Nos. 20-6570 and 20A110

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON BERNARD, PETITIONER

v.

UNITED STATES OF AMERICA

(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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ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Ind.):

Bernard v. Warden, No. 20-cv-631 (Dec. 1, 2020) (granting motion to withdraw petition)

Bernard v. Warden, No. 20-cv-616 (Dec. 8, 2020) (denying motion to stay execution)

Bernard v. Warden, No. 20-cv-616 (Dec. 8, 2020) (denying motion for stay pending appeal)

United States District Court (W.D. Tex.):

United States v. Bernard, No. 99-cr-70 (June 16, 2000) (judgment)

United States v. Bernard, No. 99-cr-70 (Sept. 28, 2012) (order denying first-in-time motion under 28 U.S.C. 2255)

United States v. Bernard, No. 99-cr-70 (Sept. 28, 2012) (order denying first-in-time motion under 28 U.S.C. 2255)

United States v. Bernard, No. 99-cr-70 (Dec. 20, 2017) (order denying second-in-time Section 2255 motion, styled as motion under Fed. R. Civ. P. 60(b)(6))

United States v. Bernard, No. 99-cr-70 (Aug. 8, 2019) (order dismissing third-in-time Section 2255 motion)

United States v. Bernard, No. 99-cr-70 (Sept. 10, 2019) (order amending August 8, 2019, judgment to transfer unauthorized Section 2255 motion to court of appeals)

United States v. Bernard, No. 99-cr-70 (Dec. 3, 2020) (order denying motion to enjoin execution)

Bernard v. United States, No. 04-cv-164 (parallel civil docket for post-conviction proceedings)

United States Court of Appeals (5th Cir.):

United States v. Bernard, No. 00-50523 (July 19, 2002) (affirming on direct appeal)

United States v. Bernard, No. 13-70013 (Aug. 11, 2014) (denying certificate of appealability with respect to first-in-time Section 2255 motion)

United States v. Bernard, No. 18-70008 (Sept. 14, 2018) (denying certificate of appealability with respect to second-in-time Section 2255 motion)

United States v. Bernard, No. 19-50837 (Sept. 9, 2020) (denying authorization to file second-or-successive Section 2255 motion)

United States v. Bernard, No. 19-70021 (Sept. 9, 2020) (affirming district court's transfer of unauthorized second-or-successive Section 2255 motion)

United States Court of Appeals (7th Cir.):

Bernard v. Warden, No. 20-3379 (docketed Dec. 8, 2020)

Supreme Court of the United States:

Bernard v. United States, No. 02-8492 (June 16, 2003)

Bernard v. United States, No. 14-8071 (Jan. 19, 2016)

Bernard v. United States, No. 18-6992 (Jan. 13, 2020)

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Petitioner, along with several other members of his gang, murdered and incinerated Todd and Stacie Bagley in 1999. After a carjacking, the gang members locked the Bagleys in the trunk of their own car and drove them to a remote area on a federal military installation, where petitioner doused the car in lighter fluid. One of petitioner's co-defendants shot each of the Bagleys in the head, killing Todd and rendering Stacie unconscious. Petitioner then set the car on fire, causing Stacie to die of smoke inhalation. In 2000, petitioner was convicted of, among other offenses, murdering Stacie within the special territorial jurisdiction of the United States, for which he received a capital sentence. The district court and the court of appeals accorded

him extensive review on both direct appeal and collateral review under 28 U.S.C. 2255, and this Court denied three petitions for writs of certiorari from the resulting judgments.

The present petition for a writ of certiorari and accompanying application for a stay arise from petitioner's third Section 2255 motion. In that motion, petitioner alleges that the government withheld evidence from him concerning his own relative position in the gang, in violation of Brady v. Maryland, 373 U.S. 83 (1963), and sponsored false testimony on that issue at the penalty phase of his trial, in violation of Napue v. Illinois, 360 U.S. 264 (1959). Petitioner has never explained "why he would not have known what his role in his own gang was," 826 Fed. Appx. 356, 358 n.2, and a chart of the gang's hierarchy -- the subject of the evidence that petitioner claims that the government did not disclose -- was in fact made available to petitioner before trial as part of the government's open-file discovery policy.

