No. 20-____

IN THE
Supreme Court of the United States

ORLANDO CORDIA HALL
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

Execution Date: November 19, 2020 at 6:00 PM

EMEREGENCY APPLICATION FOR A STAY OF EXECUTION

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PARTIES TO THE PROCEEDING

Orland Cordia Hall, petitioner on review, was the plaintiff-appellant below.

William P. Barr, Attorney General, the U.S. Department of Justice; Michael Carvajal, Director, Federal Bureau of Prisons; Barb Von Blanckensee, Regional Director Federal Bureau of Prisons, North Central Region; T.J. Watson, Complex Warden, U.S. Penitentiary Terre Haute; and Donald W. Washington, Director, U.S. Marshals Service, respondents on review, were defendants-appellees below.

RELATED PROCEEDINGS

There are two related proceedings, as defined in Supreme Court Rule 14.1(b)(iii).

This appeal originates from an Order from the District of Columbia District Court. *See* Order, *Hall* v. *Barr*, No. 20-cv-03184 (D.D.C Nov. 16, 2020). Pet. App. 10a-32a.[1]

The District Court case resulted in one appeal to the D.C. Circuit, which was decided on November 19, 2020. *See Hall* v. *Barr*, No. 20-5340 (D.C. Cir. Nov. 19, 2020). Pet. App. 1a-7a.

[1] Pet. App. to Writ of Cert., *Hall* v. *Barr*, No. 20-5340 (Nov. 19, 2020) ("Pet. App.")

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

This case concerns the government's rush to execute a federal prisoner in the midst of a global pandemic in contravention of his constitutionally and statutorily guaranteed rights. By arbitrarily scheduling Mr. Hall's execution during what public health officials have called the "worst-ever global health emergency," and providing him with the shortest notice period in the history of the modern federal death penalty, the government has flouted Mr. Hall's rights to due

process and meaningful access to counsel and the clemency process. Additionally, the panel has allowed Mr. Hall to be executed, which would cause irreparable harm, in accordance with an Execution Protocol that constitutes *ultra vires* agency action in violation of the APA

Taking a life is the "most extreme sanction available," *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002). That is why "[i]n authorizing federally funded counsel to represent their * * * clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system." *Harbison* v. *Bell*, 556 U.S. 180, 194 (2009). Yet the government now ignores this directive. Without articulating any reason why Mr. Hall's execution must suddenly take place now—in the middle of a pandemic and just weeks after the termination of a 13-year-long injunction *to which the government consented* that prevented his execution—and despite substantial and undisputed evidence that the conditions caused by the pandemic have foreclosed Mr. Hall from meaningfully accessing clemency proceedings, the government nonetheless rushes forward. This is the very definition of arbitrary.

Despite the government's disregard of this Court's precedent and Congress's mandate, the panel nevertheless concluded that the government did not violate Petitioner's due process rights or his statutory right to counsel, and that Petitioner failed to establish he would be irreparably harmed by the government's delegation of supervisory authority over his execution from the U.S. Marshals Service to the Federal Bureau of Prisons. In so doing, it manifestly erred in at least

three ways: (i) contravening this Court's command in *Ohio Adult Parole Auth.* v. *Woodard* to intervene when the government "arbitrarily denie[s] a prisoner any access to its clemency process," 523 U.S. at 289; (ii) summarily concluding, without consideration of the robust factual record Mr. Hall provided, that "Hall has benefitted from the representation of counsel sufficient to satisfy 18 U.S.C. § 3599," and (iii) failing to remedy the transfer of supervision of the sentence of death to the Federal Bureau of Prisons despite recognizing that action as a potential violation of federal law.

This Court should stay Mr. Hall's pending disposition of the pending petition for a writ of certiorari. This case satisfies each condition relevant to that determination.

There is "a reasonable probability" that four Justices will grant certiorari" and "a fair prospect" that a majority of the Court will conclude that the decision below was erroneous. *Indiana State Police Pension Trust* v. *Chrysler LLC*, 556 U.S. 960, 960 (2009) (quoting *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). This case concerns important questions about whether Mr. Hall was arbitrarily deprived the process required by *Woodard* and whether Mr. Hall benefited sufficiently from counsel to satisfy 18 U.S.C. § 3599. Moreover, this case raises important questions about whether injunctive relief is appropriate when the court below recognizes that action is a likely violation of federal law.

While this is not a "close case," the equities too favor a stay. *Id.* (quoting *Conkright*, 556 U.S. at 1402). Any

marginal harm the government might face from a potentially short stay pending resolution of the petition for a writ of certiorari pales in comparison to the irreversible harm that "[r]effusing a stay may visit" on Mr. Hall. *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J., in chambers).

Mr. Hall respectfully asks that this Court stay his execution pending petition for a writ of certiorari. Because his execution is scheduled for November 19, 2020 at 6:00 p.m. EST, Mr. Hall respectfully asks this Court to order briefing on this application before then, or administratively stay the mandate pending disposition.

OPINIONS BELOW

The D.C. Circuit's decision is attached to Petitioner's Appendix at Appendix A. Pet. App. 1a-7a. The District Court's order denying the preliminary injunction is attached to Petitioner's Appendix at Appendix D. Pet. App. 33a.

JURISDICTION

The D.C. Circuit entered judgment on November 19, 2020. The mandate also issued on November 19, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Death Penalty Act, 18 U.S.C. § 3596(a), provides:

> A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until

> exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed.

USA Patriot Improvement and Reauthorization Act, 18 U.S.C. § 3599(e), provides:

> Each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including * * * all available post-conviction process * * * and shall also represent the defendant in * * * proceedings for executive or other clemency as may be available to the defendant.

The Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(C), provides:

> The reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * in excess of statutory jurisdiction, authority, or limitations, or short of statutory right * * *.

