No. 20-697 & 20A101

IN THE
Supreme Court of the United States

ORLANDO CORDIA HALL
Petitioner,
v.
T.J. WATSON, WARDEN, USP TERRE HAUTE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit
Execution Date: November 19, 2020 at 6:00 PM

REPLY IN SUPPORT OF PETITION FOR CERTIORARI AND EMERGENCY APPLICATION FOR A STAY OF EXECUTION

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Orlando Cordia Hall respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh in this case, as well as an emergency stay of his execution so that he can litigate his claims.

INTRODUCTION

Absent intervention by this Court, Hall will be executed without *any* court having the opportunity to consider his claim that his trial was infected by racial

bias. This is a fundamental miscarriage of justice that can—and must—be remedied.

To avoid confronting the substance of Hall's *Batson* claim—which rests on evidence that the AUSA who picked the all-White jury that convicted Hall and sentenced him to death has twice been adjudicated to have impermissibly struck Black jurors on the basis of their race and then lied about it—the government contends that Hall's claims are not cognizable under 28 U.S.C. § 2241.[1] If the government is right, the necessary conclusion is that, even though this evidence was unavailable when Hall litigated his § 2255 petition, and even though no statute of limitations bars his claim, no viable forum exists, and the courthouse doors are forever closed to a claim that the district court described as "extremely serious." Pet. App. 25a. In light of this Court's admonition that courts must "engage[] in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system," *McCleskey* v. *Kemp*, 481 U.S. 279, 309 (1987), that result cannot stand. At the very least, the Court

[1] The government misstates the issues on appeal. *See* Opp. 2, 3, 13, 21, 26-27, 33-34. Hall seeks certiorari review only of the two questions presented in his Petition, *see* Pet. (i)-(ii), and does not seek this Court's review of the separate claim he raised below concerning racial discrimination in the application of the federal death penalty. .

should stay Hall's execution to permit consideration of his claims. [2]

I. ANY PURPORTED DELAY DOES NOT PRECLUDE RELIEF FOR HALL.

The government argues that delay in pursuing Hall's claims "weighs heavily against a stay here," Opp. 16, but identifies no bar precluding Hall from raising his claims in a satisfactory § 2241 petition. *Morales v. Bezy*, 499 F.3d 668, 672 (7th Cir. 2007). Instead, the government asserts that Hall's delay in raising his *Batson* claims renders interim relief unavailable here. That position is not supported by either this Court's precedents or the procedural posture in which Hall finds himself.

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[2] As the government notes in n.2 of its Opp., the district court has already stayed Mr. Hall's execution on the basis that the federal execution protocol violates the Food, Drug, and Cosmetic Act. The government is appealing this ruling, while concurrently, Mr. Hall is actively challenging his lack of due process regarding executive clemency and raising the instant *Batson* challenge. Given the number of important issues currently requiring judicial resolution, Mr. Hall requests that this Court administratively stay his execution until each of these claims can be litigated to finality. As his execution is already subject to a stay, this request seeks only minor relief that will serve to maintain the status quo. Neither party will be adversely affected by granting this request, and doing so will ensure that Mr. Hall's important constitutional and statutory claims cannot be mooted extrajudicially.

The government's authority is materially distinguishable. In *Bucklew*, plaintiff waited until just 12 days before his execution to challenge the state's lethal injection protocol, *Bucklew* v. *Precythe*,139 S. Ct. 1112, 1120 (2019), and received a last-minute stay. *Bucklew* v. *Lombardi*, 572 U.S. 1131 (2014). Only after five more years of litigation on the same claims, including two appeals and two "11th-hour" stays, did this Court find further delay unwarranted. 139 S. Ct. at 1134. Hall has received no such process here.

And while the government asserts that Hall should have brought his claims on direct appeal, Opp. 17, there are multiple reasons why doing so would have been impractical and, indeed, impossible: (1) the information surrounding Macaluso's practices was unknown to Hall before this Court's decision in *Miller-El II*, 545 U.S. 231; (2) Hall's § 2255 petition was already pending; and (3) shortly after his § 2255 proceedings concluded, Hall was protected by an injunction to which the government consented.