The lower courts correctly rejected petitioner's effort to bring such a further collateral attack years after he fully exhausted his avenues for relief. The district court determined that it lacked jurisdiction because petitioner's motion was a second or successive Section 2255 motion for which petitioner had not obtained the court of appeals' prior authorization. Pet. App. 9a-17a; see 28 U.S.C. 2244(b)(3), 2255(h). The court of appeals affirmed, Pet. App. 1a-4a, and separately declined to authorize the motion, 826 Fed. Appx. 356.

The court of appeals' decision finding petitioner's third Section 2255 motion to be "second or successive," 28 U.S.C. 2255(h), was plainly correct and does not conflict with any decision of this Court or another court of appeals. Unlike the "unusual posture" of the incompetency-to-be-executed claim in Panetti v. Quarterman, 551 U.S. 930 (2007), on which petitioner relies, his claims here did not ripen only when his execution was imminent, compare id. at 937, 945-946. Instead, he is seeking to assert the kind of claims -- about pre-trial discovery and trial testimony -- that could have been raised in his first Section 2255 motion, filed more than 15 years ago. Indeed, Section 2255 itself classifies motions based on "newly discovered evidence" as second or successive, setting forth stringent requirements for authorizing such motions, which petitioner cannot satisfy. 28 U.S.C. 2255(h)(1). And petitioner does not dispute that the courts of appeals have uniformly deemed comparable later-in-time Section 2255 motions raising Brady claims to be second or successive.

Petitioner therefore fails to show any likelihood that this Court would grant certiorari to review the decision below, let alone that the Court would accept his view that Brady claims are not successive. That alone is enough to deny his request for a stay. A stay is also unwarranted for the further reason that he waited for more than a month -- until two days before his scheduled execution -- to file his petition for a writ of certiorari. The

court of appeals entered judgment on September 9, 2020; petitioner received notice of his December 10 execution date on October 16; and the court denied rehearing on November 6. Pet. App. 1a, 5a; Stay Appl. 7. Yet petitioner waited to file his petition and stay application in this Court until December 8, and he sought relief in this Court without even bothering to afford the court of appeals an opportunity to consider his request. Cf. Sup. Ct. R. 23.3. "Last-minute stays should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier * * * 'may be grounds for denial of a stay.'" Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019) (citation omitted). The balance of equities strongly favors allowing the government to carry out petitioner's lawful sentence, imposed for a heinous murder he committed more than two decades ago, without further delay. The petition for a writ of certiorari and the application for a stay should be denied.

STATEMENT

1. In June 1999, petitioner and other members of a street gang in Killeen, Texas, carjacked and murdered Todd and Stacie Bagley. 299 F.3d 467, 471–473. Christopher Vialva, Tony Sparks, and a third gang member developed a plan to abduct and rob a motorist at gunpoint, use the victim's bankcard to make ATM withdrawals, and abandon the victim in a remote area locked inside his own car trunk. Id. at 471. The three gang members enlisted help from petitioner and a fifth gang member. Ibid.

Because the gang members had only a "tiny .22 pistol," which they considered "too small to frighten anyone," petitioner retrieved his .40-caliber Glock pistol for use in the scheme. 299 F.3d at 471. Petitioner then drove Vialva and the others from one store parking lot to another searching for a victim. Ibid. After some time, petitioner and the fifth gang member temporarily departed, and the three other gang members located a couple whom they viewed as suitable victims: Todd and Stacie Bagley, youth ministers visiting Killeen from Iowa who had stopped at a convenience store after a Sunday morning worship service. Id. at 471-472 & n.2.

While Todd used a payphone and his wife, Stacie, waited in their car, two of the group approached Todd and asked for a ride. 299 F.3d at 472. Todd agreed, and all three gang members entered the backseat of the Bagleys' car. Ibid. After giving Todd directions, Vialva pulled petitioner's .40-caliber Glock on him, Sparks pulled a smaller pistol on Stacie, and Vialva told them that "the plans have changed." Ibid. The trio then robbed the Bagleys, forced them into the trunk of their car, and drove around in the car for several hours attempting to empty the Bagleys' bank accounts from multiple ATMs. Ibid.

After petitioner and the fifth gang member rejoined the group, Vialva stated "that he had to kill the Bagleys because they had seen his face." 299 F.3d at 472. Petitioner and one of the others then set off to buy lighter fluid to burn the Bagleys' car. Ibid.

Sparks, who had expressed his desire to discontinue the crime, went home. Id. at 472 n.3.