The Fifth Amendment to the U.S. Constitution, U.S. Const., amend. V provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the U.S. Constitution, U.S. Const., amend. VI provides:

> In all criminal prosecutions, the accused shall * * * have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT

A. Statutory and Regulatory Background

i. 18 U.S.C. § 3599

In 1988, when Congress reinstated the federal death penalty, it also codified "enhanced rights of representation" for capital cases in federal courts. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4181, 4387-88. Then codified at 21 U.S.C. § 848(q), these enhanced rights guaranteed automatic representation of counsel from the commencement of the federal proceeding through any execution. *Id.* at § 7001(q), 102 Stat. 4394. In particular, Congress guaranteed that defendants facing the federal death penalty would have a statutory right to counsel in "proceedings for executive or other clemency as may be available to the defendant." *Id*.

In 2006, 21 U.S.C. § 848 was repealed and replaced by 18 U.S.C. § 3599, "Counsel for financially unable defendants," as part of the USA Patriot Improvement and Reauthorization Act. Pub. L. No. 109-177, § 221, 120 Stat. 192 (2006). Section 3599 does not alter § 848(q)'s provision that federal prisoners facing the death penalty are guaranteed counsel in "proceedings for executive or other clemency as may be available to the defendant." 18 U.S.C. § 3599(e).

This Court has since noted that "[i]n authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that

no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system." *Harbison*, 556 U.S. at194. The same right applies to federal prisoners in pursuit of federal clemency. *See id*. at 186-187.

ii. 18 U.S.C. § 3596(a)

Until 1937, federal law mandated that the U.S. Marshals Service (USMS) carry out all federal executions. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 33, 1 Stat. 112, 119 (1790). In 1937, though Congress changed the manner by which federal executions would be conducted, it maintained its requirement that they be carried out by the USMS. 18 U.S.C. § 542 (1937) (the "1937 Act").

Statutory authority continues to rest with the U.S. Marshals Service today. In 1994, Congress passed the Federal Death Penalty Act ("FDPA"). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), codified at 18 U.S.C. §§ 3591-3598. The FDPA directed "a United States Marshal [to] supervise implementation of the sentence." 18 U.S.C. § 3596(a).

The Department of Justice ("DOJ") understood that the 1994 FDPA placed the authority to carry out executions in the hands of the USMS and not the Attorney General or the Federal Bureau of Prisons ("BOP"). In a 1994 memo, the USMS General Counsel wrote that "the most notable aspect [of the FDPA] for the Marshals Services is our responsibility in implementing the Federal sentence." Memo. from Deborah

Westbrook to Dir. Gonzalez 2 (Sept. 9, 1994).[2] DOJ has since asked Congress several times to amend the FDPA to grant BOP authority to perform executions but Congress has consistently rejected those overtures. *See e.g.*, H.R. 1087, 105th Cong. (1997); H.R. 851, 110th Cong. (2007).

iii. The Bureau of Prisons' Execution Protocol

In 1993, the BOP issued an execution protocol manual governing federal executions, which required the Warden of USP Terre Haute to provide at least ninety days' notice of a planned execution to a federal death row prisoner in advance of the scheduled execution date. The protocol was reissued various times between 1993 and 2019, and each time, the ninety-day minimum notice guarantee remained unchanged.

On July 25, 2019, DOJ announced that after a nearly two-decade hiatus, it would restart federal executions pursuant to a revised BOP execution protocol ("2019 Execution Protocol"). Although the FDPA authorized the USMS to carry out death sentences, the 2019 Execution Protocol purported to reassign that statutorily guaranteed authority to the BOP. Again, the ninety-day minimum notice period persisted.

Though the ninety-day notice guarantee has been in effect from 1993 through 2020, in practice, the BOP's minimum notice guarantee has been much longer. Between January 2001 and August 2020, the BOP

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[2] *Available at*: https://files.deathpenaltyinfo.org/documents/United-States-Marshals-Federal-Execution-Documents.pdf at 20.

had never provided a notice period of less than 120 days for an initial execution date.

On July 21, 2020, BOP revised its execution protocol, without explanation, to substantially shorten the required notice period to just fifty days, with the added provision that the Warden had discretion to provide as little as twenty days' notice.

B. Factual and Procedural History

1. In 1995, Mr. Hall was tried on counts of (a) kidnapping in which a death occurred; (b) conspiracy to commit kidnapping; (c) traveling in interstate commerce to promote possession of marijuana with intent to distribute; and (d) using and carrying a firearm during a crime of violence. Mr. Hall, who is Black, was convicted on all counts by all-White jury and sentenced to death pursuant to the Federal Death Penalty Act of 1994. One of the prosecutors who picked that all-White jury was Assistant United States Attorney Paul Macaluso who, years after Mr. Hall's trial and § 2255 proceedings concluded, was found by this Court in *Miller-El* v. *Dretke*, 545 U.S. 231 (2005) to have violated *Batson* by striking Black jurors based on their race. The Fifth Circuit subsequently concluded that Macaluso had also violated *Batson* in another case, *Reed* v. *Quarterman*, 555 F.3d 364 (5th Cir. 2009).

Mr. Hall appealed his conviction, which the Fifth Circuit affirmed and denied rehearing on October 1, 1998. *United States* v. *Hall*, 152 F.3d 381 (5th Cir. 1998). This Court declined review. *Hall* v. *United States*, 526 U.S. 1117 (1999).

In May 2000, Mr. Hall moved to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255 in the District Court. In June 2002, after the district court denied multiple discovery motions, he filed an amended motion to vacate, which he then amended once more in September 2002. Mr. Hall raised nine issues in his second amended motion to vacate. Mr. Hall did not raise Macaluso's history as a *Batson* violator because that information was not yet reasonably knowable; neither *Miller-El* nor *Reed* had been decided.

