Nos. 20-697 and 20A101

IN THE SUPREME COURT OF THE UNITED STATES

ORLANDO CORDIA HALL, PETITIONER

v.

T.J. WATSON, WARDEN, ET AL.

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND TO APPLICATION FOR A STAY OF EXECUTION

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Petitioner is a federal death-row inmate who kidnapped, raped, and buried alive a 16-year old girl in 1994 -- a "heinous, cruel, and depraved" crime. United States v. Hall, 152 F.3d 381, 406 (5th Cir. 1998). Following a jury trial, petitioner was convicted of interstate kidnapping resulting in death, among other offenses, and sentenced to death. The district court and the court of appeals accorded petitioner extensive review on direct appeal and collateral review under 28 U.S.C. 2255, and he has also been a party to lengthy litigation concerning the federal execution protocol. In the course of those proceedings, this Court twice denied petitions for writs of certiorari.

The present application arises from a petition for a writ of habeas corpus, filed just one week ago, that raises claims that he could have raised, or did raise unsuccessfully, years ago.

Specifically, petitioner contends that the government used its peremptory strikes at his 1995 trial to exclude black jurors, in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and that his death sentence is the product of systemic racial discrimination in the imposition of capital punishment. After highly expedited briefing, the district court denied petitioner's motion to stay his execution, finding the petition to be barred by 28 U.S.C. 2255(e), which generally prohibits federal prisoners from using habeas applications under Section 2241 to circumvent the strict limits on successive claims that Congress has established for federal postconviction proceedings. After further highly expedited briefing, the court of appeals today affirmed that decision and similarly denied a stay.

Before this Court, petitioner renews his request for a last-minute stay of his execution, which was scheduled for 6:00 pm today but is currently stayed, based on contentions that the jury that found him guilty and recommended a death sentence a quarter of a century ago was selected in a racially discriminatory manner and that the death penalty has broadly been administered in a racially biased fashion. Petitioner has failed to show any reasonable probability that this Court will grant review, and his claims cannot support the issuance of a stay. First, petitioner has engaged in inexcusable delay in bringing claims that are based -- even on petitioner's own telling -- on information that he acquired

months or years ago. Second, as both lower courts recognized, even aside from that delay, petitioner is not entitled to extraordinary relief because his claims -- which he could or did raise through the principal collateral-review mechanism of a motion under 28 U.S.C. 2255 -- are not cognizable in a Section 2241 petition. This last-minute Section 2241 petition is also his second habeas petition, and thus amounts to an abuse of the writ.

Third, petitioner's claims are meritless. The trial record amply supports the trial court's finding that the government did not exercise its peremptory strikes in a racially discriminatory manner. Indeed, petitioner acknowledges that the record of voir dire in his trial does not support a meritorious Batson claim. Instead, petitioner relies on evidence of improper jury selection from other cases, prosecuted by another sovereign in a pre-Batson era, involving a state attorney who later became an Assistant United States Attorney (AUSA) and was part of the team who prosecuted this case. That evidence cannot show a Batson violation that is nowhere to be found in petitioner's own trial. And petitioner's statistical claim alleging racial discrimination in the application of the death penalty is based on tenuous statistical analysis that, both legally and factually, does not support any inference of racial discrimination in his own case.

Finally, the balance of equities also favors denying any equitable relief. The public and the victim's family have an

overwhelming interest in implementing the capital sentence recommended by a jury a quarter-century ago. Indeed, the victim's family has already traveled thousands of miles to Terre Haute for the execution of petitioner's sentence this evening. As the Fifth Circuit rightly noted in recently denying leave for a successive collateral attack under Section 2255: "It is time -- indeed, long past time -- for these proceedings to end." In re Hall, 2020 WL 6375718, *7 (5th Cir. Oct. 30, 2020).

STATEMENT

1. In September of 1994, petitioner -- a marijuana dealer in Pine Bluff, Arkansas, who obtained his drugs from North Texas -- believed that a man named Neil Rene had stolen some of his drug money. See Hall, 152 F.3d at 389. Petitioner and his coconspirators went to Neil Rene's apartment in Arlington, Texas armed with handguns, a baseball bat, duct tape, and a jug of gasoline. Ibid. Neil Rene's 16-year-old sister, Lisa Rene, was the only person in the apartment. Ibid. The coconspirators demanded entry, and the girl called 911 for help. Ibid. After an unsuccessful attempt to kick in the front door, petitioner's coconspirators shattered a sliding glass door with a baseball bat, tackled Lisa, and dragged her to a car where petitioner and another coconspirator were waiting. Ibid. Petitioner then raped Lisa in the car and forced her to perform oral sex on him, and members of the group drove her to Arkansas. Ibid. Once they arrived,

petitioner's coconspirators tied Lisa to a chair and raped her repeatedly. Ibid.

The next day, petitioner and another coconspirator took Lisa into a bathroom to talk. Hall, 152 F.3d at 389. Petitioner then came out and told his coconspirators that Lisa "kn[e]w too much." Ibid. Petitioner, accompanied by Bruce Webster, dug a grave in a nearby park. Ibid. Petitioner, Webster, and a third coconspirator then took Lisa to the park, but they could not find the makeshift grave in the dark. Id. at 389-90. The group drove Lisa back to the motel, switched rooms to avoid detection, and held her captive for one more night. Id. at 390.

