the aggravating element is satisfied if the murder occurred during the commission of another offense).

37. *Higgs*, 353 F.3d at 299.

38. *Id.*; *see* United States v. Jackson, 327 F.3d 273, 287 (4th Cir. 2003) (Niemeyer, J., concurring) (stating that if a death sentence depends on proof of an aggravated offense, then all elements of the offense and at least one aggravating factor must be in the indictment). For a complete discussion of *Jackson* see generally Meghan H. Morgan, Case Note, 16 CAP. DEF. J. 221 (2003) (analyzing United States v. Jackson, 327 F.3d 273 (4th Cir. 2003)).

39. *Higgs*, 353 F.3d at 299.

40. *Id.*

41. *Id.* at 300; *see* § 3592(c)(16) (stating that multiple killings committed during one criminal episode is an aggravating factor).

42. *Higgs*, 353 F.3d at 300.

The Ex Post Facto Clause of the Ninth Amendment generally prohibits the legislature from passing a law that would criminalize an act otherwise innocent when committed, increase the corresponding sentence to a crime subsequent to its commission, or deprive a defendant of a defense available when the act was committed.[43] The clause, however, does not ensure that a defendant will always be tried under the law as it existed at the time of the offense.[44] Nonetheless, the court held that finding that "multiple killings" was a statutory aggravator in Higgs's case would amount to a violation of the Ex Post Facto Clause because it "clearly 'increase[d] the punishment for criminal acts.'"[45] Therefore, the court found that although the indictment alleged "multiple killings," it would not support the death sentence because "multiple killings" was not a statutory aggravator, due to the Ex Post Facto Clause, and the indictment needed to allege one statutory aggravator to be sufficient.[46]

b. The "Other Crime" Aggravator

The court found that the indictment did satisfy the statutory aggravator requirement with respect to the six first-degree murder charges.[47] Under § 3592(c)(1), killing during one of certain enumerated crimes, or an attempt to commit such crimes, constitutes an aggravating factor.[48] The indictment in Higgs's case alleged that the murder was committed "in the perpetration of, and attempted perpetration of a felony, to wit, kidnapping."[49] Therefore, the court decided that the indictment clearly alleged a statutory aggravating factor for, and was not defective with respect to, the six murder counts.[50] However, the court did not find that the aggravating factor was sufficient to support the kidnapping death sentences because, even if it could have been used as an aggravating factor

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43. *Id.*; *see* U.S. CONST. art. I, § 9, cl. 3 (prohibiting Congress from passing an ex post facto law); Dobbert v. Florida, 432 U.S. 282, 292 (1977) (stating that a law that penalizes "as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed" violates the ex post facto clause (internal quotation marks omitted)).

44. *See Dobbert*, 432 U.S. at 292–93 (noting the limits of the Ex Post Facto Clause).

45. *Higgs*, 353 F.3d at 300–01 (quoting California Dep't of Corr. v. Morales, 514 U.S. 499, 504 (1995)). *Morales* concerned a state law; hence, the Supreme Court examined the law under U.S. CONST. art. I, § 10, which prohibits the states from passing ex post facto laws. *Compare* U.S. CONST. art. I, § 10 (forbidding the states from passing ex post facto laws), *with* U.S. CONST. art. I, § 9, cl. 3 (providing that Congress shall pass no ex post facto law).

46. *Higgs*, 353 F.3d at 301.

47. *Id.*

48. *Id.*; *see* 18 U.S.C. § 3592(c)(1) (2000) (stating that "[d]eath during the commission of another crime" is an aggravator).

49. *Higgs*, 353 F.3d at 301 (internal quotation marks omitted).

50. *Id.*

for the kidnappings, it was not submitted to the jury in connection with the kidnapping counts.[51]

c. Prior Conviction Aggravators

The Government argued that the indictment was not defective with respect to any of the nine charges because the jury relied on the prior conviction aggravators, which need not be alleged in the indictment, in choosing the death sentence.[52] In *Almendarez-Torres v. United States*,[53] the Supreme Court held that a sentence enhancement for a prior conviction was:

> [A] penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the Government to charge the factor that it mentions, an earlier conviction, in the indictment.[54]