Petitioner and the three remaining gang members then drove the Bagleys' car (with the Bagleys still in the trunk) and petitioner's car to a remote area on the Fort Hood military installation. 299 F.3d at 472-473. Petitioner helped pour lighter fluid in the Bagleys' car, while the Bagleys sang and prayed in the trunk. Id. at 472. Stacie then stated that "Jesus loves you" and "Jesus, take care of us." Ibid. Vialva cursed in reply, ordered the trunk opened, and shot the Bagleys in the head with petitioner's gun, killing Todd instantly and knocking Stacie unconscious with a shot to the side of her face. Id. at 473. Petitioner then set fire to the car, causing Stacie to die of smoke inhalation. Ibid.

The gang members' escape was foiled when petitioner's car slid off the road into a muddy ditch, where the gang members were found and later arrested by law-enforcement officers responding to the fire. 299 F.3d at 473.

2. A federal jury found petitioner guilty on one count of carjacking resulting death, in violation of 18 U.S.C. 2119 and 2; one count of conspiring to murder the Bagleys, in violation of 18 U.S.C. 1117; and two counts of first-degree murder (one for each of the Bagleys) within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111(b) and 2. 299 F.3d at 473. Pursuant to the Federal Death

Penalty Act of 1994 (FDPA), Pub. L. No. 103-322, Tit. VI, 108 Stat. 1959, the district court held a penalty-phase trial in front of the same jury.

Along with other evidence, the government presented the testimony of Texas Ranger John Aycock, who explained the background and structure of the gang, known as the 212 PIRU Bloods. D. Ct. Doc. 317, at 111-113 (Oct. 25, 2000).[1] He described both Vialva and Sparks as "climbers" in the 212 PIRU Bloods who attempted to elevate their status in the gang "with their boldness and things that they could do, their plans and their schemes." Id. at 114. Ranger Aycock testified that while Vialva was described as the "scary" one in the group, petitioner was a "person who would assist and help" other gang members "and would not run from a fight." Id. at 114, 125. Other witnesses testified that, although petitioner was not a full-fledged member of the gang, he "associated" and "hung around" with it. See, e.g., D. Ct. Doc. 312, at 239-240 (Oct. 25, 2000); D. Ct. Doc. 314, at 24, 36, 49, 135 (Oct. 25, 2000).

Following the penalty phase, the jury recommended that petitioner be sentenced to death for the killing of Stacie Bagley. 299 F.3d at 473. In June 2000, the district court imposed that sentence pursuant to the FDPA. Judgment 2. The court of appeals

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[1] All citations to the district court docket entries are to the docket in No. 99-cr-70 (W.D. Tex.).

affirmed on direct appeal, 299 F.3d 467, and this Court denied certiorari, 539 U.S. 928.

3. In 2004, petitioner filed his first motion to vacate his sentence under Section 2255. In the lengthy motion, petitioner asserted claims under both Brady v. Maryland, 373 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1959). See D. Ct. Doc. 416, at 134-147 (Dec. 8, 2014). Petitioner did not, however, assert that the government violated Brady or Napue with respect to the disclosure or presentation of evidence about his role in the gang. See ibid.

The district court denied petitioner's Section 2255 motion and declined to grant a certificate of appealability (COA). D. Ct. Doc. 449, at 62-63 (Sept. 28, 2012). With respect to petitioner's Brady and Napue claims, the court found that the claims were procedurally barred because they could have been raised on direct appeal, and were "without merit" in any event. Id. at 14-15 & n.1, 22-26. The court of appeals denied a COA, 762 F.3d 467, and this Court denied certiorari, 577 U.S. 1101.

4. In 2017, petitioner filed his second Section 2255 motion, styled as a motion under Federal Rule of Civil Procedure 60(b) for relief from the judgment in his initial Section 2255 proceedings. D. Ct. Doc. 569, at 1-63 (Nov. 30, 2017). Petitioner did not assert any additional Brady or Napue claims; instead, he alleged that the district judge who had presided over his trial

and initial Section 2255 proceedings, and who had since resigned, had been "unfit to perform judicial tasks." Id. at 1-2.

The district judge to whom the case had been reassigned construed petitioner's motion as an unauthorized second-or-successive Section 2255 motion, dismissed it for lack of jurisdiction, and denied a COA. D. Ct. Doc. 571, at 5-6 (Dec. 20, 2017). The court of appeals likewise denied a COA, 904 F.3d 356, and this Court denied certiorari, 140 S. Ct. 859.