Regardless, the government attempts to lure the Court into applying a rigid rule prohibiting the grant of a stay when a petitioner's request is brought close in time to his execution. But no such rule exists. *See, e.g.*, *Gutierrez* v. *Saenz*, No.19-8695, __ S. Ct. __, 2020 WL 3248349 (June 16, 2020) (granting stay of execution one day prior to scheduled execution); *Madison* v. *Alabama*, 138 S. Ct. 1172 (2018) (granting stay on date of execution).

Accordingly, any perceived delay by Hall is indeed justifiable and does not, in any event, suggest that a stay is unwarranted here.

II. THE PANEL MANIFESTLY ERRED BELOW AND HALL IS LIKELY TO SUCCEED ON THE MERITS.

A. § 2255 Does Not Diminish Prisoners' Right to Relief.

The writ of habeas corpus is designed to permit "[c]hallenges to the validity of any confinement." *Muhammad* v. *Close*, 540 U.S. 749, 750, 124 S. Ct. 1303, 1304, 158 L. Ed. 2d 32 (2004). Contrary to the government's argument, Opp. 20-22, this Court has recognized that "[n]owhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." *United States* v. *Hayman*, 342 U.S. 205, 219 (1952). The savings clause is an integral part of a statute that as "history makes clear . . . was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Davis* v. *United States*, 417 U.S. 333, 343 (1974).

Contrary to the government's suggestion, relief under § 2241 is not only warranted when it attacks the "execution of a sentence," Opp. 21. Circuit courts have in general agreed that where an application of § 2255(h) would result in a "complete miscarriage of justice," *Bruce* v. *Warden Lewisburg USP*, 868 F.3d 170, 179 (3d Cir. 2017), or an "intolerable result," *Webster* v. *Daniels*, 784 F.3d 1123, 1139 (7th Cir. 2015) (en banc), § 2255 is "inadequate or ineffective to test the legality of his detention" within the meaning of § 2255(e). *See also Tolliver* v. *Dobre*, 211 F.3d 876, 878 (5th Cir. 2000) (per curiam) (holding that though "Section § 2255 is the primary means of collaterally attacking a federal sentence[,]" a habeas action brought

as "a § 2241 petition attacking a federally imposed sentence may be considered"). The contours of what falls within such general scope is ill defined; as the Seventh Circuit recently admonished against thinking that its existing precedent "rigidly describe[s] the outer limits of what might prove that section 2255 is inadequate or ineffective to test the legality of a person's detention." *Purkey* v. *United States*, 964 F.3d 603, 611–12 (7th Cir. 2020). In *Webster*, the en banc appeals court found that the petitioner could use § 2241 to present newly discovered evidence that his "execution . . . violates the Eighth Amendment." 784 F.3d at 1139. The panel below erred in not permitting the present petition to proceed under § 2241 in light of the new evidence demonstrating that a miscarriage of justice and intolerable result will otherwise ensue.

B. The Lower Court Erred In Concluding § 2255 Was Not Structurally Inadequate.

The government wrongly suggests that Hall's claims are an improper effort to circumvent the bars of § 2255, because they are based on newly discovered evidence. Opp. 23-24. This argument ignores Hall's argument that scope of the savings clause in § 2255(e) remains open, as recently recognized by the Seventh Circuit in *Purkey* v. *United States*, 964 F.3d 603, 611–12 (7th Cir. 2020). Though the lower courts appeared to accept this fact, they did not make a serious attempt to analyze whether Hall's petition sought to cure a "fundamental problem," *id*. at 615, and instead focused on questions of venue and judicial economy in the legislative history of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Pet. App. 23a-24a.

Moreover, the government's argument that Hall could have brought the claims presented in this petition in his initial § 2255 motion, Opp. 25, ignores the fact that the evidence supporting Hall's claim here was not available until after his § 2255 motion was denied. Contrary to the government's arguments, Opp. 25-26, and the district court nevertheless determined that because some of the information at issue was purportedly in the public domain, Hall's counsel should have discovered it. Pet. App. 16a-18a. This imposes an undue burden on defense counsel, and is inconsistent with the idea that "[d]ue diligence . . . means reasonable diligence, not the maximum feasible diligence." *Webster* v. *Watson*, 975 F.3d 667, 683 (7th Cir. 2020) (quotation omitted); *see also Williams* v. *Taylor*, 529 U.S. 420, 435 (2000) (diligence in the context of procedural default means "a reasonable attempt, in light of the information available at the time, to investigate.").