Later, the Court bolstered its decision by noting that recidivism traditionally was a sentencing factor, not an element of a crime, and that there was less need for constitutional safeguards, such as a finding by a jury beyond a reasonable doubt, in expanding a sentence based on a prior conviction because that prior conviction was presumably obtained through attendant Constitutional safeguards in the first trial.[55] Therefore, the Fourth Circuit decided that prior convictions clearly constituted an exception to the requirement that indictments allege all factors that could enhance a sentence past the statutory maximum.[56] Higgs acknowledged the exception, but argued that *Ring* called the continuing vigor of *Almendarez-Torres* into doubt.[57] The Fourth Circuit noted that *Ring* specifically left that question untouched and declined to rule contrary to *Almendarez-Torres*.[58] Therefore, the Fourth Circuit upheld the sufficiency of the indictments with respect to all nine charges because the statutory aggravators regarding previous convictions, relied on by the petit jury, did not need to be alleged in the indictments.[59]

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51. *Id.*

52. *Id.*; *see* 18 U.S.C. § 3592(c)(2), (12) (2000) (stating that prior convictions for serious drug offenses and violent felonies involving firearms are statutory aggravators).

53. 523 U.S. 224 (1998).

54. Almendarez-Torres v. United States, 523 U.S. 224, 226–27 (1998).

55. *Higgs*, 353 F.3d at 302–03 (quoting *Jones*, 526 U.S. at 248).

56. *Id.* at 304.

57. *Id.* at 303.

58. *Id.*; *see Ring*, 536 U.S. at 597 n.4 (noting that the petitioner's death sentence was not supported by a finding of prior convictions and therefore the continuing validity of *Almendarez-Torres* was not at stake in the case).

59. *Higgs*, 353 F.3d at 304.

C. *Harmless-error*

Additionally, the court found that even if the indictment was defective, Higgs would still not be entitled to a reversal because the error would have been harmless.[60] Under applicable Supreme Court precedent, error is harmless if " 'it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' "[61] Indeed, " ' most constitutional errors can be harmless.' "[62] The Fourth Circuit noted that the primary function of an indictment is to inform the defendant of the charges and provide the defendant with enough information to determine if double jeopardy has attached.[63] The Court found that, even if it was error not to include the aggravators in the indictment, such an error would be harmless because the indictment charged the defendant under statutes that carried a maximum penalty of death and the subsequent death notice actually alleged each aggravating factor the Government sought to prove at trial.[64] Therefore, Higgs was actually given a fair apprisal of the charges he faced, and if any elements were omitted from the indictment, such error could not have contributed to the verdict.[65] Moreover, because the petit jury later found the aggravators beyond a reasonable doubt, "Higgs was not prejudiced by the lack of an independent judgment of the grand jury."[66] Finally, the court stated that any error would have been harmless because the evidence of Higgs's prior convictions was not contested at trial.[67] Therefore, the Fourth Circuit found that even if it was error to omit the aggravators from the indictment, such error was "harmless beyond a reasonable doubt."[68]

Higgs argued that review for harmless-error was inappropriate because the failure to allege aggravators in the indictment was a structural error that required immediate reversal and was thus not subject to harmless-error review.[69] The Supreme Court has found structural error only in the limited set of cases in

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60. *Id.*

61. *Id.* (quoting Neder v. United States, 527 U.S. 1, 15 (1999)).

62. *Id.* (quoting *Neder*, 527 U.S. at 8).

63. *Id.* at 306; *see* Russell v. United States, 369 U.S. 749, 763–64 (1962) (noting that the Court has repeatedly emphasized the importance of the indictment in apprising a defendant of the nature of the charges and whether a defense of double jeopardy is available).

64. *Higgs*, 353 F.3d at 306–07.

65. *Id.*

66. *Id.* at 307; *see* United States v. Mechanik, 475 U.S. 66, 70 (1986) (finding that improprieties affecting a grand jury's charging decision were harmless in light of subsequent conviction).

67. *Higgs*, 353 F.3d at 307; *see Neder*, 527 U.S. at 16 (holding that omission of an element in the indictment was harmless when the evidence supporting the element at trial was great and the defendant did not try to contest it).

68. *Higgs*, 353 F.3d at 307.