2. After Mr. Hall's initial § 2255 proceedings concluded, he intervened in a pending civil action brought by other federal death row prisoners challenging the legality of the BOP's lethal injection protocol. Mot. to Intervene, *Roane* v. *Gonzales*, No. 1:05-cv-02337-TSC (D.D.C. Apr. 27, 2007), ECF No. 38. With the government's consent, the district court entered a preliminary injunction barring Mr. Hall's execution, which remained in place for more than thirteen years, from June 2007 until September 2020. *See* Order *Roane* v. *Gonzales*, No. 1:05-cv-02337-TSC, ECF No. 68.[3] On September 20, 2020, that injunction was vacated upon a motion by the government. *In the Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (TSC), 2020 WL 5594118 at *19 (D.D.C. Sept. 20, 2020). Just ten days later, on September 30, 2020, DOJ announced that "Attorney General William P.

[3] Mr. Hall's claims were consolidated with those of other federal death row prisoners in 2019. *See In the Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145-TSC (D.D.C.).

Barr [had] directed the Federal Bureau of Prisons to schedule the execution of Orlando Cordia Hall * * * "[4] Mr. Hall's execution was scheduled for November 19, 2020—exactly 50 days after he received notice. *See id.*

3. The scheduling of Mr. Hall's execution triggered a 30-day deadline to file a clemency petition and an additional 15-day period in which to file any supporting evidence. This 45-day period was marked by a dramatic surge in COVID-19 cases, hospitalizations, and death in the United States. For example, on October 30—the day Mr. Hall's clemency petition technically became due—the United States hit its highest daily number of coronavirus cases since the pandemic began, recording at least 99,000 new infections. CDC COVID Data Tracker, Ctr. for Disease Control and Prevention (Nov. 18, 2020), https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases ("CDC Daily Tracker").

4. Due to the pandemic, Mr. Hall's counsel have been unable to conduct an adequate clemency investigation without putting their health and safety—as well as the health and safety of their families, witnesses, and others—at serious risk.

At the core of Mr. Hall's effort to obtain a reprieve and a commutation of his sentence lie the following questions: What was Mr. Hall's culpability relative to that of his codefendants, of whom he is now the only

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[4] Press Release No. 20-1,034, Execution Scheduled for Federal Death Row Inmate Convicted of Murdering a Child, Dep't of Justice (Sept. 30, 2020), https://www.justice.gov/opa/pr/execution-scheduled-federal-death-row-inmate-convicted-murdering-child.

one to face the death penalty? Do any circumstances in his upbringing or background—like the fact that he was sexually assaulted as a child, *see* Pet. App. 40a–41a —help provide mitigating context for his actions? Can he be safely incarcerated if his life is spared? Given his involvement in an admittedly outrageous crime, is he remorseful for the shocking loss he inflicted on the victim's loved ones? And what positive value does Mr. Hall's life still possess, such that it should be preserved? Gathering evidence to answer those questions—whether from first-person witness accounts, documents, or other sources—is counsel's task in pursuing clemency.

Pursuing these avenues requires investigation. To explore issues of relative culpability, for example, counsel must interview Mr. Hall's codefendants.[5] To take another example, to rebut the jury's prediction that Mr. Hall would pose too great a threat of violence in custody to risk sparing his life, counsel need to interview the witnesses, many of them corrections professionals, who can corroborate Mr. Hall's remarkably successful adjustment to confinement in prison, where

[5] One of these co-defendants gave multiple detailed statements to the authorities without ever suggesting that Mr. Hall had taken part in sexually assaulting the victim, only to add that allegation after repeated interrogations. *See* Pet. App. 37a-38a. While Mr. Hall's post-conviction proceedings were pending, that co-defendant remained in prison and vulnerable to retaliation. *Id*. at Pet. App 45a-46a. Now out of prison for good (which was not the case until this spring, when the pandemic was already ravaging the United States), he could well acknowledge that his trial testimony against Mr. Hall on this point was false—a crucially important admission for purposes of Mr. Hall's clemency effort. *Id*.

he has proven altogether non-violent and compliant. *Id*. at 41a-43a. And with respect to the value Mr. Hall's life brings to his large extended family and network of friends, there are numerous witnesses who can describe how Mr. Hall "relates to family members, how he shares joy at their successes and commiserates with their failures, and how he helps provide a steady source of love and understanding for his children as they navigate their own lives as parents." *Id*. at 48a-49a; *see also id*. at 46a-49a (explaining counsel's view that "providing a detailed account of the very strong bonds [Mr. Hall] shares with his immediate and extended family, and the vital and positive role he plays in their lives" may be "the most significant—and significantly unfinished—task in fully developing a clemency application for Mr. Hall").

None of this investigation can be conducted remotely; instead, it must be pursued through *in-person* interviews with potential witnesses. This is so for several reasons.

First, such interviews are required by the professional standards and norms for capital defense, which counsel are duty-bound to respect. *See* Decl. of Dr. Elizabeth Vartkessian ¶ 11, No.1:20-cv-03814, *Hall* v. *Barr*, (D.D.C. Nov. 3, 2020), ECF No. 1-12 ("Vartkessian Decl.") ("The professional duty to investigate imposed by national standards for capital defense applies at every stage of the proceedings;" "reasonably effective counsel must * * * undertake such investigation as part of whatever clemency proceedings may be available to the client, and to determine whether legal issues may remain to be litigated on the client's behalf after an initial round of appeals and post-conviction

review"); *id*. ¶ 6 ("Prevailing national standards [for defending death penalty cases] require counsel or their representative to conduct mitigation interviews in person"); *id*. ¶ 9 ("While the [government's] decision to seek a death sentence is discretionary, the capital defense team's duty to adhere to prevailing professional standards at every stage of the proceedings, including in seeking clemency or in evaluating the prospects of emergency litigation on the eve of an execution, is not"); Decl. of Jeremy Schepers ¶ 2, No.1:20-cv-03814, *Hall* v. *Barr*, (D.D.C. Nov. 3, 2020), ECF No. 1-22, ("Schepers Decl.") (applicable national standards for the performance of the capital defense team mandate "[*i*]*n-person* interviews with witnesses") (emphasis added); *id*. at Ex. 1 to Schepers Decl.