The following morning, petitioner, Webster, and another coconspirator again drove Lisa to the park, where they had dug her grave the day before. Hall, 152 F.3d at 390. Petitioner led Lisa -- blindfolded -- to her gravesite. Id. at 389-90. Petitioner covered her head with a sheet and hit her in the head with a shovel. Id. at 390. Lisa tried to flee, but one of the men tackled her. Ibid. Petitioner and Webster took turns hitting her with the shovel, and Webster gagged her, dragged her into her grave, poured gasoline over her, and buried her. Ibid. Lisa was alive but unconscious when she was buried, and although she may have regained consciousness in the grave before her death, she ultimately succumbed to the combined effects of asphyxia and

multiple blunt-force injuries. See United States v. Hall, 455 F.3d 508, 511 (5th Cir. 2006), cert. denied, 549 U.S. 1343 (2007).

2. In 1994, a federal grand jury in the United States District Court for the Northern District of Texas indicted petitioner on multiple charges, including interstate kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1) (Count One); conspiring to commit kidnapping in violation of 18 U.S.C. 1201(c) (Count Two); traveling in interstate commerce to promote possession of marijuana with intent to distribute in violation of 18 U.S.C. 1952 (Count Three); and using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. 924(c) (Count Six). See United States v. Hall, 94-CR-121, Doc. No. 15 (N.D. Tex. Nov. 22, 1994) (Superseding Indictment). The government filed notice of its intent to seek the death penalty for the offense of interstate kidnapping resulting in death, pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591-3598.

Petitioner's jury trial began in October 1995. The lead prosecutor was AUSA Richard Roper, and AUSA Paul Macaluso was also a member of the prosecution team. See D. Ct. Doc. 18 at 3. During jury selection, the venire included seven prospective jurors who were black, as is petitioner. Id. at 4. Of those prospective jurors, the district court struck one for cause; the prosecution team used its peremptory challenges to strike four; the defense

used a peremptory strike to exclude another; and one was seated on the jury as an alternate. D. Ct. Doc. 1-21, at 123-126; D. Ct. Doc. 1-11, at 6-7.[1] Petitioner raised a challenge to the government's strikes under Batson v. Kentucky, 476 U.S. 79 (1986). The district court expressed doubt that petitioner had established a prima facie case of discrimination, but nonetheless called on the prosecution team to explain its reasons for the strikes. D. Ct. Doc. 1-11, at 8. AUSA Roper then detailed his race-neutral reasons for the strikes, most of which concerned jurors' willingness to recommend the death penalty. Id. at 8-14. After hearing the prosecutor's explanations, the district court overruled the objection. Ibid.; see D. Ct. Doc. No. 18 at 4.

In the guilt phase of the trial, the jury found petitioner guilty on all four counts. In the penalty phase, the jury recommended a sentence of death on Count One, which the district court imposed, along with terms of imprisonment on the remaining counts. See Hall, 152 F.3d at 390.

Petitioner appealed, raising 11 issues. Hall, 152 F.3d at 390-91. Although one of his appellate claims concerned jury selection -- he challenged the "district court's rejection of defense challenges for cause to impaired and biased venirepersons"

[1] The district court stated that "five qualified black prospective jurors remained" after strikes for cause, D. Ct. Doc. No. 18 at 4. That does not include the juror who was seated as an alternate.

-- he did not pursue a Batson claim. Id. at 391. The Fifth Circuit affirmed petitioner's convictions and sentence in 1998. Id. at 427. This Court denied certiorari. 526 U.S. 1117 (1999) (No. 98-7510).

3. Between 2000 and 2004, petitioner litigated various motions, including a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, which he amended multiple times. See D. Ct. Doc. 18 at 4; Hall v. United States, No. 00-CV-422, 2004 WL 1908242, at *1 (N.D. Tex. Aug. 24, 2004). As amended, petitioner raised 12 claims, including a claim that his "rights under the Fifth and Eighth Amendments were violated by the racially discriminatory effects of the federal capital sentence scheme." Hall, 2004 WL 1908242, at *4. In support of that claim, petitioner "submitted an affidavit from Kevin McNally discussing racial disparities in the application of the death sentence in federal cases." D. Ct. Doc. 18 at 6. Petitioner did not raise a Batson claim.

The district court denied the Section 2255 motion. As relevant here, the court explained that petitioner's statistical evidence was insufficient to support his claim of discrimination in the application of the death penalty, because petitioner's statistics "presented no evidence that there were similarly situated white defendants against whom the death penalty was not sought," nor "that there has been any discriminatory intent" on

behalf of the Department of Justice. Hall v. United States, No. 00-CV-422, 2004 WL 1908242, at *37 & n.11 (N.D. Tex. Aug. 24, 2004). The Fifth Circuit declined to issue a certificate of appealability. United States v. Hall, 455 F.3d 508, 510 (5th Cir. 2006). This Court again denied certiorari. 549 U.S. 1343 (2007) (No. 06-8178).

4. In 2016, the Fifth Circuit denied petitioner's request for authorization to file a successive Section 2255 motion attacking his firearm conviction based on Johnson v. United States, 576 U.S. 591 (2015). In re Hall, No. 16-10670 (5th Cir. June 20, 2016). In 2019, petitioner filed another request to file a successive Section 2255 motion, this time based on United States v. Davis, 139 S. Ct. 2319 (2019). On October 30, 2020, the Fifth Circuit denied authorization. In re Hall, No. 19-10345, ___ F.3d ___, 2020 WL 6375718 (5th Cir. Oct. 30, 2020).