5. In 2019, petitioner filed his third Section 2255 motion, asserting Brady and Napue claims that he had not previously sought to assert. D. Ct. Doc. 661, at 35-58 (Feb. 4, 2019).

The thrust of the claims is that the government allegedly withheld evidence about petitioner's place in the gang hierarchy; petitioner asserts that the allegedly withheld evidence would have led the jury not to impose the death penalty and that the evidence came to light only at the 2018 resentencing of petitioner's co-defendant, Tony Sparks. See D. Ct. Doc. 661, at 1-5; Pet. 4-12. Sparks was resentenced in February 2018. Pet. App. 10a. At his resentencing hearing, the government called former Killeen Police Department Sergeant Sandra Hunt, "who had previously headed the [Department's] gang unit," to testify as an expert "about her investigation into the organizational hierarchy of the 212 PIRU Bloods." Ibid. Sergeant Hunt testified that her unit had identified Sparks as a member of the gang based in part on a hand-drawn diagram, obtained in 1998 from an unidentified high-school

student, which listed the gang members' names in a pyramid. D. Ct. Doc. 661-1, at 4-7; see D. Ct. Doc. 661-7 (diagram). The diagram used gang members' first names or "street names"; Hunt's unit also created a copy that filled in many of the gang members' full names. D. Ct. Doc. 661-1, at 6-7; see D. Ct. Doc. 661-8 (diagram with full names). Sergeant Hunt testified that Sparks' name appeared on the diagram in the fifth row, with "the enforcers or the recruiters" for the gang. D. Ct. Doc. 661-1, at 8-9. She also testified that Vialva's name was in the seventh row and that petitioner's name appeared "at the very bottom of the chart of [the] pyramid," in the thirteenth row, "about 30 people below Mr. Sparks." Id. at 9.

The district court determined that it lacked jurisdiction over petitioner's third Section 2255 motion, because it was an unauthorized successive motion. Pet. App. 9a-17a. Although the court characterized petitioner's argument that his latest collateral attack should be classified as a first Section 2255 motion, due to the allegedly belated discovery of the evidence, as "compelling," it found the argument "ultimately unpersuasive because it is not supported by a single relevant authority" and "has been rejected conclusively by the Fifth Circuit." Id. at 12a. The court observed that "[s]everal other circuit courts have also ruled that second-in-time Brady claims are not exempt from" the statutory restrictions on second-or-successive collateral attacks. Id. at 13a (collecting cases). The court initially

dismissed petitioner's motion, id. at 17a, but later amended the judgment to instead transfer the motion to the court of appeals, id. at 18a.

6. On September 9, 2020, the court of appeals affirmed the transfer in an unpublished, per curiam decision. Pet. App. 1a-4a. The court observed that petitioner's third motion was "successive" under its precedent, id. at 3a, which recognizes that the statutory exception permitting certain successive petitions based on "evidence [that] was not previously discovered or discoverable" would be superfluous if all motions based on such evidence were "non-successive," Leal Garcia v. Quarterman, 573 F.3d 214, 221 (5th Cir. 2019). And the court addressed this Court's decision in Panetti v. Quarterman, 551 U.S. 930 (2007), which found a motion asserting an incompetency-to-be-executed claim not successive only where "the factual predicate for the prisoner's claim (his mental state at the time of execution) could not have existed when the prisoner filed his first petition." Pet. App. 3a. The court of appeals reasoned that Panetti "reinforces" the unavailability of a further collateral attack like petitioner's, for which "the factual predicate * * * existed long before [he] filed his first" collateral attack. Id. at 3a-4a. The court remanded to the district court with instructions to dismiss the motion for want of jurisdiction. Id. at 4a.

On the same date, the court of appeals denied petitioner's request for authorization to file a successive Section 2255 motion.

826 Fed. Appx. 356. The court explained that, "[t]o file a successive habeas petition pursuant to Section 2255(h)(1), [petitioner] must show that his petition 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. at 358; see 28 U.S.C. 2255(h)(1). The court found that petitioner could not satisfy that standard because, by his own account, the purportedly newly discovered evidence on which he relied -- Hunt's testimony and the pyramid diagrams -- did not "challenge the evidence of his guilt," only his sentence. 826 Fed. Appx. at 358. The court also found that "[e]ven if Section 2255(h)(1) allowed [petitioner] to challenge his sentence, [he] cannot establish that this evidence is 'newly discovered.'" Id. at 358 n.2. The court observed that "[t]he factual predicate" for the claims "is that the government withheld information describing [petitioner's] role in the gang of which he was a member and presented false testimony as to that information," but petitioner "offers no explanation why he would not have known what his role in his own gang was" and, indeed, "all but admits he had such knowledge." Ibid.