Second, and perhaps more important, those prevailing professional norms require in-person contact with witnesses precisely because such contact has proven through long experience to be *what works*. "[S]haring of personal family memories * * * requires that the defense team establish rapport, spending time with witnesses to earn their trust," and "[e]xperience teaches that this is the only route to eliciting the necessary family and social history information"—an "interpersonal, necessarily emotional process" that "cannot be accomplished except *in person*." *Id.* ¶ 4 (emphasis added); *see also*, *e.g*., Vartkessian Decl. at Appendix 2 ¶¶ 23–39 ("face-to-face in-person interviews" are indispensable to ensuring that the information obtained is accurate and complete).

Unfortunately, since spring the hazardous conditions imposed by the coronavirus pandemic have made, and continue to make, any such investigation

entirely impossible. *See* Schepers Decl. ¶ 4 ("The spread of the virus led us to suspend in-person efforts to conduct typical (and necessary) fact and mitigation investigation activities that require in-person contact under the prevailing professional norms," in order to protect the health and safety "not only * * * of our legal team, but also of those witnesses with whom they might come in contact"). As one extensively credentialed expert put it, the necessary investigation into the client's background "cannot proceed in a pandemic without violating minimum standards of performance," and presently "cannot * * * be done in a manner that is safe for both witnesses and capital defense team members." Vartkessian Decl. ¶ 10.

Reflecting the urgent health risks associated with conducting in-person investigation during the pandemic, capital defense organizations in Texas (where much of the Hall clemency investigation would take place), *see* Pet. App. 38a-40a, have suspended all such activities until the pandemic is brought under control. *See* Decl. of Tivon Schardl ¶¶ 4–5, No.1:20-cv-03814, *Hall* v. *Barr*, (D.D.C. Nov. 3, 2020), ECF No. 1-14 (no in-person investigation by employees of the Capital Habeas Unit of the Federal Public Defender for the Western District of Texas until the pandemic abates); Schepers Decl. ¶¶ 4–5 (same, for the corresponding unit of the Northern District federal public defender); Decl. of Randi Chavez ¶¶ 3-4, No.1:20-cv-03814, *Hall* v. *Barr*, (D.D.C. Nov. 3, 2020), ECF No. 1-13 (same, for the nonprofit law office Texas Defender Service); Decl. of Benjamin B. Wolff ¶¶ 5-6, No.1:20-cv-03814, *Hall* v. *Barr*, (D.D.C. Nov. 3, 2020), ECF No. 1-16

(same, for the Texas State Office of Capital and Forensic Writs).

And the task of conducting an adequate clemency investigation in this case—which, all told, would require Mr. Hall's counsel to travel by airplane to states including Arkansas, Louisiana, Missouri, Texas, and Wisconsin—is made all the more impossible by the fact that both of Mr. Hall's long-time counsel face particular risks with respect to COVID-19. Ms. Widder was previously hospitalized with tuberculosis and has several other underlying health conditions that increase her risk of serious illness or death. Pet. App. 55a-62a. She is also the sole caregiver for her twelve-year-old daughter who also suffers from an underlying health condition. *Id.* at 62a. Any risk of exposure to Ms. Widder will also risk the health and safety of her daughter. *Id*. Mr. Owen suffers from several medical conditions that increase his risk of serious illness or death, as does his wife. *Id.* at 51a-52a. Current CDC Guidelines discourage all travel, but especially for persons with underlying health conditions or family members with underlying health conditions, such as Ms. Widder and Mr. Owen.

The government has not contested any of these facts. The panel ignored them entirely (as did the district court); neither of the decisions even acknowledges any of this robust evidence that Mr. Hall presented in support of his claims.

5. Due to the conditions created by the pandemic, and the clear impossibility of conducting a safe and adequate clemency investigation in just 45 days during a surging pandemic, Ms. Widder and Mr. Owen wrote to the pardon attorney to request a reprieve of

Mr. Hall's execution date. *See* Ltr. from Robert Owen & Marcia Widder, Counsel for Orlando Hall, to Hon. Rosalind Sargent-Burns, Acting Pardon Attorney, U.S. Dep't. of Just. & Hon. Pat Chipollone, White House Counsel (Oct. 30, 2020). [6]

The automated reply to Mr. Owen's email explained that the decision process is "extremely lengthy due to the volume of matters pending and the need to carefully examine and investigate all requests and supporting documentation" and that it thus can take "1-3 months" for petitions to be accepted for review. *See* E-Mail Corr., *Hall* v. *Barr*, No. 1:20-cv-03184-TSC (D.D.C. Nov. 3, 2020), ECF No. 1-19.

