

Capital Case
Execution Scheduled Dec. 10, 2020

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON BERNARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

EMERGENCY APPLICATION FOR A STAY OF EXECUTION
[Execution Scheduled for Dec. 10, 2020 at 6:00 p.m. EST]

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Petitioner Brandon Bernard was sentenced to death for his role at age 18 as an accomplice to a gang-related carjacking that ended in a double murder. As detailed in his Petition for Writ of Certiorari, after unsuccessfully litigating an initial collateral attack under 28 U.S.C. § 2255, Mr. Bernard discovered that at the time of his trial, the government was in possession of favorable information relevant to his sentence, but not to his guilt of the underlying offenses. The government never

disclosed that information to Mr. Bernard's trial attorneys, either prior to trial or during the initial § 2255 proceeding.

Armed with this new information, Mr. Bernard filed a second § 2255 motion, arguing that the reasoning of this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), should entitle him to obtain review of the merits of his penalty-phase claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), without satisfying the gatekeeping requirements of 28 U.S.C. § 2255(h). The district court described Mr. Bernard's *Panetti*-based procedural argument as "compelling," but concluded that Fifth Circuit precedent foreclosed it. The Court of Appeals affirmed that view. Thus, to date Mr. Bernard's penalty-phase *Brady* and *Napue* claims have received no judicial review whatsoever. As a consequence, if the decision of the court below stands, Petitioner will be executed under a judgment obtained in "a proceeding that d[id] not comport with standards of justice[.]" *Brady*, 373 U.S. at 88.

Mr. Bernard respectfully asks the Court to stay his execution, presently set for Thursday, December 10, 2020, at 6:00 p.m. Eastern time, pending its disposition of his petition for writ of certiorari. As set out below, this case satisfies each consideration relevant to that determination.

A. STANDARD FOR ISSUING A STAY OF EXECUTION

The standard for granting a stay is well-established. The factors are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)

whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). In the present context, there must be “a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari” and “a significant possibility of reversal of the lower court’s decision,” in addition to irreparable harm. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citation omitted).

1. A reasonable probability exists that the Court will grant certiorari.

There is a reasonable probability the Court will grant certiorari to review the judgment of the Fifth Circuit and answer the question presented in this case. First, a “reasonable probability” is usually understood as describing a likelihood lower than “more likely than not[.]” *Smith v. Cain*, 565 U.S. 73, 75 (2012) (discussing “reasonable probability” of a different outcome in the context of *Brady* materiality). Thus, to be entitled to a stay of execution until the Court can review his petition in due course, Mr. Bernard need not demonstrate a high likelihood that the Court will decide to hear his case, but only a reasonably good chance of that outcome.

Second, Rule 10(c) identifies, as a relevant consideration in the Court’s exercise of its certiorari jurisdiction, whether “a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court.” The Fifth Circuit’s decision finding Mr. Bernard’s second-in-time § 2255 motion subject to the gatekeeping requirements of 28 U.S.C. § 2255(h) is contrary to the Court’s decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), as another circuit

court has explained in a careful and detailed analysis of the issue. *See Scott v. United States*, 890 F.3d 1239, 1250-51 (11th Cir. 2018); *see also* Petition for Writ of Certiorari at 25–28 (discussing *Scott*). A number of other judges of the federal courts of appeals subscribe to *Scott*'s analysis of how *Panetti* should apply to *Brady* claims, including a strong component of the majority of the full Fourth Circuit in *Long v. Hooks*, 972 F.3d 442, 487 (4th Cir. 2020) (en banc) (Wynn, Thacker, and Harris, JJ., concurring). Thus, there exists significant disagreement among federal appellate jurists over how *Panetti* should apply to whether *Brady* claims are successive, when the *Brady* violation could not have been known to the defendant at the time of his first § 2255 motion. Given the frequency with which *Brady* issues arise for prosecutors, that is sufficient to show a reasonable probability that the Court will grant certiorari to consider the question. *See, e.g., Maryland v. King*, 567 U.S. 1301, at *2 (2012) (Roberts, C.J., in chambers) (finding a “reasonable probability” that certiorari would later be granted, where lower court’s decision was in conflict with other relevant decisions of other courts, so as to potentially warrant review, and implicated “an important feature of day-to-day law enforcement”). In addition, the issue at the heart of this case is an exceptionally important one: whether, especially in a death penalty case, the government should be allowed to insulate its *Brady* violations from ever having judicial review, simply by the expedient of continuing to hide those violations until a defendant’s first § 2255 proceeding has concluded (for example, as in this case, by making misrepresentations to the § 2255 court regarding the true scope of discovery the prosecution allowed at trial). Finally, as detailed in the Petition, this

case presents an exceptionally compelling vehicle for addressing the Question Presented, given the lack of complicating factors.