7. On October 16, 2020, the government gave notice that petitioner's execution date had been set for December 10, 2020. D. Ct. Doc. 698, at 1. On November 6, 2020, the court of appeals denied petitioner's request for rehearing en banc. Pet. App. 5a-

6a. On November 12, 2020, petitioner filed a motion in the district court seeking to enjoin his execution on various grounds -- including so that he could file a petition for a writ of certiorari, which he did not commit to filing at any particular time before the deadline of April 5, 2021. D. Ct. Doc. 701-2, at 6 & n.8; see id. at 7-15. The court denied petitioner's motion on December 3, 2020, stating that it "lack[ed] jurisdiction" to grant the request and that, in any event, petitioner had "failed to demonstrate a likelihood of success on the merits" and had failed to show that "the balance of equities weighs in his favor." D. Ct. Doc. 717, at 11. Petitioner did not thereafter seek a stay or an injunction in the court of appeals before filing the present petition and stay application in this Court on December 8, 2020.[2]

[2] On November 24, 2020, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241 in the Southern District of Indiana, where he is confined, with an accompanying motion for a stay of execution. Petitioner's habeas petition asserted the same Brady and Napue claims that he had previously asserted in his successive Section 2255 motion in the Western District of Texas. See Pet. for Writ of Habeas Corpus 1-4, Bernard v. Warden, No. 20-cv-616 (S.D. Ind.). On December 8, 2020, the Indiana district court denied petitioner's motion for a stay after determining that he was not likely to succeed in satisfying the requirements in Section 2255's saving clause, 28 U.S.C. 2255(e), for filing a habeas petition. Order 9-13, Bernard v. Warden, supra. The court also observed that "even supposing the police diagram and Sergeant Hunt's conclusions are newly available evidence, [petitioner] has not made a strong showing that this evidence is so compelling that no reasonable juror would have sentenced him to death in light of it." Id. at 10. On December 8, 2020, petitioner noticed an appeal to the Seventh Circuit, which remains pending as of the filing of this brief.

ARGUMENT

Petitioner's application for a stay, and his petition for a writ of certiorari, should be denied. In order to obtain a stay of execution pending the consideration of a petition for a writ of certiorari, a movant must first establish a likelihood of success on the merits -- specifically, "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" as well as "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). A movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted). If 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).

Petitioner cannot satisfy those standards. As a threshold matter, petitioner's application for a stay should be denied because of his inexcusable delay in seeking a stay, as well as his disregard for Rule 23.3 of the Rules of this Court. The judgment for which petitioner seeks this Court's review was entered on September 9, 2020; petitioner received notice of his December 10 execution date on October 16; and the court of appeals denied rehearing en banc on November 6. See pp. 12-13, supra. Yet petitioner waited until December 8 -- three months after the

judgment, one month after the denial of rehearing, and two days before his scheduled execution -- to seek a stay in this Court. And he filed his stay application without having first sought a stay in the court of appeals. Rule 23.3 provides that an application for a stay "will not be entertained unless the relief requested was first sought in the appropriate court or courts below," "[e]xcept in the most extraordinary circumstances." Sup. Ct. R. 23.3. Petitioner identifies no such extraordinary circumstances here, and his failure to do so itself furnishes a sufficient basis to decline to entertain his stay application. Cf. Barefoot, 463 U.S. at 896 (noting that this Court "generally places considerable weight on the decision reached by the circuit courts").

Even setting aside those defects, petitioner's request for a stay should be denied. First and foremost, petitioner has failed to establish a reasonable probability that this Court will grant certiorari, let alone a significant possibility of reversal. Petitioner contends (Pet. 16-23; Stay Appl. 5-6) that the court of appeals erred in treating his third Section 2255 motion as an unauthorized second-or-successive motion and that its decision is contrary to this Court's reasoning in Panetti v. Quarterman, 551 U.S. 930 (2007). But the court of appeals considered petitioner's Panetti argument and correctly rejected it, and the court's decision does not conflict with the decision of any other court of appeals -- as petitioner himself acknowledges (Pet. 15). Further

review is also unwarranted because petitioner's underlying claims under Brady v. Maryland, 373 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1959), lack merit, as multiple courts have recognized. Finally, petitioner has failed to demonstrate that the balance of equities favors a stay, which would undermine the government's and the public's interest in the timely enforcement of petitioner's lawful sentence.