On November 2, Mr. Owen received further communications from the Office of the Pardon Attorney ("OPA"), who stated that OPA had no authority to reprieve, withdraw, or reschedule Mr. Hall's execution date, but could instead convert Mr. Owen's October 30 letter to a commutation petition, accept evidence through November 14, and conduct a telephonic hearing during the week of November 2. See E-Mail Corr., *Hall* v. *Barr*, No. 20-3184 (D.D.C. Nov. 3, 2020), ECF No. 1-20. In other words, the "process" the government offered Mr. Hall included: (i) 30 days to conduct a clemency investigation and prepare a clemency investigation, which began running amidst the worst public health crisis of all time and days after a 13-year long injunction sparing Mr. Hall from execution was lifted; (ii) a hearing a few days after that petition would have been due, but before any supporting

[6] *Available at Hall* v. *Barr*, No. 20-3184 (D.D.C. Nov. 3, 2020), ECF No. 1-18.

evidence would have been received; and (iii) a total of five days—two of which were a Saturday and a Sunday—for OPA to "carefully examine and investigate" Mr. Hall's plea for mercy and make an informed recommendation to the president.

Thereafter, Mr. Hall brought suit and sought a preliminary injunction barring his execution until such time as he and his counsel could safely conduct the necessary interviews and investigation to meaningfully access the clemency process. *See* Memo. in Supp. of Mot. for TRO & Prelim. Inj., *Hall* v. *Barr*, 1:20-cv-03184-TSC, ECF No. 3-1 (D.D.C. Nov. 3, 2020).

The district court denied his motion for a preliminary injunction on the basis that he had not shown a likelihood of success on the merits. Pet. App. XX Mem. Op. at 5, *Hall* v. *Barr*, et al., 1:20-cv-03184-TSC, ECF No. 23 (D.D.C. Nov. 3, 2020).

A panel of the D.C. Circuit affirmed, finding that (i) Mr. Hall's due process rights were satisfied because he was offered the opportunity to file a clemency petition, even though the combination of the pandemic and the government's arbitrary truncation of the notice period made it impossible to conduct any investigation that would have informed such a petition; (ii) Mr. Hall's statutory right to counsel under 18 U.S.C. § 3599 was satisfied because Mr. Hall was technically represented by counsel (again, ignoring the conditions of the pandemic that hamstrung this counsel from meaningfully pursuing clemency in any way); and (iii) while recognizing that it was debatable whether the BOP's arrogation of U.S. Marshal's authority to supervise the implementation of death sentences violated federal law, declining to reach the likelihood of

success issue and instead finding that Mr. Hall had failed to link the BOP's supervisory role to irreparable harm. *See* Pet. App. 1a-7a.

REASONS FOR GRANTING THE STAY

To obtain a stay pending the disposition of a petition for a writ of certiorari, the applicant must demonstrate "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Indiana State Police Pension Trust*, 556 U.S. at 960 (quoting *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). "'[I]n a close case it may [also] be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Id.* (quoting *Conkright*, 556 U.S. at 1402). Those standards are satisfied here.

I. THE PETITION PRESENTS A COMPELLING CASE FOR CERTIORARI, AND THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT REVIEW.

Mr. Hall's certiorari petition raises important questions regarding three separate issues. Mr. Hall need only show that certiorari is likely as to one.

1. This case presents important questions about the minimal due process standard in clemency proceedings established by *Ohio Adult Parole Authority* v. *Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J.,

concurring in part and concurring in the judgment). *See also* Pet. App. 16a (acknowledging that Justice O'Connor's opinion in *Woodard* is controlling authority, and that the government has not contested this point).

The panel's decision has mandated at least some procedural safeguards in clemency proceedings—most notably, *meaningful access* to those proceedings. Scheduling Mr. Hall's execution in the midst of a continually-worsening global pandemic with little notice has deprived Mr. Hall of these guarantees, because the circumstances have rendered his counsel utterly unable to conduct the investigation necessary to submit an adequate clemency petition without risking the health and safety of themselves, their families, and others.

2. This case also presents important questions about the scope of representation guaranteed by Congress to condemned prisoners in codifying 18 U.S.C. § 3599. This statutorily mandated access to counsel is "illusory" where counsel are unable to acquire information necessary to perform their professional obligations. *Al-Joudi* v. *Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005). The panel disregarded this mandate in concluding Mr. Hall received adequate representation. The decision of the government to schedule Mr. Hall's execution in the midst of the pandemic with the shortest notice period in history, has thwarted Mr. Hall's ability to meaningful access his statutorily guaranteed right to counsel.

3. Finally, this case presents important questions about the relationship between the likelihood of the merits and irreparable harm prongs of *Winter* and

Nken. The panel below incorrectly concluded that there must be a link between irreparable harm and every claim for which the moving party asserts a likelihood of success. This decision flatly contravenes this Court's holdings in *Winter* and *Nken.* It is sufficient for a moving party to show a likelihood of success on a claim and that it would suffer irreparable harm, for any reason, if the preliminary injunction or stay is not granted.

II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL HOLD THAT THE D.C. CIRCUIT'S DECISION WAS ERRONEOUS.

There is at least "a fair prospect" that this Court will conclude the D.C. Circuit erred with respect to at least one of the three questions presented in the petition. At this stage, Mr. Hall need not show that outcome is a certainty (or anything close to certainty). *See Araneta* v. *United States*, 478 U.S. 1301, 1304 (1986) (Burger, C.J., in chambers) ("such matters cannot be predicted with certainty"); *Bd. of Educ. of City of L.A.* v. *Super. Ct. of Cal., Cty. of L.A* ., 448 U.S. 1343, 1347 (1980) (Rehnquist, J., in chambers) (comparing this exercise to "the reading of tea leaves"). Instead, the arguments in the petition need pass only the threshold of "plausibility." *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers); *accord California* v. *Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers). Although it is enough to make that showing with respect to any of the questions presented in the petition, here, Mr. Hall clears that bar with respect to all three questions presented.

A. The Court Below Wrongfully Concluded that Mr. Hall Received Adequate Process Under *Woodard*.

The court of appeals wrongfully concluded that Mr. Hall received the minimal due process standards provided for in *Woodard*.