While petitioner was appealing and collaterally attacking his sentence in the Fifth Circuit, he also joined litigation in the U.S. District Court for the District of Columbia challenging the then-existing federal lethal-injection protocol. In 2006, that court entered a preliminary injunction barring petitioner's execution (and others). That preliminary injunction remained in place for the next 14 years but was vacated on September 20, 2020, following the completion of a lengthy process of revising the federal execution protocol. In re Fed. BOP Execution Protocol

Cases, No. 19-MC-145 (TSC), 2020 WL 5604298, at *4 (D.D.C. Sept. 20, 2020). After the vacatur of that injunction, on September 30, 2020, the Attorney General announced that the Bureau of Prisons had scheduled petitioner's execution to take place on November 19, 2020.

5. Meanwhile, in April of 2017, petitioner filed a Section 2241 petition in the Southern District of Indiana (where he is confined), claiming that his firearm conviction was invalid. Hall v. Watson, No. 17-CV-00176, Doc. No. 1. The district court stayed the proceedings pending this Court's decision in Davis. Hall, No. 17-CV-176, Doc. No. 21. After the Fifth Circuit denied authorization to file a successive Section 2255 motion raising the same claim, the district court in Indiana granted the government's motion to dismiss petitioner's Section 2241 petition, on the ground that 28 U.S.C. 2255(e) bars petitioner from challenging his conviction or sentence via a habeas petition under Section 2241 raising an issue that petitioner already raised and lost on the merits under Section 2255. Hall, No. 17-CV-176, Doc. No. 48 (Nov. 13, 2020). The Seventh Circuit affirmed. Hall v. Watson, No. 20-3216, Doc. No. 11.

6. On November 12, 2020, seven days before his scheduled execution date, petitioner commenced this case by filing a second Section 2241 petition in the Southern District of Indiana, raising two challenges. First, petitioner -- for the first time since the

voir dire proceedings themselves -- asserted a Batson violation. Second, petitioner asserted that "statistical evidence shows race-based differences in the application of the federal death penalty between black and non-black defendants." D. Ct. Doc. No. 18 at 7. Along with his Section 2241 petition, petitioner filed a motion for a stay of execution. Ibid.

The district court ordered expedited briefing, and on November 17, 2020, it denied the stay motion. D. Ct. Doc. No. 18 at 7-22. The court explained that petitioner had failed to show a strong possibility of success on the merits because he was not entitled to pursue his claims under Section 2241. Under the so-called "saving clause" in Section 2255(e), a federal prisoner may resort to relief under Section 2241 only where Section 2255 itself is "inadequate or ineffective to test the legality of his detention." The district court here observed, citing Webster v. Daniels, 784 F.3d 1123, 1135 (7th Cir. 2015) (en banc), that although the Seventh Circuit construes the saving clause to allow some claims challenging a conviction or sentence, it does so only there is "'some kind of structural problem with section 2255.'" And it found that petitioner did not satisfy that requirement. D. Ct. Doc. 18 at 8-9.

The district court analyzed petitioner's assertion of new evidence in detail. D. Ct. Doc. 18 at 11-17. As to the Batson claim, the district court found that "the facts underlying" it

were "available through diligent search during petitioner's § 2255 proceedings." Id. at 14. Specifically, petitioner relied on Miller-El v. Dretke (Miller-El II), 545 U.S. 231 (2005), in which this Court discussed a jury selection manual ("the Sparling Manual") that "was circulated in the Dallas County District Attorney's Office from 1968 to 1976, and explicitly urged prosecutors to exclude minorities from jury service." Id. at 12. He also relied on findings in Miller-El II and Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2009), that Macaluso, while employed by the Dallas County District Attorney's Office, had engaged in a pattern of race-based jury selection during the trials at issue in those cases. D. Ct. Doc. 18 at 12. The district court rejected petitioner's claim "that the manual's existence only came to light with the issuance" of the decision in Miller-El II, however, explaining that the manual was in fact the subject of news stories as early as 1986 and was even mentioned in this Court's February 2003 opinion in Miller-El I -- which issued while petitioner's initial Section 2255 proceeding was still pending. Id. at 12 & n.2 (citing Miller-El v. Cockrell, 537 U.S. 332, 334-335 (2003)). The court similarly observed that "Macaluso's employment history as a prosecutor in the Dallas County District Attorney's Office was a matter of public record easily discoverable by defense counsel well before 2005," and even more specifically, "a 2002 article cited by [petitioner] shows that AUSA Macaluso's ties to

the Sparling Manual were also known while [petitioner's] § 2255 petition was pending before the district judge in Texas." D. Ct. Doc. 18 at 13. Accordingly, the district court found that petitioner's "current Batson claim does not involve evidence that is 'newly discovered' but new lawyers looking at the same evidence that has been available to [petitioner] for many years." Id. at 14.