1. The court of appeals correctly determined that petitioner's third Section 2255 motion was successive. Pet. App. 1a-4a. Petitioner has not identified any court of appeals that would have allowed a federal prisoner to bring a Section 2255 motion in the circumstances of this case. And no substantial likelihood exists that this Court would grant certiorari and allow petitioner's claim to proceed. Indeed, this Court has repeatedly and recently denied certiorari in cases raising the same or a similar issue. See Scott v. United States, 139 S. Ct. 842 (2019) (No. 18-6783); Brown v. Hatton, 139 S. Ct. 841 (2019) (No. 18-6759). The same result is warranted here.

a. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a state or federal prisoner may not file a "second or successive" motion for federal post-conviction relief without first obtaining authorization from the appropriate court of appeals. 28 U.S.C. 2244(b)(2) and (3), 2255(h). The court of appeals may authorize such a motion only if the court certifies that the motion contains: "(1) 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; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h); see 28 U.S.C. 2244(b)(2)(A) and (B). When, as here, the prisoner has not obtained the required certification, the district court lacks jurisdiction to entertain the motion. See Burton v. Stewart, 549 U.S. 147, 153 (2007) (per curiam). A court of appeals' denial of certification is not reviewable by the en banc court or this Court. 28 U.S.C. 2244(b)(3)(E); see 28 U.S.C. 2255(h) (incorporating Section 2244's procedures).

The statutory phrase "second or successive" as used in AEDPA is a "term of art." Magwood v. Patterson, 561 U.S. 320, 332 (2010) (quoting Slack v. McDaniel, 529 U.S. 473, 486 (2000)). "Congress did not define the phrase," id. at 331-332, and this Court "has declined to interpret [it] as referring to all [applications for post-conviction relief] filed second or successively in time," Panetti, 551 U.S. at 944. In Panetti, this Court held that a prisoner's claim that his current mental illness rendered him incompetent to be executed, see Ford v. Wainwright, 477 U.S. 399 (1986), raised for the first time in a second petition for writ of habeas corpus, was not "second or successive" because it was not ripe until after his first petition was filed. Panetti, 551 U.S.

at 946-947. The Court explained that Ford claims generally "are not ripe until after the time has run to file a first federal habeas petition," and they ripen, if at all, only when execution is imminent. See id. at 943, 946. And the Court declined to construe the provisions governing second-or-successive petitions "in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party." Id. at 947; see id. at 945 (emphasizing "the unusual posture" of the case).

b. As the court of appeals recognized (Pet. App. 3a), petitioner's Brady and Napue claims are not comparable to the competency claim at issue in Panetti. Claims concerning the alleged withholding of exculpatory evidence (Brady) or the presentation of false testimony at trial (Napue) relate to the trial, not to the implementation of the sentence. Petitioner could have raised such claims in his first Section 2255 motion. Indeed, petitioner did raise claims (different ones) under Brady and Napue in his first Section 2255 motion, and they were denied on the merits. See p. 8, supra.

Petitioner's allegation that the factual predicate for his latest Brady and Napue claims came to light only at the Sparks resentencing in 2018 does not make those claims newly "ripe" within the meaning of Panetti. The basis for the competency claim in Panetti -- which required that the prisoner be mentally incompetent at a time when his execution was imminent -- could not have

existed, and did not exist, at the time of the prisoner's first post-conviction petition. Here, in contrast, petitioner alleges at most that the factual basis for his claims existed but was unlawfully withheld from him. Although such a claim could be deemed to be premised on newly discovered evidence, that does not make it newly ripe, nor does it make claims alleging such evidence non-successive. See Brown v. Muniz, 889 F.3d 661, 671 (9th Cir. 2018) ("[W]hereas a Brady claim involves a 'factual predicate' that existed but could previously 'not have been discovered,' an unripe claim involves no previously existing 'factual predicate' at all.") (citation omitted), cert. denied, 139 S. Ct. 841 (2019); Tompkins v. Secretary, 557 F.3d 1257, 1260 (11th Cir.) (per curiam) (rejecting the view that "any claim based on new evidence is not 'ripe' for presentation until the evidence is discovered"), cert. denied, 555 U.S. 1161 (2009).