This Court has held that the Due Process Clause guarantees prisoners two fundamental rights with regard to the "fail safe" that is clemency proceedings: (1) meaningful access to the clemency process, and (2) at least some "procedural safeguards" in clemency proceedings. *Woodard*, 523 U.S. at 289.

Despite this Court's instruction, the panel below allowed the second guarantee to swallow the first, concluding that as long as *some* process is offered, that necessarily means adequate access.

That conclusion was manifestly erroneous. The government may not have caused the pandemic, but it made the decision to set Mr. Hall's execution in the midst of a surging global health crisis, and on the fastest timetable in the history of the modern federal death penalty. No one—not the government nor either court below—has contested that the pandemic conditions have prevented Mr. Hall's counsel from conducting any clemency-related investigation in the days since Mr. Hall's execution was set. They unquestionably have. That is perhaps best exemplified in the fact that counsel to another federal prisoner scheduled for execution did attempt some investigation despite the pandemic and became infected by and severely ill with COVID-19, rendered entirely unable to continue work on their client's behalf. *See* Decl. of Kelley J. Henry ¶¶ 3-10, *Hall* v. *Barr*, No. 1:20-cv-

03184-TSC (D.D.C. Nov. 11, 2020), ECF No. 18-1. And without being able to conduct the investigation necessary to develop his bases for mercy, the clemency process has been emptied of any value.

The panel fundamentally misapprehended Mr. Hall's due process argument. The crux of Mr. Hall's complaint is not that he was not afforded sufficient process once he filed a clemency petition. Pet App. 5a (concluding that the opportunity to file a petition "provided Hall whatever clemency process may have been due to him," and not mentioning access). It is that he was denied *access* to the clemency process in the first place. In other words, he is not arguing for a better meal or better service, he is arguing for a seat at the table. What the government has denied Mr. Hall, therefore, is distinguishable from the situation in *Woodard*, where the petitioner's complaint was not that he was prevented from accessing the clemency process at all, but rather that he should have had *more* process once had had filed his clemency petition.

Based on its fundamental misunderstanding of Mr. Hall's claim, the panel concluded that because the Pardon Attorney was willing to review Mr. Hall's petition, *see id.*, that means Mr. Hall was able to meaningfully file one. But "access" to empty process is not the "meaningful access" this Court has held is required with respect to the clemency process. *Harbison* v. *Bell*, 556 U.S. 180, 192 (2009) (prisoners should not be "put to death without meaningful access to the 'fail-safe' of our justice system") (citation omitted).

As this Court has recognized, "[t]he right to a meaningless ritual" is no right at all. *Douglas* v. *People of State of Cal.*, 372 U.S. 353, 358 (1963). Meaningless

ritual is all Mr. Hall has been offered, and yet the panel concluded this was all that was "due to [Mr. Hall]." Pet. App. 5a. That was manifest error. *See Harbison*, 556 U.S. at 192 (prisoners should not be "put to death without meaningful access to the 'fail-safe' of our justice system") (citation omitted).

This conclusion was manifest error, and warrants the Court's review.

B. The Court Below Manifestly Erred in Concluding That Mr. Hall's Statutory Right to Counsel Pursuant to 18 U.S.C. § 3599 Has Been Satisfied.

This Court has recognized that access to counsel during clemency proceedings is necessary to "ensure[] that no prisoner w[ill] be put to death without meaningful access to the 'fail-safe' of our justice system." *Harbison,* 556 U.S. at 194 (citation omitted).

Congress, too, expressly contemplates that without the assistance of learned counsel, an indigent death-sentenced prisoner cannot meaningfully seek clemency. *See* 18 U.S.C. § 3599. And as Mr. Hall explained in the courts below, *see Hall* v. *Barr, et al*., No. 20-cv-03184 (D.D.C. Nov. 3, 2020), Dkt. #1 ¶¶ 71-76, professional guidelines mandate that counsel conduct an exhaustive investigation in pursuit of clemency, and failure to adhere to these standards constitutes a violation of an attorney's ethical and professional responsibilities. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Preventing Mr. Hall's counsel from developing his clemency petition—when that opportunity could readily be afforded simply by waiting until the pandemic is brought under sufficient control to

schedule Mr. Hall's execution and thereby allowing counsel to discharge their responsibilities to him—interferes with Mr. Hall's statutory right to counsel, and is the definition of "arbitrarily den[ying Mr. Hall] any access to the clemency process." *Woodard*, 523 U.S. at 289. [counsels'] ability to present their [client's] claims * * * will be irreparably compromised." *Id.* Even so, the courts below concluded that counsel who are entirely hindered from undertaking any clemency investigation—a premise neither the government nor the courts below contested in light of the accelerating pandemic—somehow still fulfill the requirements of 18 U.S.C. § 3599. This cannot be.

Mr. Hall presented substantial evidence—including seven witness declarations, among other things— concerning (i) the type of clemency investigation required in his case, which would have required interviewing two dozen witnesses spread across six states, all of which are experiencing a surge in COVID-19 cases that would make travel and in-person interviews impossible, *Hall* v. *Barr, et al.*, No. 20-cv-03184 (D.D.C. Nov. 3, 2020), Dkt. #1 ¶¶ 114-115; *see also generally id.*, Dkts. 1-12; 1-13; 1-14; 1-15; 1-16; 1-22; (ii) the necessity of conducting this investigation in person, and (iii) the fact that both of Mr. Hall's long-time counsel are in the high-risk category, thus making travel particularly dangerous. *See supra* p. 16. Both the panel and the district court ignored this evidence entirely.

The panel's decision was manifest error, and warrants the Court's review.

C. The Panel's Order Would Allow Mr. Hall To Be Executed In Accordance With An Execution Protocol That Constitutes *Ultra Vires* Action In Violation Of The APA.