69. *Id.* at 304; *see Neder*, 527 U.S. at 8–9 (stating that structural errors are presumed to affect the defendant's rights because they destroy the procedural safeguards that insure a fundamentally fair trial).

which the impropriety impacted the entire framework of the trial itself and was not just an error in process.[70] For example, the Court has held that allowing proof below the standard of reasonable doubt, entirely depriving a defendant of counsel or the right to represent herself, judicial bias, and conducting trials closed to the public are all structural error.[71]

Higgs pointed to two Supreme Court cases in which the Court found errors affecting the indictment to be structural.[72] However, the Fourth Circuit noted that in other cases the Court declined to find that indictment errors constituted structural errors.[73] Given the Court's overall reluctance to expand the category of structural error, the Fourth Circuit declined to adopt a categorical rule that all indictment error is structural.[74] Moreover, the Fourth Circuit was persuaded by the reasoning of the United States Court of Appeals for the Tenth Circuit in *United States v. Prentiss*.[75] In *Prentiss*, the Tenth Circuit noted that the Supreme Court held that failure to instruct the jury on each element of the offense was subject to harmless-error analysis.[76] The Tenth Circuit reasoned that because the right to have a petit jury decide whether each element of the offense was proven beyond a reasonable doubt was as important as the right to have a grand jury review an indictment, " '[i]f denial of the former right is subject to harmless error analysis, we believe denial of the latter right must be as well.' "[77] Therefore, the Fourth Circuit determined that failure to allege a statutory aggravator in the indictment was not a structural error, but was instead subject to harmless-error review.[78]

IV. Application in Virginia

The Fourth Circuit's holding in *Higgs* creates a daunting hurdle for a federal appellant seeking reversal in the Fourth Circuit on the ground that the indictment

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70. *Higgs*, 353 F.3d at 304; *see Neder*, 527 U.S. at 8 (discussing the limited circumstances in which the Court would find an error structural).

71. *Higgs*, 353 F.3d at 304–05.

72. *Id.* at 305; *see* Vasquez v. Hillery, 474 U.S. 254, 260–64 (1986) (finding that racial discrimination in the composition of a grand jury is structural error); Ballard v. United States, 329 U.S. 187, 195–96 (1946) (stating that sex discrimination in the composition of a grand jury is structural error).

73. *Higgs*, 353 F.3d at 305; *see Mechanik*, 475 U.S. at 70–71 (finding that the simultaneous presence of two witnesses in the grand jury room is not structural error).

74. *Higgs*, 353 F.3d at 305–06.

75. *Id.* at 306; *see* United States v. Prentiss, 256 F.3d 971, 984 (10th Cir. 2001) (finding that failure to allege an element of a crime in an indictment is subject to harmless-error review).

76. *Higgs*, 353 F.3d at 306 (citing *Prentiss*, 256 F.3d at 984); *see Neder*, 527 U.S. at 9 (stating that jury instructions that fail to instruct on each element of an offense are not necessarily structural error).

77. *Higgs*, 353 F.3d at 306 (quoting *Prentiss*, 256 F.3d at 984).

78. *Id.*

failed to allege a statutory aggravating or intent element. The court conceded that *Ring* and *Apprendi* require that the indictment allege a statutory aggravating and intent factor.[79] However, based on the court's reasoning, an appellant is unlikely to ever find relief from the court on such a claim. First, the court decided that only one statutory aggravator and one intent factor need to be alleged in the indictment and found by the jury.[80] Moreover, because of *Almendarez-Torres*, if the statutory aggravator is a prior conviction, then it does not need to be alleged in the indictment at all.[81] Finally, even if the statutory aggravator or intent element is not alleged in the indictment, the appellant will still be entitled to relief only if the error was not harmless.[82]

Assuming the Government was to allege only one aggravating factor in the indictment, and the aggravators based on prior convictions were not operative in the case, the Government would assume a substantial risk under the Fourth Circuit's analysis. The Fourth Circuit explicitly stated:

> [T]hose intent and aggravating factors which the government intends to rely upon to render a defendant death-eligible under the FDPA are the functional equivalent of elements of the capital offenses and must be charged in the indictment, submitted to the petit jury, and proved beyond a reasonable doubt.[83]

This implies that the statutory aggravator charged in the indictment must also be the one found by the jury beyond a reasonable doubt. If the Government alleged only one aggravator in the indictment, but proved a different one to the jury, then neither aggravator would fulfill the Fourth Circuit's requirement, and the indictment would presumably be defective because the aggravating element would not be satisfied by any one aggravator. Therefore, in such a circumstance, defense counsel would be well advised to focus their efforts on attacking the aggravator or aggravators alleged in the indictment during the sentencing phase. If the jury does not find them, then no aggravating element will have been contained in the indictment and found by the jury beyond a reasonable doubt, and the indictment will be defective under *Higgs*.