Instead, AEDPA explicitly addresses the issue of claims based on newly discovered evidence by allowing some -- but not all -- such claims to be brought as successive collateral attacks. Specifically, Section 2255(h)(1) provides that the courts of appeals may authorize a federal prisoner to file a "second or successive motion" that contains "newly discovered evidence," if certain criteria are satisfied. 28 U.S.C. 2255(h)(1); see 28 U.S.C. 2244(b)(2)(B)(i) (equivalent gate-keeping provision for state prisoners, requiring that "the factual predicate for the claim could not have been discovered previously through the

exercise of due diligence"). That provision forecloses any suggestion that a "later petition is non-successive" whenever the later petition is allegedly based on "evidence [that] was not previously discovered or discoverable." Leal Garcia v. Quarterman, 573 F.3d 214, 221 (5th Cir. 2009); see Pet. App. 3a (citing Leal Garcia). Indeed, Section 2255(h)(1) would be entirely superfluous if second-in-time motions based on newly discovered evidence were deemed not to be second or successive at all.[3]

Consistent with the decision below, all the courts of appeals to have considered the question have held that a second-in-time motion brought by a federal or state prisoner raising Brady claims is subject to AEDPA's gate-keeping requirements for second-or-successive motions. See Brown, 889 F.3d at 668; In re Pickard, 681 F.3d 1201, 1205 (10th Cir. 2012); Tompkins, 557 F.3d at 1259-1260; Evans v. Smith, 220 F.3d 306, 323 (4th Cir. 2000), cert. denied, 532 U.S. 925 (2001); Pet. App. 13a (additional citations).

c. Petitioner acknowledges that the question presented has not divided the courts of appeals. See Pet. 24 (recognizing that "technically there is not yet a circuit split on this issue"). Nonetheless, petitioner contends (Pet. 24-28) that further review is warranted based on judicial views expressed in dicta or in

[3] Here, the court of appeals held that Section 2255(h)(1) was unavailable to petitioner because he "concede[d]" that his Brady and Napue claims did not bear on whether he was "'guilty of the offense.'" 826 Fed. Appx. 356, 358; see 28 U.S.C. 2255(h)(1). The court also alternatively found that the evidence at issue was not actually "newly discovered," 826 Fed. Appx. at 358 n.2, for reasons discussed below, see pp. 24-25, infra.

concurring or dissenting opinions. Petitioner principally relies (Pet. 25-28) on Scott v. United States, 890 F.3d 1239 (2018), cert. denied, 139 S. Ct. 842 (2019), in which a panel of the Eleventh Circuit recognized that its precedent required treating a second-in-time habeas petition raising a Brady claim as second or successive, see id. at 1243. The panel stated that it "disagree[d]" with the binding circuit precedent, and criticized it. Id. at 1256; see id. at 1253-1256. But the Eleventh Circuit denied rehearing en banc after no judge in regular active service called for a poll, see Order, Scott, supra, No. 15-11377 (Aug. 16, 2018).

The other circuit decisions cited by petitioner likewise provide no basis for further review of the court of appeals' decision here. In Long v. Hooks, 972 F.3d 442, 470 (2020) (en banc), the Fourth Circuit did even not apply Panetti, having previously authorized the successive habeas petition under Section 2244(b)(2)(B) as a claim of "actual innocence." Although three concurring judges expressed the view that Brady claims should not be "subjected to the strictures of 'second or successive' petitions," id. at 485 (Wynn, J., concurring) (citation omitted), that view was not endorsed by any of the circuit's 12 other judges. And in Allen v. Mitchell, 757 Fed. Appx. 482 (6th Cir. 2018), a single dissenting judge expressed the view that a habeas petition raising a Brady claim was not successive. Id. at 487 (Moore, J., dissenting). Those isolated and non-binding views do not indicate

any division of authority in the courts of appeals warranting certiorari here.