The court also found that petitioner's statistical claim did not rely on genuinely new evidence that could satisfy the saving clause. D. Ct. Doc. 18 at 17. Petitioner primarily relied on a 2011 study by sociologist Scott Phillips, who was hired by another death-row inmate to "'conduct a statistical analysis on the possible effect of race on the federal death penalty in Texas,'" using data from 1988 to 2010. Id. at 15 (quoting D. Ct. Doc. No. 1 at 48). The district court observed that the Seventh Circuit has limited its recognition of claims under the saving clause that rely on newly proffered evidence to claims where the evidence "'existed at the time of the original proceedings,'" but was unavailable to the defendant. Ibid. (quoting Webster, 784 F.3d at 1140 & n.9). The district court emphasized that "[w]ithout this requirement, 'there would never be any finality' where a petitioner raises a claim, such as discriminatory application of the death sentence, for which new evidence is regularly created." Ibid. (quoting Webster, 784 F.3d at 1140 & n.9). The district court

further determined that, "[t]o the extent [petitioner] relies on the underlying data" in Phillips' study, he failed to demonstrate that the evidence was previously unavailable despite the exercise of due diligence. Id. at 17. The district court observed, among other things, that Phillips relied on data compiled by Kevin McNally, and that "[b]ecause [petitioner] had this data and relied upon it in his [own] § 2255 proceedings, it was not previously unavailable." Ibid.

The court also considered the equities. In doing so, it stressed that petitioner's "delay in bringing his claims * * * weigh[ed] heavily against granting a stay." D. Ct. Doc. 18 at 22 (citing Lee v. Watson, 2019 WL 6718924, at *2 (7th Cir. Dec. 6, 2019)).

7. Petitioner appealed and sought a stay from the court of appeals. The court of appeals ordered expedited briefing and earlier today affirmed and denied a stay. The Seventh Circuit observed that petitioner's claims were meritless for the reasons explained in the district court's "comprehensive order." Hall v. Watson, No. 20-3229, Doc. 18 at 2. The Seventh Circuit also determined that "Section 2255 is not a structurally inadequate or ineffective vehicle for the claims [petitioner] proposes to raise now," emphasizing that he had previously pursued and then dropped a Batson claim, and had "long ago raised and lost the systemic-

bias claim in his first round of § 2255 litigation in the Northern District of Texas." Ibid.[2]

ARGUMENT

The application for a stay of execution should be denied. A movant seeking a stay pending review must establish "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" in addition to "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). The movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted). And once the movant satisfies those prerequisites, the Court considers whether a stay is appropriate in light of the "harm to the opposing party" and "the public interest." Nken v. Holder, 556 U.S. 418, 435 (2009). This Court has applied "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a

[2] Petitioner's challenge to the federal lethal injection protocol remains pending. A related stay application is currently before this Court, No. 20A99, and the district court has recently issued a stay of execution. In re Fed. BOP Execution Protocol Cases, No. 19-MC-145, Dkt. No. 323 (Nov. 19, 2020). Petitioner also filed an action in the District of Columbia seeking to delay his execution based on claims relating to the notice he received and his ability to seek clemency, with respect to which a petition for a writ of certiorari and stay application are currently pending before this Court (Nos. 20-688 and 20A100).

time as to allow consideration of the merits without requiring entry of a stay." Hill v. McDonough, 547 U.S. 573, 584 (2006).

Petitioner cannot satisfy those standards. As a threshold matter, petitioner's extreme delay in pursuing his latest claims counsels strongly against equitable relief. And even if those claims were more timely, they are both legally and factually infirm. Under well-established law, petitioner cannot pursue under Section 2241 claims that he could have pursued, or did pursue, under Section 2255. Even if he could, petitioner's claims are meritless, relying on highly generalized evidence, or evidence from other cases that had no evident bearing on petitioner's own trial.

I. PETITIONER'S DELAY IN PURSUING HIS CLAIMS WEIGHS HEAVILY AGAINST A STAY HERE.

Last-minute stays or injunctions of federal executions "'should be the extreme exception, not the norm.'" Barr v. Lee, 140 S. Ct. 2590, 2591 (2020) (quoting Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019)). The "'last-minute nature of an application' that 'could have been brought' earlier . . . 'may be grounds for denial of a stay'" or other equitable relief. Bucklew, 139 S. Ct. at 1134 (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)); see Gomez v. U.S. Dist. Ct., 503 U.S. 653, 654 (1992) (same).

As the district court recognized, petitioner could have brought his current claims years ago, and his delay "weighs heavily

against granting a stay." D. Ct. Doc. No. 18 at 21. Petitioner did not pursue his current jury-selection claim in his appeal or in the multiple collateral attacks he has filed over the past decades. None of petitioner's many challenges to his conviction or sentence, across multiple courts, has been successful. In his direct appeal -- in which he was represented by at least three attorneys, one of whom continues to represent him today -- petitioner raised 11 separate claims of error. See United States v. Hall, 152 F.3d 381, 388-427 (5th Cir. 1998). He did not include a Batson claim, although he had asserted an unsuccessful Batson objection in the district court, see D. Ct. Doc. No. 1-11. Petitioner's counsel has acknowledged that the inclusion and exclusion of particular claims was the result of "'winnowing out weaker claims on appeal and focusing on those more likely to prevail.'" D. Ct. Doc. 15-2, at 3.

In 2000, represented by separate counsel so he could file ineffective-assistance claims against his former counsel, petitioner sought relief under 28 U.S.C. 2255. He ultimately asserted 12 separate claims after supplementing his Section 2255 motion twice. Hall v. United States, No. 00-CV-422, 2004 WL 1908242, at *4 (N.D. Tex. Aug. 24, 2004). Again, no claim related to allegations of racial bias in his jury selection. See ibid. Notably, petitioner did raise the other claim he makes here -- namely, that his "rights under the Fifth and Eighth Amendments

were violated by the racially discriminatory effects of the federal capital sentence scheme" -- based on the very same type of statistical evidence. Id. But the district court rejected that claim on the merits, and both it and the Fifth Circuit denied a certificate of appealability. United States v. Hall, 455 F.3d 508, 510 (5th Cir. 2006), cert. denied, 549 U.S. 1343 (2007).