If the defendant also has a prior conviction, then the strategy outlined above will be ineffective after *Higgs*. *Higgs* relied on the fact that under *Almendarez-Torres* the prior conviction was not an element of an enhanced crime, but was rather a sentence enhancer and therefore did not need to be alleged in the indictment.[84] To the extent that *Almendarez-Torres* was good law, the Fourth Circuit remained

79. *Id.* at 297.
80. *Id.* at 298.
81. *Id.* at 302.
82. *Id.* at 304.
83. *Higgs*, 353 F.3d at 298.
84. *Id.* at 301–04.

on solid ground; after all, in that case the Supreme Court "was squarely presented with the question of whether" an indictment needed to allege the existence of prior convictions when the convictions were used to enhance the penalty.[85] However, the Supreme Court has recently impinged that holding's vitality. In *Apprendi* the Court stated, "As we made plain . . . last Term, *Almendarez-Torres* represents at best an exceptional departure from the historic practice" of finding that sentencing schemes which prohibit the jury from deciding facts which enhance a defendant's sentence raise serious constitutional concerns.[86] The Court later acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided."[87] In his concurrence in *Ring*, Justice Scalia re-affirmed his dissent in *Almendarez-Torres* and stated his belief that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt."[88] By characterizing the *Almendarez-Torres* rule as an exception to the Court's decisions in *Ring* and *Apprendi*, the Fourth Circuit implicitly acknowledged that its holding is contrary to those results.[89] Although *Almendarez-Torres* remains good law, it appears that the Court is not entirely satisfied with the exception that it carves in the more recent trend in their jurisprudence that all factors that may enhance a sentence past a statutory maximum must be found by the jury. If the *Almendarez-Torres* exception should be retired, then the Fourth Circuit would no longer have support for its ruling that prior convictions are statutory aggravators that do not need to be alleged in the indictment.

Even if a federal appellant were to convince the Fourth Circuit that an indictment was defective for failing to allege statutory aggravating or intent factors, the appellant would still need to prove that the error was not harmless.[90] At least one circuit has taken the view that failure to allege elements of a crime in an indictment is structural error.[91] However, many more circuits have taken the opposite view.[92] In light of the Supreme Court's recent application of the

85. *Id.* at 302; *see Almendarez-Torres*, 523 U.S. at 226.

86. *Apprendi*, 530 U.S. at 486–87.

87. *Id.* at 489.

88. *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

89. *Higgs*, 353 F.3d at 303–04.

90. *Id.* at 304.

91. *See* United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999) (finding that if objected to before trial, an indictment's failure to allege one element of the crime is not subject to harmless-error review).

92. *See, e.g.*, United States v. Allen, No. 98-2549, 2004 WL 188080, at *6 (8th Cir. Feb. 2, 2004) (declining to find failure to allege aggravating factors in an indictment structural error); United States v. Suarez, 313 F.3d 1287, 1293–94 (11th Cir. 2002) (applying harmless-error review to a claim that an indictment failed to allege factors that enhanced the sentence in violation of *Apprendi*); United States v. Adkins, 274 F.3d 444, 454 (7th Cir. 2001) (reaffirming that *Apprendi* errors in the

plain error test to such a claim in *Cotton*, the latter is probably the more viable view.[93] Recently, the Supreme Court strengthened this conclusion in the capital context by holding that a state court's application of harmless-error review to a defective indictment was not a sufficient ground to provide habeas relief to the petitioner.[94]

Nonetheless, other petitioners may have more success with showing that failure to allege an aggravating factor in the indictment was not harmless.[95] In *Higgs*, the court based its finding that the error was harmless, in part, on the ground that the aggravating factor not contained in the indictment was found by the jury and went uncontroverted at trial.[96] However, by vigorously contesting each aggravating factor during the sentencing phase, again presuming the prior conviction aggravator is not applicable to the proceedings, an appellant in the Fourth Circuit may be able to show that the error was not harmless. The Fourth Circuit also found that the error was not harmless because the death notice and the indictment's references to the statutes Higgs was charged under put Higgs on sufficient notice of the charges he faced.[97] Indeed, the court stated that the indictment was merely "defective because it failed to allege those essential elements of the offenses, not because it charged an offense different from the one for which he was ultimately convicted and sentenced."[98]