2. If the Court grants certiorari, there is a “fair prospect” it will reverse the judgment below.

The stay standard requires an applicant to demonstrate a “fair prospect” that if review is granted, the Court will reverse the judgment under review. *King*, 567 U.S. at 1301 (Roberts, C.J., in chambers) (citing *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). That degree of likelihood has also been described as a significant or substantial possibility. *Phillip Morris USA, Inc., v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) (granting stay where it was “significantly possible that the judgment below will be reversed”); *Barnes v. E-Systems, Inc., Group Hospital Medical & Surgical Insurance Plan*, 501 U.S. 1301, 1303 (1991) (Scalia, J., in chambers) (same, where there was a “substantial possibility” that the judgment below would fall).

Mr. Bernard has made that showing here. Indeed, it is *highly likely* that the Court, if it grants review, will reverse the Fifth Circuit. None of the courts taking the same view as the Fifth Circuit (including that court itself) have engaged in depth with the question of how *Panetti*’s principles should apply in the circumstances of a *Brady* claim that the petitioner, due to government misconduct, could not have known about in time to present it in his initial § 2255 motion. Meanwhile, numerous appellate judges have concluded after detailed analysis of this Court’s reasoning in *Panetti* that a *Brady* claim should not be deemed successive when government malfeasance precluded its presentation in an initial § 2255 motion. This inference is

especially strong given this Court’s rightful reluctance to interpret § 2255 in a manner that would mean a petitioner’s “forever losing [his] opportunity for any federal review . . .” of a particular constitutional claim. 551 U.S. at 945-46. Upholding the Fifth Circuit would mean that a valid penalty-related *Brady* claim could never be reviewed by any court, so long as the government hid the *Brady* material until the initial § 2255 proceeding was complete. As numerous judges have recognized, Congress would not have intended this result; nor would it have intended to incentivize prosecutors to act in this manner. The Court is likely to conclude the same, which means there is at least a “fair prospect” it will reverse the Fifth Circuit.

3. Mr. Bernard will be irreparably injured without a stay.

Mr. Bernard will suffer irreparable injury if his execution goes forward before the Court can consider and act on his petition for certiorari. *See e.g., Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) (“The third requirement – that irreparable harm will result if a stay is not granted – is necessarily present in capital cases.”); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J.) (granting stay of execution in light of the “obviously irreversible nature of the death penalty”); *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (“There can be no doubt that a defendant facing the death penalty at the hands of the state faces irreparable injury.”).

4. A stay will not substantially injure the other parties interested in the proceeding.

This is not a case where a death row prisoner is bringing a last-minute motion for stay of execution as a tactical step. *See Gomez v. U.S. Dist. Court*, 503 U.S.

653, 654 (1992) (per curiam) (noting that the balancing of the parties' interests should include considering whether a stay application is last-minute or otherwise manipulative of the habeas process). He has pursued this issue diligently. The initial 18 years of delay is not due to any action of his, but *the government's* hiding the *Brady* material until its use benefitted the government in another proceeding. Mr. Bernard filed his second-in-time § 2255 motion on February 4, 2019. The government set his execution date more than a year and a half later, on October 16, 2020, before his case was even final in the Fifth Circuit. That court denied rehearing en banc on November 6, 2020. Amid the flurry of other work on Mr. Bernard's behalf, including preparing his clemency petition and meeting with the Pardon Attorney, he could not, as a practical matter, have filed this petition sooner.

To be sure, the government's new urgency to carry out Mr. Bernard's sentence may be temporarily forestalled, but only so long as will be necessary to ensure that the government may carry out the sentence lawfully. Indeed, any exigency in these proceedings is entirely of the government's making. For one thing, of course, it was the *government* that concealed for nearly twenty years the information necessary for Mr. Bernard to bring his *Brady* and *Napue* claims in the first place. And while the government had no functional execution protocol when Mr. Bernard's initial § 2255 proceeding concluded in 2016, that situation came to an end in July 2019 with the government's announcement that it had adopted a new protocol and would begin to schedule executions (which it proceeded to do). Even then, the government waited more than a year before setting an execution date for Mr. Bernard. At a minimum,

then, the Court need not cut short its consideration of Mr. Bernard’s substantial petition for writ of certiorari simply to accommodate the government’s sudden and unexplained fit of purported urgency to move ahead with his execution. “[T]he fact that the government has not – until now – sought to” schedule Mr. Bernard’s execution “undermines any urgency surrounding” its claimed need to do so. *See Oscorio-Martinez v. Att’y Gen. U.S. of Am.*, 893 F.3d 153, 179 (3d Cir. 2018).

5. The public interest favors granting a stay.

The community as a whole will suffer harm if no stay is granted. Allowing government misconduct to go unremedied will erode the public’s confidence that the court system offers a level playing field, providing a forum to redress grievous wrongs. And there is an “overwhelming public interest” in “preventing unconstitutional executions.” *Bronshtein v. Horn*, 404 F.3d 700, 708 (3d Cir. 2005) (citation omitted). A stay of execution, in fact, will serve the strong public interest – an interest the government shares – in administering capital punishment in a manner consistent with the Constitution.

CONCLUSION

For all the foregoing reasons, the Court should stay Mr. Bernard's execution to permit it to review and consider his petition for writ of certiorari in due course.

Respectfully submitted,



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Dated: December 8, 2020