Most recently, petitioner filed a different Section 2241 petition in the Southern District of Indiana, No. 17-CV-176; a motion for authorization to file a second or successive Section 2255 motion in the Fifth Circuit; see In re Hall, No. 19-10345; and an action in the District of Columbia, No. 20-CV-3184. But in none of the more recent actions did petitioner raise the claims he alleges here, even though, on his own accounting, he already had much of the evidence on which he now relies. Rather, he raises them now in this (second) Section 2241 petition filed just seven days before his scheduled execution.

The last-minute nature of these claims is indicative of their merits, as none of petitioner's many attorneys apparently deemed them worthy of pursuit before now. And, as this Court has recently emphasized, the last-minute nature of petitioner's challenge in itself counsels strongly against equitable relief. Petitioner's request for extraordinary last-minute equitable relief based on claims that "could have been brought" earlier constitutes "grounds for denial of" his request. Bucklew, 139 S. Ct. at 1134 (quotation

marks omitted); cf. ibid. (noting that this Court has "vacated a stay entered by a lower court * * * where the inmate waited to bring an available claim until just 10 days before his scheduled execution" for a 24-year-old murder conviction). Had petitioner pursued these claims earlier, this litigation would have run its course by now. Having instead filed only last week, petitioner has no equitable right to demand that his execution be further delayed. See Hill, 547 U.S. at 584.

II. PETITIONER HAS FAILED TO SHOW THAT THIS COURT IS LIKELY TO REVIEW AND REVERSE THE SEVENTH CIRCUIT'S DECISION

A. Petitioner Has Failed To Establish That He Can Pursue His Current Claim Through Section 2241

As the Seventh Circuit recognized, even if Section 2255(e) sometimes permits habeas petitions challenging a conviction or sentence, it cannot be used to assert claims that he could have, or did, raise in a Section 2255 proceeding. Hall v. Watson, No. 20-3229, Doc. 18. Petitioner has not identified, and counsel for the government is not aware of, any decision of any court of appeals allowing a federal prisoner to pursue habeas relief in comparable circumstances. And no substantial likelihood exists this Court will do so in this case. Indeed, the Court has twice recently denied stay motions, and petitions for writs of certiorari, by capital prisoners who sought to litigate last-minute claims under the saving clause. Lee v. Watson, Nos. 20-

5032, 20A7, 2020 WL 3964235 (July 14, 2020); Purkey v. United States, Nos. 20-26, 20A12, 2020 WL 4006838 (July 16, 2020).

1. Congress enacted Section 2255 in 1948 in order to make federal postconviction challenges more efficient by requiring federal prisoners to bring such challenges in the district of their conviction rather than the district in which they happened to be confined. See United States v. Hayman, 342 U.S. 205, 210-219 (1952) (discussing the legislative impetus for enactment of Section 2255). A half-century later, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1220, Congress sought to further streamline such federal postconviction challenges by imposing a one-year statute of limitations (generally running from the date that a prisoner's conviction becomes final) and barring second or successive challenges outside of certain narrowly drawn circumstances that do not exist here. See 28 U.S.C. 2255 (Supp. II 1996). One of those circumstances is when a prisoners relies on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." Id. § 2255(h)(1). A prisoner must bring such a claim within one year of "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Id. § 2255(f)(4).

In order to ensure that federal prisoners do not circumvent the Section 2255 framework specifically enacted for federal postconviction challenges by instead seeking relief under the general federal habeas statute, 28 U.S.C. 2241, Congress has also provided since 1948 that a federal prisoner who could seek -- or has sought -- relief by motion under Section 2255 may not instead pursue an application for a writ of habeas corpus under Section 2241. See 28 U.S.C. 2255(e). Section 2255(e) allows a federal prisoner to pursue relief under Section 2241 only if he can show "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality" of his conviction or sentence. 28 U.S.C. 2255(e). That "saving clause" allows prisoners to use Section 2241 where a particular type of claim is simply not cognizable under Section 2255. A prisoner might, for example, use Section 2241 to challenge "the deprivation of good-time credits" and "parole determinations" -- claims that could not be pressed under Section 2255, because they attack "the execution of [the] sentence" rather than the sentence itself. See, e.g., McCarthan v. Director of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1092-1093 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017).

In this case, as the Seventh Circuit recognized, a motion under Section 2255 would have been fully adequate to test either claim. In fact, petitioner did bring one of his claims, alleging statistical disparities in the application of the death penalty,

in his initial Section 2255 proceeding. That claim was considered and rejected on the merits, because petitioner could not "show that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." Hall v. United States, No. 00-CV-422, 2004 WL 1908242, at *36 (N.D. Tex. Aug. 24, 2004) (citing United States v. Armstrong, 517 U.S. 456 (1996)). And while petitioner did not pursue his Batson claim during his Section 2255 proceedings, he does not dispute that he faced no legal impediment in doing so.