However, Justice Scalia recently noted that *Ring* aggravating factors are elements that essentially make "the underlying offense of 'murder' a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.' "[99] Therefore, it appears that on some level the statutory aggravating factors operate to enhance the murder from one crime, for which life is the maximum sentence, to a different crime, for which death is the maximum sentence. By failing to allege the statutory aggravators in the indictment, the Government essentially charges the defendant with a lesser crime from the one for which the defendant will ultimately be prosecuted. In that sense, the defec-

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indictment warrant only harmless-error review); *Prentiss*, 256 F.3d at 984–85 (concluding that harmless-error review is appropriate when an indictment fails to allege an element of a crime).

93. *See Cotton*, 535 U.S. at 631 (applying a plain-error test to the respondent's forfeited claim that the Government failed to allege an element of the offense in the indictment).

94. *See* Mitchell v. Esparza, 124 S. Ct. 7, 11–12 (2003) (per curiam) (finding that the state court's decision that the failure to charge an aggravating factor in the indictment is subject to harmless-error review is not adequate grounds upon which to grant habeas relief, despite the fact it occurred in the capital context). For a complete discussion of *Mitchell*, *see generally* Meghan H. Morgan, Case Note, 16 CAP. DEF. J. 455 (analyzing Mitchell v. Esparza, 124 S. Ct. 7, 11–12 (2003) (per curiam)).

95. *Higgs*, 353 F.3d at 304 (citing Delaware v. Van Arsdall, 745 U.S. 673, 681 (1986)).

96. *Id.* at 307.

97. *Id.* at 306–07.

98. *Id.* at 306.

99. Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (plurality opinion).

tive indictment fails to put the defendant on adequate notice to defend against the charges because, contrary to the Fourth Circuit's assertions, it does indeed charge a different crime. Therefore, even if the failure to allege a statutory aggravator in an indictment is only subject to harmless-error review, it is not clear, even under *Higgs*, that the review will always be favorable to the Government.[100]

The United States Supreme Court has declined to apply the Fifth Amendment right to an indictment by the grand jury to the states.[101] Nonetheless, in Virginia, the accused has a firmly established statutory right to have the grand jury return an indictment before standing trial for a felony.[102] Virginia courts have long interpreted the statute to require the Commonwealth to allege each element of the crime charged in the indictment.[103] Therefore, the rationale employed in *Higgs* should apply with equal force in Virginia. Because *Ring* made aggravating factors into essential elements of the crime, and an indictment in Virginia must allege each element of the crime charged, a Virginia indictment must allege at least one aggravating factor.[104]

However, the rules announced in *Higgs* would have a slightly different impact in Virginia. Unlike the federal government, Virginia recognizes only two statutory aggravators: vileness and future dangerousness.[105] Certainly, evidence of a prior conviction under the Virginia statutory scheme would help prove future dangerousness. Indeed the statute explicitly states that the death penalty may be imposed if the jury:

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100. *See Allen*, 2004 WL 188080, at *9–*12 (finding that failure to allege aggravating factors in the indictment is not harmless-error because it deprives the defendant of his right to have the grand jury review his case and noting that if the error was harmless the right to a grand jury would be drastically impinged). For a complete discussion of *Allen*, *see generally* K. Brent Tomer, Case Note, 16 CAP. DEF. J. 621 (2004) (analyzing United States v. Allen, No. 98-2549, 2004 WL 188080, at *1 (8th Cir. Feb. 2, 2004) and State v. Fortin, No. A-31-2001, 2004 WL 190051, at *1 (N.J. Feb. 3, 2004)).

101. Hurtado v. California, 110 U.S. 516, 534 (1884).

102. *See* VA. CODE ANN. § 19.2-217 (Michie 2000) (ensuring that "no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury").

103. *See* Hagwood v. Commonwealth, 162 S.E. 10, 12 (Va. 1932) (finding that an indictment must necessarily "set forth all of the essential elements of the crime, and, if any of them are omitted, it is fatally defective"); Boyle v. Commonwealth, 55 Va. (14 Gratt.) 674, 674 (1858) ("It has been long and well settled by the courts of England, and by the courts of Virginia, that an indictment for any offence must allege every fact entering into the legal definition of such offence.").