The court of appeals recognized that it had not yet "definitively resolved" whether the Federal Bureau of Prison's role in the execution process violates the Federal Death Penalty Act's requirement that a United States Marshal supervise implementation of the sentence[.] Pet. App. 6a. But rather than staying Mr. Hall's execution pending definitive resolution, the court allowed for Mr. Hall's execution to proceed. This was wrong.

Mr. Hall claimed below that the 2019 Execution Protocol is the result of *ultra vires* action because it allows the BOP to supplant the mandatory role of the U.S. Marshal under the FDPA, which states that U.S. Marshal "shall supervise implementation of the [death] sentence." 18 U.S.C. § 3956(a). The panel applied the wrong legal standard in determining whether the *ultra vires* claim provides a basis for a stay or preliminary injunction. Citing *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), the panel held that Mr. Hall, in order to overturn the district court's denial of a preliminary injunction, had to "establish a likelihood that the assertedly improper division of responsibilities between the United States Marshal and the Bureau of Prisons irreparably harms him." Pet. App. 6a-7a. That was error, and it contravenes this Court's holding in *Winter* and *Nken* v. *Holder*, 556 U.S. 418 (2009). The proper application of the *Winter* and *Nken* standard demonstrates that Mr. Hall is entitled to a preliminary injunction or a stay.

1. The Panel Applied The Incorrect Standard For Preliminary Injunctions Or Stays.

In the proceedings below, the parties cited both *Winter* (which applies to preliminary injunctions) and *Nken* (which applies to stays). *Winter* and *Nken*, however, use the same, traditional four-part test for evaluating the request for relief. And the common purpose of a preliminary injunction or a stay in a case like this is to preserve the *status quo* so the moving party can obtain judicial review of its claims on appeal. *See Nken*, 556 U.S. at 428 ("Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined."). Here, Mr. Hall seeks appellate review of his dismissed *ultra vires* claim, but he will lose the ability to obtain such review if his execution goes forward before the merits of the appeal are determined. Neither *Winter* nor *Nken* requires (as the D.C. Circuit did) a link between irreparable harm and every claim for which the moving party asserts a likelihood of success. It is sufficient for a moving party to show a likelihood of success on a claim and that it would suffer irreparable harm, for any reason, if the preliminary injunction or stay is not granted.

2. Mr. Hall Has Demonstrated A Likelihood Of Success On His *Ultra Vires* Claim.

The panel did not resolve the issue of whether Mr. Hall has established a likelihood of success, but the facts show that the district court erred and the 2019 Execution Protocol constitutes *ultra vires* agency action in violation of the APA.

The district court held that the Protocol properly "provides the U.S. Marshal the power to supervise the

implementation of a death sentence." Pet. App. 31a (emphasis added). The 2019 Execution Protocol, however, restricts that "power" in violation of the mandatory language of the FDPA requiring the U.S. Marshal to supervise executions. The Protocol affords the BOP broad discretion to vary execution procedures as it sees fit and, critically, without obtaining the U.S. Marshal's consent. For example, the 2019 Execution Protocol states that implementation procedures shall be followed "unless modified at the discretion of the [BOP] Director or his/her designee," and broadly provides that such modifications may be made as required by undefined "circumstances." *In re Matter of the Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-00145-TSC, Doc. 39-1 at A874 (D.D.C. Nov. 13, 2019); *see also id*. at A1019 ("These procedures should be observed and followed as written unless deviation or adjustment is required, as determined by the Director of the BOP or the Warden.").

The 2019 Protocol does not give the same discretion to the U.S. Marshal. That is because, in a November 27, 2017 memorandum, the BOP stated that it had conferred with the U.S. Marshal regarding the 2019 Execution Protocol and had obtained "their deference to BOP on all matters related to the time, place, and manner of carrying out federal executions." *Id.* at A858 (emphasis added.)

Thus, the 2019 Protocol reserves the ultimate decision-making authority to the BOP, which cannot be squared with the FDPA's command regarding the U.S. Marshal's supervisory role. The 2019 Protocol prevents the U.S. Marshal from following the FDPA's strict dictate of supervision because—in keeping with

the U.S. Marshal's deference to the BOP—the Protocol gives the BOP, not the U.S. Marshal, the power to alter any aspect of the sentence implementation. The BOP could, for instance, completely cut the U.S. Marshall out of the execution process. The Protocol, therefore, violates Section 706(2)(C) of the APA, 5 U.S.C. § 706(2)(C), because it patently exceeds the statutory authority. *See, e.g.*, *Catholic Health Initiatives* v. *Sebelius*, 617 F. 3d 490, 497 (D.C. Cir. 2014) (Brown, J., concurring) ("When an agency has acted beyond its delegated authority, a reviewing court will hold such action *ultra vires* . . . or a violation of the [APA] 5 U.S.C. § 706(2)(C)."); *Brown & Williamson Tobacco Corp.* v. *Food & Drug Admin*., 153 F.3d 155, 176 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000) (voiding as *ultra vires* an agency rule that conflicted with the governing statute because the agency "exceeded the authority granted to it by Congress.").

The courts below also noted the various, limited roles that the 2019 Protocol allows the U.S. Marshal, such as approving the commencement of executions and certifying that they have been carried out. Pet. App. 5a–7a, 31a. However, given the BOP's wide latitude to vary the execution procedures, those roles for the U.S. Marshal are tenuous and readily altered; accordingly, they come nowhere near the mandatory supervision contemplated under the FDPA.

The district court further held that the U.S. Marshal's supervisory role under the FDPA "does not preclude other DOJ components from participating" in executions and that the Attorney General properly delegated its authority over implementing executions to the BOP. Pet App. 30a. The problem is that FDPA

does not grant the original supervisory authority to the Attorney General. Instead, it explicitly states that the U.S. Marshal shall supervise the implementation of executions.