That the district court was able to find evidence in the public record using the Internet in the year 2020 does not bear on whether counsel in the late 1990s or early 2000s could or should have been able to find it at that time. *Williams*, 529 U.S. at 443 (reversing decision finding lack of diligence by habeas counsel and stating that "[w]e should be surprised, to say the least, if a district court . . . were to hold that in all cases diligent counsel must check public records"). Hindsight may be 20/20, but it should not be the basis for denying Hall the opportunity to litigate what the district court acknowledged to be "extremely serious" claims. Pet. App. 25a.

And the evidence now available to Hall shows that the racially motivated misconduct tainting his trial was unfortunately not an isolated incident. Here, the evidence would expose systemic failings of the death sentence the government seeks to impose on Hall, despite its roots in the race of the Black defendant and the Black men and women stricken from the venire panel as part of a campaign to ensure no Black defendant like Hall had a true jury of his peers. The Court is not "powerless to act in such a case." *Webster*, 784 F.3d at 1139.

C. PREVENTING HALL FROM LITIGATING HIS CLAIMS WOULD BE A MISCARRAIGE OF JUSTICE.

Finally, even if the Court were to find that Hall should have brought these claims sooner, it nevertheless should grant a stay and permit him to litigate them because declining to do so would "result in a 'fundamental miscarriage of justice.'" *Coleman* v. *Thompson*, 501 U.S. 722, 749-50 (1991) (internal quotation omitted). The government argues that no circuit has expressly created an "exception to Section 2255(e) for race-related claims." Opp. 28. But Hall does not ask this Court to graft any such categorical exception onto the statute. Rather, he contends that it would be a fundamental miscarriage of justice *in this case* if the government were permitted to execute him without any opportunity for any court to consider and resolve the merits of his "extremely serious" claim that his

death sentence was tainted by racial bias.[3] Pet. App. 25a; *see also* Amicus Br. 2-3; *id.* at 11-14.

As amicus has explained, "[c]laims that racial discrimination has infected a death sentence are different in kind than other constitutional harms." Amicus Br. 6. And because the United States "lacks an interest in enforcing a death sentence obtained based on racial discrimination," "it would be a miscarriage of justice for Hall to be executed without any court considering the significant evidence he has presented that his death sentence was 'obtained on so flawed a basis.'" *Id.* at 4.[4]

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[3] Nor is Hall's petition barred by the abuse-of-the-writ doctrine. Opp. 29. McCleskey was decided before AEDPA established a framework adjudicating successive petitions, and that framework is AEDPA. See Wright v. Spaulding, 939 F.3d 695, 698 (6th Cir. 2019) (Thapar, J.) (observing that "AEDPA tried to curb what courts used to call 'abuse of the writ'" before enacting legislation that governs "second or successive" habeas petitions).

[4] And to set the record straight, Hall has never "conceded that the trial record itself shows no Batson violation." Opp. 29. What Hall has argued is that courts have hesitated to find a *Batson* violation based on a cold trial record alone. Br. 22-23. Further, while the government says Hall's reliance on cases like *Buck* v. *Davis* is "misplaced," it offers no explanation for this conclusory assertion. *Id.*

III. THE PANEL'S ORDER WOULD MEAN NO COURT EVER HEARS HALL'S MERITORIOUS *BATSON* CLAIMS.

The government's attempt to minimize Hall's showing of substantial violations under *Batson* v. *Kentucky* fails for at least three reasons: (1) the government completely ignores Paul Macaluso's undeniable record of impermissibly striking minorities from juries; (2) it is a fallacy to suggest that Batson violations are the province of trial, and not appellate, courts; and (2) the government has not meaningfully distinguished the disparate treatment of Black and White prospective jurors identified by Hall.