Petitioner therefore cannot demonstrate that Section 2255 was "inadequate or ineffective to test" his current claims. "[I]nadequate or ineffective," taken in context, "must mean something more than unsuccessful." Purkey v. United States, 964 F.3d 603, 615 (7th Cir.), reconsideration denied, 812 F. App'x 380 (7th Cir. 2020), stay vacated, No. 20A4, 2020 WL 3988688 (U.S. July 15, 2020), and cert. denied, No. 20A12, 2020 WL 4006838 (U.S. July 16, 2020). And the "inadequate or ineffective to test" must also require something more than a constraint on litigation resources that leads counsel to focus on the claims they deem likely to succeed. Were it otherwise, Section 2241 would always provide an unchecked channel for raising -- in circumvention of the explicit constraints of the Section 2255 remedy itself -- claims that counsel deemed insufficiently meritorious to assert during previous proceedings.

2. Petitioner contends (Pet. 12-15) that the saving clause authorizes his claims, asserting that they rest on newly discovered evidence of potential racial discrimination and should therefore be cognizable under Section 2241. That contention is both legally unsound and factually inaccurate.

Section 2255 specifically contemplates successive collateral attacks based on "newly discovered evidence," but explicitly limits them to circumstances that are not present here. Specifically, it allows them only if that new evidence "would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" -- i.e., where they pertain to a claim that the prisoner did not actually commit the underlying crime at all. 28 U.S.C. 2255(h)(1) (emphasis added). And even claims of that sort must be brought within a year of "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. 2255(f)(4).

Petitioner can provide no sound reason why Congress would have channeled federal postconviction relief through Section 2255, limited successive Section 2255 claims based on new evidence to timely asserted claims of factual innocence, yet allowed untimely claims that do not relate to factual innocence to be brought at any time in a Section 2241 habeas petition. The purported "newly discovered evidence" on which petitioner relies here does not

suggest his factual innocence. And petitioner did not file this action within a year of the date that his alleged "new evidence" was, or could have been, discovered. Petitioner cannot circumvent Section 2255's express limits on successive claims based on new evidence by simply proceeding under Section 2241 instead. To hold otherwise would render meaningless Congress's carefully reticulated limitations on post-conviction petitions in Section 2255. That petitioner's claim is expressly barred by Section 2255's limits on successive petitions reflects the intended operation of the statute, not some deficiency within it that can be overcome with the saving clause.

Petitioner relies (Pet. 14-15) on the Seventh Circuit's decision in Webster v. Daniels, 784 F.3d 1123 (7th Cir. 2015) (en banc), to support his invocation of Section 2241. The government has argued that the Seventh Circuit's prior decisions, including Webster, take an overly expansive view of Section 2255(e)'s saving clause, in at least certain respects. See Pet. at 14-25, United States v. Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420). But even accepting Webster, the courts below -- which, unlike this Court, were bound by Webster -- correctly determined that it does not support petitioner's reliance on the saving clause here. See Hall v. Watson, No. 20-3229, Doc. 18 at 2. Webster held only that "there is no categorical bar against resort to section 2241 in cases where new evidence would reveal that the Constitution

categorically prohibits a certain penalty." 784 F.3d at 1139 (emphasis added). Petitioner cannot satisfy either criterion. The crux of petitioner's claim is not he is "categorically ineligible" for capital punishment, but instead that he was subject to assertedly unconstitutional procedures. And the evidence on which he relies in support of that claim is not "new."

To the contrary, the central facts about jury selection in petitioner's case were known to him during his trial and direct appeal more than two decades ago. The trial record -- which is the core evidence for any Batson claim -- has, of course, always been available to petitioner. Petitioner recognizes that on that record, his claim is a "non-starter" and a "sure loser," D. Ct. Doc. 15 at 7 n.3, 13, and therefore argues that the judicial decisions in Miller-El II and Reed constituted newly-discovered evidence to support his previously meritless Batson claim, because those cases discussed Batson violations involving Macaluso. See Miller-El v. Dretke, 545 U.S. 231 (2005); Reed v. Quarterman, 555 F. 3d 364 (5th Cir. 2009). But even on petitioner's telling, he brought his Batson claim eleven years after those judicial decisions were published. In any event, as the district court explained, the facts outlined in Miller-El II and Reed were not new, even at the time those decisions issued.

For example, the "Sparling manual" was discussed in a story by the Dallas Morning News in 1986. D. Ct. Doc. 18 at 12 n.2. A

separate article published in 2002 specifically discussed "AUSA Macaluso's ties to the Sparling Manual." Id. at 13. Furthermore, as petitioner acknowledges, this Court itself discussed the Sparling Manual in Miller-El I, 537 U.S. 332, 334-335 (2003). All of that evidence arose before, or during the pendency of, petitioner's first Section 2255 proceeding, and petitioner therefore cannot claim it is "new" in November of 2020. As the district court explained, petitioner's "current Batson claim does not involve evidence that is 'newly discovered' but new lawyers looking at the same evidence that has been available to Mr. Hall for many years." D. Ct. Doc. 18 at 14.

The same is true of petitioner's "new" statistical evidence. As the district court explained, petitioner actually relied on much of that "new" evidence in his first Section 2255 motion. D. Ct. Doc. 18 at 17; see also id. at 6 (describing affidavit from Kevin McNally discussing racial disparities in the application of federal death sentences in cases reaching back to 1988). The balance of petitioner's "new" evidence -- a statistical analysis prepared in 2011 -- is, in fact, almost a decade old. Those statistics were compiled at the request of another death-row inmate in 2010, and petitioner himself could similarly have sought its compilation during the years that he was challenging his conviction and sentence. D. Ct. Doc. 1 at 40. The only impediment he has asserted to doing so is a claim that "[c]ounsel for Mr. Hall

requested funding for such analysis, but were denied," Hall 7th Cir. Br. at 29. But the record evidence cited and provided by petitioner does not support that contention. Instead, petitioner's filed declarations describe only limitations on funding for additional sentencing mitigation work. D Ct. Doc. 15-1 at 6-8.