The district court relied on *United States* v. *Giordano*, 416 U.S. 505, 514 (1974), for the "unexceptional" proposition that the Attorney General may delegate authority where Congress "does not say otherwise" Pet App. 30a–31a, but *Giordano* does not in fact support the District Court's holding. In *Giordano*, the statute at issue specifically gave authority to the Attorney General to delegate to "any Assistant Attorney General," 416 U.S. at 514, while here the FDPA vests the sole authority in the U.S. Marshal. Moreover, the FDPA does not refer to the BOP or any designee of the U.S. Marshal's supervisory authority, so Congress did "say otherwise" in the FDPA, clearly expressing its intent that the U.S. Marshall must supervise federal executions. Thus, *Giordano* supports the argument that the 2019 Protocol is *ultra vires*.

III. MR. HALL WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

There is a clear "likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc.*, 561 U.S. at 1302. That is true for at least two reasons: Absent a stay, there is a risk (1) that Mr. Hall could be executed amid arbitrary denials of his constitutional and statutory rights; and (2) that this Court will effectively be deprived of its jurisdiction to consider the petition for a writ of certiorari.

First, the harm of being executed is inarguably "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for

equitable relief to prevent [it]." *League of Women Voters of the U.S.* v. *Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (internal quotation marks omitted); *see also Wainwright* v. *Booker*, 473 U.S. 935, 935 n.1. (1985) (Powell, J., concurring) (In capital cases, irreparable harm is "necessarily present."). Without intervention, the government may execute Mr. Hall with no legal impediment. That means Mr. Hall will be executed without the opportunity to fully litigate his meritorious constitutional and statutory claims. That is an "irremediable" harm. *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986); *cf. Hollingsworth* v. *Perry*, 558 U.S. 183, 193-195 (2010) (per curiam) (staying adoption of a new judicial rule in part based on the absence of "a meaningful comment period").

Second, failure to stay the execution risks "foreclos[ing] * * * certiorari review by this Court," which itself constitutes "irreparable harm." *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984); *accord, e.g.*, *John Doe Agency*, 488 U.S. at 1309. "Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals." *John Doe Agency*, 488 U.S. at 1309 (alteration in original) (quoting *New York* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers)). Allowing the government to proceed towards executing Mr. Hall while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison*, 468 U.S. at 1302. Because "'the normal course of appellate review might otherwise cause the case to become moot,'

issuance of a stay is warranted." *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); *see also Chafin* v. *Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants "stays as a matter of course").

IV. THE BALANCE OF EQUITIES AND RELATIVE HARMS WEIGH STRONGLY IN FAVOR OF GRANTING A STAY.

In addition to the stay factors identified above, "'in a close case it may be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Indiana State Police Pension Trust*, 556 U.S. at 960 (quoting *Conkright*, 556 U.S. at 1402). Because the other factors plainly point in favor of granting the requested stay, this Court need not consider the balance of equities here. But, if it does, this additional factor reinforces that result.

First, "[r]efusing a stay may visit an irreversible harm on [Mr. Hall], but granting it will * * * do no permanent injury to respondents." *Philip Morris USA Inc.*, 561 U.S. at 1305. Staying the mandate will not undermine the fact of Mr. Hall's conviction. Nor will granting a stay prevent the government from eventually executing Mr. Hall in accordance with the law—whatever this Court determines that it requires. It will merely allow Mr. Hall and the government sufficient time to litigate Mr. Hall's constitutional and statutory claims.

Second, the public has an interest in ensuring that agencies act in accordance with the law, particularly when the consequences are so grave and far-reaching. *See Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts,

C.J., in chambers); *League of Women Voters of United States*, 838 F.3d at 12; Pet. App. 118a ("[t]he public interest is not served by executing individuals before they have had the opportunity to avail themselves of legitimate procedures to challenge the legality of their executions"). The public, too, would therefore be ill-served if Mr. Hall were executed without being given a full opportunity to litigate whether the execution protocol violates the FDPA's requirements.

To be sure, this Court has recognized that the public also has an "interest in the timely enforcement of a [death] sentence." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1133 (2019) (quoting *Hill* v. *McDonough*, 547 U.S. 573, 584 (2006)). But this is not a situation where Mr. Hall has filed a late-breaking challenge grounded in "settled precedent." *Cf. id.* Rather, as the district court correctly found (and as the government has conceded), Mr. Hall's claims did not even become ripe until—at the earliest—the date his execution was set. Pet. App. 14a Within days of that occurrence, Mr. Hall filed his complaint in the district court, which was supported substantial evidence, including seven detailed witness declarations, among other things. *See Hall* v. *Barr, et al*., No. 20-cv-03184 (D.D.C. Nov. 3, 2020), Dkt. #1 ¶¶ 94-116.. And, it bears noting that the government scheduled Mr. Hall's execution just ten days after an injunction was lifted that had protected Mr. Hall from execution for 13 years. That injunction was entered *with consent of the government*, thus undermining any argument that the government's interest in finality is somehow paramount here (to the contrary, the government as provided no reason why it must suddenly execute Mr. Hall, after

declining to do so for so many years, now and in the middle of a global pandemic that is interfering with his rights.

On balance, a stay is therefore warranted. Failure to grant one "may have the practical consequence of rendering the proceeding moot" or otherwise cause irreparable harm to Mr. Hall. *Mikutaitis* v. *United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers). The government would not "be significantly prejudiced by an additional short delay," and a stay would serve both the public interest and judicial economy. *Id.* "In light of these considerations," this Court should "grant the application." *Id.*

CONCLUSION

For the foregoing reasons, Mr. Hall respectfully requests the Court should Applicant's execution pending disposition of his petition for certiorari.

Respectfully submitted,

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