First, the government tries to sidestep Macaluso's track record of Batson violations, going as far as to make the incredible claim that there is nothing "tying the Sparling Manual to this case." Opp. 33. That, of course, intentionally overlooks that this Court analyzed that manual in detail and called out Macaluso by name **ten** times in *Miller-El,* 545 U.S. 231. "If anything more is needed for an undeniable explanation of what was going on, history supplies it." *Id.* at 266. As the Supreme Court and Fifth Circuit have made clear, Macaluso was well-versed in eliminating racial minorities from the jury pool. *Id.*; *Reed* v. *Quarterman*, 555 F.3d 364 (5th Cir. 2009). This history is unquestionably relevant, *see Flowers*, 139 S. Ct. at 2246, and it bears directly on the strength of Hall's *Batson* claim here. No amount of evasiveness can allow the government to avoid it.

Second, the government apparently now takes the position that Hall got all of the review of his *Batson* claim he is owed because the trial court heard a

Batson challenge at trial. Opp. 32. This ignores that the *Batson* claim raised in this Petition is premised on evidence that was indisputably unavailable at trial. Indeed, had the trial court been aware of Paul Macaluso's shameful history, it may well have reached a different conclusion at that hearing. *Flowers* v. *Mississippi*, 139 S. Ct. 2228 (2019), which the government cites, Opp. 32, demonstrates this point. There, the petitioner lost a *Batson* challenge at trial, only to have his constitutional rights vindicated by this Court based on more comprehensive evidence—precisely what Hall seeks here. 139 S. Ct. at 2232-33 ("At the sixth trial, the State exercised six peremptory strikes—five against black prospective jurors . . . Flowers again raised a Batson claim, but the trial court concluded that the State had offered race-neutral reasons for each of the five peremptory strikes").

Third the government asserts that the *Batson* claims are not meritorious, but this argument ignores the detailed side-by-side juror analysis proffered by Hall for potential Black jurors Amy Evans and Billie Lee.

That analysis, at a minimum, shows that Ms. Evans and Ms. Lee were struck on grounds for which other potential jurors, who were White, were not struck. Both Ms. Evans and Ms. Lee were purportedly struck for reasons the government never questioned them about during voir dire. Br. 34-35; *see also* Pet.-App. Br. at 34-37, *Hall* v. *Watson*, No. 20-3229 (7th Cir. Nov. 18, 2020). The failure to ask those questions "is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545

U.S. at 246. The government also claimed to strike both Ms. Evans and Ms. Lee for their relationships to individuals who were either in prison or practicing defense attorneys. Br. 34-35. Again, White jurors with similar relations were not struck. While the prosecution claimed that Lee and Evans were equivocal in their views on the death penalty, other White jurors held similar views but nonetheless were not struck. This disparate treatment among similar White and Black jurors too is indicative of pretext. *Miller-El II*, 545 U.S. at 241. Taken together, there is considerable evidence of a Batson violation.

In light of the Supreme Court's decision in *Miller-El II*—both the legal principles it articulated and its specific finding that one of the very same prosecutors responsible for seating the all-White jury that convicted and sentenced Hall had discriminated on the basis of race and then tried to conceal that discrimination by offering pretextual justifications—Hall has established a likelihood of success of establishing, at a minimum, that Ms. Lee and/or Ms. Evans were impermissibly struck on account of their race, in violation of *Batson*.

IV. THE BALANCE OF THE EQUITIES WEIGHS IN FAVOR OF A STAY

There is an unmistakable "likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1302 (2010). Without a stay, Hall will be executed amid violations of his constitutional and statutory rights, this Court will be stripped of jurisdiction to consider the petition. That would constitute an "irremediable" harm. *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986).

And "when, as in this case, 'the normal course of appellate review might otherwise cause the case to become moot,' * * * issuance of a stay is warranted." *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (citing *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)). Because "the balance of harms favors applicants," *id*., the Court should stay Hall's execution.

CONCLUSION

For the foregoing reasons, and those discussed in the Petition for Writ of Certiorari and Hall's Emergency Application for a Stay of Execution, the Petition and Emergency Application for a Stay of Execution should be granted.

Respectfully submitted,

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