Petitioner has argued that the district court held his attorneys to too high a standard of diligence in discovering new evidence, and he faults the district court for using the Internet to ascertain what evidence might have been available to petitioner before now. Hall 7th Cir. Reply Br. 7. But the district court was careful to point to publicly disseminated information, such as news reports and court decisions. And more generally, the bar for diligence cannot be as low as would be necessary to accept petitioner's evidence here as "new," thereby countenancing delays of a decade or more in bringing information in decisions of this Court to a lower court's attention. And to the extent that some of petitioner's evidence might not have been readily available in its current form until recently, it cannot be the case that any addition of hard copy materials to the internet, or description of pre-existing facts or studies in a new judicial decision, or statistical re-analysis of historical data, could support a Section 2241 action based on "new evidence" whenever counsel happens to encounter the newly publicized information. That

approach would permit the precise "never-ending series of reviews and re-reviews (particularly since there is no numerical limit for section 2241)," which Congress expressly sought to preclude. Purkey, 964 F.3d at 615.

3. Petitioner alternatively asks (Pet. 15-16) this Court to craft a new atextual exception to Section 2255(e) for race-related claims. No circuit has created such an exception, and this Court's precedents do not support one. Petitioner suggests (Pet. 16) that that such claims fall within a general "miscarriage-of-justice exception," but the decisions he cites -- House v. Bell, 547 U.S. 518, 536 (2006), and Wainwright v. Sykes, 433 U.S. 72, 91 (1977) -- address the miscarriage-of-justice exception to procedural default and do not suggest that long-final federal criminal convictions may continually be subject to repeated attacks notwithstanding Section 2255(e). It is well-established that Congress may limit the availability of successive collateral relief, as it has done in Section 2255(e), without providing an exception for the amorphous class of race-related claims that petitioner would allow at any time. See Felker v. Turpin, 518 U.S. 651, 664 (1996).

Petitioner's claims of a "miscarriage of justice" also have no footing in the record. Petitioner states (Pet. 14), for example, that his sentence was "handed down by an all-White jury fabricated on the basis of racial prejudice," and he represents

(Pet. ii) that this case concerns "a Black prisoner whose conviction and death sentence were procured through intentional race discrimination." But petitioner himself has conceded that the trial record itself shows no Batson violation, and that his additional "evidence" is not based on his own case. D. Ct. Doc. 15 at 7 n.3, 13. Petitioner has pointed to no evidence – and none exists -- that his jury considered race, or that any members of his jury bore any racial animus. His reliance (Pet. 15) on cases like Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017), and Buck v. Davis, 137 S. Ct. 759, 777 (2017), is likewise misplaced.

In any event, this case would be a particularly poor vehicle to consider petitioner's new proposed exception to the saving clause, because even if Section 2255 did not bar applicant's Section 2241 action, the abuse-of-the-writ doctrine would. A prisoner abuses the federal writ of habeas corpus by "raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." McCleskey v. Zant, 499 U.S. 467, 489 (1991). Petitioner previously filed a Section 2241 petition in April of 2017, when, even on his own accounting, had possessed all the evidence to support his Batson claim for approximately six years. There was, as a result, no legitimate practical impediment to petitioner pursuing these claims in his

initial Section 2241 petition, and his successive petition is an abuse of the writ.

B. Petitioner's Claims Also Do Not Warrant This Court's Review

Petitioner also seeks this Court's review on the merits of his Batson claims. For the reasons described above, those claims are not properly presented here. Even if they were, however, they are meritless.

1. The trial record in this case makes it clear that petitioner's four-person prosecution team, led by AUSA Richard Roper, committed no Batson violation; that the government's peremptory strikes were motivated largely by a detailed analysis of each juror's views on the death penalty; and that it is moreover unclear what the final racial/ethnic composition of the jury was, notwithstanding petitioner's repeated assertion (Pet. 1, 8, 9, 14, 15, 18) that the jury was "all-White." The government's briefs before the district court and Seventh Circuit contain a detailed factual discussion of the voir dire in petitioner's case, which the government lacks the space to reproduce in this emergency filing beyond the brief summary that follows.

As explained in the briefing below, see, e.g., Gov't Br., 7th Cir. No. 20-3229, at 33-51, AUSA Roper handled a substantial amount of the voir dire; completed the prosecution's peremptory strike list; presented all the argument on the Batson challenges and did so from his own notes; and provided voluminous, legitimate, and

credible reasons for the strikes at issue. See, e.g., D. Ct. Doc. 1-15 (prosecution strike list); D. Ct. Doc. 1-11 (Batson hearing). Potential juror Amy Evans, for example, stated in her questionnaire that her ability to impose the death penalty when life without parole was also an option would be "depend[e]nt upon the nature of the crime," but added that she "would probably lean more to the life sentence." D. Ct. Doc. 1-14 at 10. In striking her, AUSA Roper relied on, inter alia, those beliefs, her hesitance in answering questions about the death penalty, and the fact that she had two close relatives in prison, one for murder. Id. at 13; D. Ct. Doc. 1-11 at 12-14. Similarly, prospective juror Billie Lee indicated a strong reluctance to impose the death penalty, stating, inter alia, "basically I feel [the death penalty] should not be applied." D. Ct. Doc. 13 at 168. She additionally explained that she believed the death penalty served a legitimate purpose when used against habitual perpetrators of "heinous crimes," D. Ct. Doc. 1-29 at 9, or crimes against children, but specified that she meant "smaller children," and re-expressed her general preference that "life without ever being released would be a better option," D. Ct. Doc. 13 at 170-171; D. Ct. Doc. 1-11 at 9. AUSA Roper explained that he exercised a peremptory strike on Lee because of these and other views. D. Ct. Doc. 1-11 at 14-16.