104. *See Ring*, 536 U.S. at 609 (stating that aggravating circumstances are equivalent to elements of a crime); *Higgs*, 353 F.3d at 297–98 (finding that at least one statutory aggravating factor must be alleged in the indictment); *Hagwood*, 162 S.E. at 12 (noting that an indictment must allege all essential elements of a crime).

105. *See* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (stating that the jury may only impose the death sentence if the jury finds the defendant poses an ongoing danger to society or that the crime was committed in a particularly despicable manner).

> [A]fter consideration of the past criminal record of convictions of the defendant, find[s] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.[106]

This statute differs subtly from the federal statute. Under the federal statute, the factfinder must only find the existence of a prior conviction to enhance the sentence to death.[107] In contrast, in Virginia, the factfinder, after considering the existence of prior convictions, must then determine whether the defendant poses a future danger to society.[108] This procedure is not simply a mechanical application of a prior sentence to enhance the penalty to death. Rather, it requires an individualized determination of all of the facts relating to the defendant in evaluating whether he or she poses a continued threat to society. The simple fact of a prior conviction is not enough to make the defendant death-eligible. Therefore, it falls outside of the exception in *Almendarez-Torres*, and the aggravator of future dangerousness would need to be alleged in a Virginia indictment. Unlike in the Fourth Circuit, after *Higgs*, a prior conviction alone would not be enough to save an indictment that did not allege either of the Virginia aggravators.

However, because the jury needs to find only one statutory aggravator in Virginia, the reasoning behind the ruling in *Higgs*, that the Government needs to allege only one statutory aggravator in the indictment, applies to Virginia with equal force.[109] Because only one statutory aggravator, if found by the jury, is sufficient to make the defendant death-eligible in Virginia, then only one needs to be alleged in the indictment.[110] The other aggravator, following the *Higgs* reasoning, could fairly be said to be a sentence consideration.[111] Therefore, under the rationale behind *Higgs*, an indictment may be sufficient if it alleges only one aggravating factor; however, the prosecution would expose itself to the risk that if the jury did not find the aggravating factor in the indictment, the only possible sentence would be life.

Finally, even if an appellant in Virginia shows that the prosecution failed to allege aggravating elements in the indictments, the appellant would still need to show that the error was not harmless. In Virginia "[b]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[112] Because this standard is essen-

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106. *Id.*

107. 18 U.S.C. § 2592(c)(2), (12) (2000) (stating that prior convictions for serious drug felonies and violent felonies involving the use of firearms are statutory aggravators).

108. VA. CODE ANN. § 19.2-264.2.

109. *Id.*

110. *Higgs*, 353 F.3d at 299.

111. *Id.*

112. Jenkins v. Commonwealth, 492 S.E.2d 131, 132 (Va. 1997) (internal quotation marks omitted).

tially the same standard used by the Fourth Circuit in *Higgs*, much of the court's reasoning in that case could apply with equal force in Virginia.[113] Therefore, a Virginia appellant might encounter the same difficulties Higgs faced in showing that the failure to allege aggravating elements in the indictment warrants relief. Of course, a trial court should not rely on a possible future finding of harmless-error and impose a sentence of death based on an indictment that did not allege aggravating factors.[114]

V. Conclusion

In *Higgs*, the Fourth Circuit made it extremely difficult, but not impossible, for a defendant who was convicted of a capital charge in federal court to challenge that conviction on the ground that the indictment failed to allege the statutory aggravating and intent factors. After *Higgs*, the defendant must show that every aggravating factor the jury found was not in the indictment and was not a prior conviction subject to the *Almendarez-Torres* exception. Moreover, even if a defendant can make this difficult showing, the defendant still must show that the error was not harmless. Because of Virginia's different statutory aggravators, the rationale behind the Fourth Circuit's adoption of the *Almendarez-Torres* exception should not apply in the Commonwealth.

Maxwell C. Smith

113. *See Higgs*, 353 F.3d at 304 (finding error was harmless if the court decides "beyond a reasonable doubt" that the error did not impact the verdict).

114. *See* Hackney v. Commonwealth, 504 S.E.2d 385, 389 (Va. Ct. App. 1998) ("The harmless error doctrine should not be used prospectively by a trial court as a basis to disregard an established rule of law.").