No. 17-6261

IN THE SUPREME COURT OF THE UNITED STATES

Donald R. Fell, Petitioner

v.

United States, Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

REPLY TO THE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Donald Fell, through undersigned counsel, petitioned this Court for a writ of certiorari on September 28, 2017. After three enlargements of time for filing, the United States submitted a brief in opposition on March 7, 2018. In its brief in opposition, the government suggests that the Court of Appeals decision in this case poses no conflict with the decisions of other circuits. (Brief in Opposition at 8). The government's main argument, however, is that the posture of this case is not suited to this Court's review, because it arises on a denial of mandamus appeal which was taken in the pretrial posture. (Brief in Opposition at 9-14). Although Mr. Fell relies primarily on the points and authorities in his Petition, he submits the following brief points in reply.

First, this Court's authority to review a summary denial of mandamus of a Court of Appeals is well established. In *Mallard v. United States*, 490 U.S. 296 (1989), this Court reversed a summary denial of mandamus by a Court of Appeals, which arose on an interlocutory appeal of a district court's order compelling counsel to represent an indigent civil litigant. Given the summary nature of the Court of Appeals' ruling denying mandamus, Mallard's petition for certiorari as well as this Court's subsequent opinion are almost entirely devoted to the analysis of the District Court of the statute in issue, and its correlative authority. *See* Petition for Writ of Certiorari, *Mallard v. United States District Court for the Southern District of Iowa et al.*, 490 U.S. 296 (1989) (No. 87-1490); *Mallard v United States,* 490 U.S. 296, 300-310. Mandamus relief had been sought there, as here, in the pre-trial posture. *Id.* 299-300.

Second, contrary to the government's assertion that the matter is not yet ripe for this Court's consideration, Mr. Fell does not have adequate other means to obtain relief. That this is true has already been held in the Court of Appeals *in this case*. *See United States v. Fell*, 360 F.3d 135, 139-40 (2d Cir. 2004) (discussing ripeness of pretrial constitutional challenge to FDPA), *citing Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (ripeness entails a fact-specific evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977); *see also United States v. Quinones*, 313 F.3d 49, 57-60 (2d Cir. 2002) (same).

The Court of Appeals also noted in that earlier *Fell* opinion the specific propriety of pre-trial interlocutory adjudication of constitutional challenges to the Federal Death Penalty Act:

> [D]ue regard for the rights of criminal defendants compels the conclusion that . . . the defendant['s] constitutional challenge to the FDPA was ripe for consideration by the District Court and is ripe for our review. First, the defendant['s] argument clearly was fit for adjudication. HN4 A challenge to the facial constitutionality of a criminal statute is a pure question of law [that] . . . ["]is eminently fit for judicial review."
>
> [A] defendant suffers practical and legally cognizable disadvantages by postponing a facial challenge to the death penalty until after trial. Quite apart from a defendant's obvious desire to know in advance whether he will be risking his life by going to trial, . . . a defendant may reasonably prefer the ordinary allocation of peremptory challenges - six for the government, ten for the defense - rather than the allocation in a capital case of twenty for each side. . . . [A] defendant may reasonably prefer a jury on which persons who are conscientiously opposed to the death penalty are not excused for cause.

> Further, if the death penalty remains a possibility during trial, a defendant may be forced into trial tactics that are designed to avoid the death penalty but that have the consequence of making conviction more likely. Moreover, the possibility of capital punishment frequently induces defendants to enter into plea agreements in order to guarantee their own survival. And the Supreme Court has specifically held that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." Accordingly, to the extent that a defendant might be disposed to plead guilty before trial in order to avoid capital punishment, withholding consideration of a facial challenge to the death penalty until after trial, conviction and sentence could cause him substantial hardship.

United States v. Fell, 360 F.3d at 140 (2d Cir. 2004), quoting *United States v. Quinones*, 313 F. 3d 49, 50-60 (2d Cir. 2002). Thus, the fact that Mr. Fell has no adequate remedy at law for a later appeal of this issue has been established.

Moreover, whatever policy considerations that would otherwise weigh against incurring additional delay of the trial in this matter are not apposite here. At present, the trial is stayed pending a separate interlocutory appeal that has been taken by the government of a separate decision of the District Court. *United States v. Fell,* No. 17-1991 (2d Cir. appeal docketed June 22, 2017). *Cf, e.g., Johnson v. Jones*, 515 U.S. 304, 309, 115 S. Ct. 2151, 2154, 132 L. Ed. 2d 238 (1995) (noting concern that interlocutory appeals can threaten trial proceedings with delay, additional costs, and diminishing coherence).

Finally, this Court recently denied a petition for writ of certiorari in which a constitutional question had been raised about the propriety of Arizona's scheme for seeing and administering capital punishment. *Hidalgo v. Arizona*, 241 Ariz. 543 (Ariz. 2017), cert. denied, 2018 U.S. LEXIS 1639 (U.S. Mar. 19, 2018) (No. 17-251). The order denying the petition for certiorari included a statement of Justice Breyer, with whom Justice

Ginsburg, Justice Sotomayor, and Justice Kagan joined, noting the need for the constitutional question to arise on a record that had been developed in an evidentiary hearing:

> . . .[I]n this case, the opportunity to develop the record through an evidentiary hearing was denied. As a result the record as it has come to us is limited and largely unexamined by experts and the courts below in the first instance . . . . Capital defendants may have the opportunity to fully develop a record with the kind of empirical evidence that the petitioner points to here. And the issue presented in this petition will be better suited for certiorari with such a record.

Id. at *8, (Statement of Breyer, J.). *Cf also*, Petition for Writ of Certiorari, *Evans v. State of Mississippi,* (Jan. 2, 2018) (No. 17-7245) (attaching record of geographic arbitrariness in deployment of capital punishment in Mississippi).

Here, Mr. Fell presents this Court with a record which, unlike that in *Hidalgo*, has been fully developed. The district court conducted a two-week evidentiary hearing at which fifteen different expert witnesses testified, and hundreds of pages of exhibits were introduced. All of this evidence and information is before this Court for its review. As such, the issues here are well suited for certiorari in the manner indicated in *Hidalgo*.

CONCLUSION

This is a death penalty case in which the district court has issued a sweeping order condemning the Federal Death Penalty Act for the myriad of constitutional defects that have concerned this Court's death penalty jurisprudence since *Furman v Georgia,* 408 U.S. 238 (1972). Because the record is developed and the issues are ripe, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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