The comprehensive jury-selection record created in this case explains why none of petitioner's counsel ever raised a Batson

claim in any appeal or collateral-review motion in the last 25 years. The only court to consider the Batson claim was the one best-situated to evaluate it, as the experienced trial judge in this case assessed the reasons for the government's strikes after presiding over voir dire and personally observing AUSA Roper's explanations of his decisions. As this Court has explained, the ultimate question of discriminatory intent under Batson is a "'finding of fact"' to which "a reviewing court ordinarily should give * * * great deference." Batson, 476 U.S. at 98 n.21; see Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019) (noting that "[t]he Court has described the appellate standard of review of the trial court's factual determinations in a Batson hearing as 'highly deferential"') (citation omitted); Hernandez v. New York, 500 U.S. 352, 364 (1991) (plurality opinion) (describing "Batson's treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard"). Accordingly, "[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." Flowers, 139 S. Ct. at 2244 (quoting Snyder v. Louisiana, 552 U.S. 472, 477 (2008)). Petitioner does not even suggest that standard could be met here.

Instead, petitioner's argument rests primarily on inferences from jury-selection practices in the Dallas District Attorney's Office. But petitioner points to no evidence that any of the

problems that plagued the Dallas District Attorney's Office were present at the U.S. Attorney's Office years later, that AUSA Macaluso selected the jurors to strike at his trial, that any AUSAs discussed the race of potential jurors, or any other evidence tying the Sparling Manual to this case. Petitioner also argues (Pet. 17) that the government's decision to prosecute him in the Northern District of Texas, rather than the Eastern District of Arkansas, was influenced by the relative percentage of minority populations in north Texas versus central Arkansas, proving that "[r]acial discrimination permeates government decisions made in this case." That argument has no basis in the record, and is facially implausible. The United States Attorney's Office for the Northern District of Texas prosecuted petitioner because he kidnapped and raped his 16-year-old victim there, and because the girl he brutalized and buried alive was part of that community, as were the family members who survived her.

2. To the extent that petitioner is pressing his statistics-based claims in this Court, they likewise do not suggest an entitlement to relief. This Court has rejected claims like petitioner's, explaining that a defendant "must prove that the decisionmakers in his case acted with discriminatory purpose." McCleskey v. Kemp, 481 U.S. 279, 292 (1987). Indeed, petitioner has acknowledged that "'a racially disproportionate pattern of criminal charging, standing alone, is insufficient to demonstrate

purposeful racial discrimination,'" and that such a claim must be buttressed by "'case-specific evidence of personal racial animus on the part of the prosecution team.'" D. Ct. Doc. 18 at 16 (quoting D. Ct. Doc. 1 at 56). Particularly in the absence of a viable Batson claim, petitioner cannot make such a showing here.

III. EQUITABLE CONSIDERATIONS WEIGH HEAVILY AGAINST A STAY

In all events, the application should be denied because the balance of equities weighs in favor of permitting the government to carry out petitioner's lawful sentence.

This Court has repeatedly emphasized that "[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)). Once post-conviction proceedings "have run their course," "an assurance of real finality" is necessary for the government to "execute its moral judgment." Calderon v. Thompson, 523 U.S. 538, 556 (1998). That interest in carrying out petitioner's sentence is magnified by the heinous nature of his crimes and the length of time that has passed since his sentence. Delaying petitioner's execution "would frustrate the [federal government's] legitimate interest in carrying out a sentence of death in a timely manner." Baze, 553 U.S. at 61 (plurality opinion). And as discussed above, the last-minute nature of petitioner's challenge also creates "a strong equitable

presumption against the grant of a stay." Hill, 547 U.S. at 584. That equitable presumption should be particularly strong in a case, like this one, where the prisoner is seeking to circumvent statutory limitations enacted to streamline postconviction challenges and thereby prevent delays in the execution of capital judgments occasioned by last-minute litigation.

Petitioner's victim, 16-year-old Lisa Rene, was an innocent bystander to a dispute over a drug transaction. Because petitioner believed that he was out a few thousand dollars over a marijuana dispute, he and his coconspirators subjected Lisa Rene to a horrific death, including being kidnapped, repeatedly raped, and ultimately gagged, soaked in gasoline, and buried alive. See Hall, 152 F.3d at 389-90. Her family has waited decades for petitioner's sentence to be carried out, and has already traveled thousands of miles to Terre Haute for its execution. His current claim is procedurally barred and legally and factually meritless. As the Fifth Circuit rightly noted: "It is time -- indeed, long past time -- for these proceedings to end." In re Hall, 2020 WL 6375718, at *7.

CONCLUSION

The application for a stay and the accompanying petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General

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