2. Further review is also unwarranted -- and a stay unjustified -- because, as multiple courts have recognized, petitioner's underlying Brady and Napue claims lack merit. A crucial predicate for any Brady claim is that material evidence in the government's possession was not "disclosed to the defense." Strickler v. Greene, 527 U.S. 263, 280 (1999) (citation omitted); see Brady, 373 U.S. at 87. Here, even if petitioner were not barred from filing a successive Section 2255(h) motion, his constitutional claims would fail because he cannot show that the government withheld any of the disputed evidence or that the evidence would have been material at sentencing.

a. Before trial, the government made its file fully available to petitioner's counsel for inspection. D. Ct. Doc. 34, at 1 (July 29, 1999) (government's notice of policy of "open file type discovery"); D. Ct. Doc. 36, at 1 (July 29, 1999) (similar); D. Ct. Doc. 449, at 25 (district court's statement that "[t]he Government in this case, as in all cases in this Division, has an open file policy"). As part of its open-file policy, the government made available to the defense the hand-drawn diagram of the hierarchy of the 212 PIRU Bloods -- later the subject of Sergeant Hunt's testimony at Sparks's 2018 resentencing -- and even included that diagram on the government's exhibit list. See D. Ct. Doc. 266, at 9 (June 8, 2000) ("Diagram depicting the

members of the 212 PIRU Bloods"). Accordingly, neither the hand-drawn diagram nor the information it contained was suppressed or withheld.

Petitioner's instead focuses his Brady claim on the government's alleged suppression of Sergeant Hunt's "expert opinion" that "the gang had a pyramidal hierarchy" and that petitioner "was at its 'very bottom.'" Pet. 11 (citation omitted). But petitioner also cannot show that the government suppressed that evidence. Sergeant Hunt did not testify about the gang chart until 18 years after petitioner's trial. The government could not improperly suppress an expert opinion that had not yet been expressed.

Petitioner asserts (Pet. 11) that Hunt's testimony at the 2018 resentencing indicated that the government had contacted her before petitioner's trial for her "analysis of the hierarchy" of the gang. But the portion of her testimony that he cites does not support that assertion:

> Q. All right. Did you at my request look to see if there were other gang individuals -- let me back up.
>
> You're familiar with the incident that took place on June 21, 1999 in Killeen where Todd and Stacie Bagley were kidnapped and murdered?
>
> A. I am.
>
> Q. Did you, at that time, at our request, go back and see if any of the identities of any of the other people who were involved in that were on this chart?
>
> A. Yes, I did.

D. Ct. Doc. 661-1, at 9 (cited at Pet. 11 as 19-70021 C.A. ROA 2321). After that exchange, Sergeant Hunt proceeded to testify that she had "locate[d]" several of the defendants on the chart, including petitioner, Vialva, and Sparks. Ibid. Sergeant Hunt did not, however, indicate that she had told the prosecution anything about the gang's hierarchy before petitioner's 2000 trial that was not disclosed to petitioner. Her later testimony at the resentencing consisted primarily of describing the hierarchy reflected on the hand-written pyramid diagram itself, which was available to petitioner.

In any event, the government had no duty to disclose information to petitioner about his own status in the gang. See United States v. Agurs, 427 U.S. 97, 103 (1976) (explaining that the situations in which Brady applies all "involve[] the discovery, after trial of information which had been known to the prosecution but unknown to the defense") (emphasis added); United States v. Vasquez-Hernandez, 924 F.3d 164, 171 (5th Cir. 2019) (recognizing that government "bears no responsibility to direct the defense toward potentially exculpatory evidence that is either known to the defendant or that could be discovered through the exercise of reasonable diligence"). As the court of appeals observed, petitioner's own knowledge of his gang status would undermine his Brady claim even if it were not barred by Section 2255(h). 826 Fed. Appx. at 358 n.2 ("[Petitioner] offers no explanation why he would not have known what his role in his own gang was. * * *

Indeed, [petitioner] all but admits he had such knowledge."). Accordingly, even if petitioner were correct that the government was aware of Sergeant Hunt's opinions, he cannot show that the government suppressed any favorable evidence that was not already known to him.

Petitioner suggests (Pet. 12) that the "police-prepared" version of the diagram used at Sparks's resentencing, which showed the gang members' full names, was itself Brady material. He describes (Pet. 11) that document as a "formal" chart that "interpreted the original based on information in the gang unit's files." In fact, the primary difference between the charts consisted of adding the last names of members identified only by their first names on the handwritten chart (information that petitioner himself may well have known). Compare D. Ct. Doc. 661-7, with D. Ct. Doc. 661-8. More importantly, the only asserted value of either chart as potential mitigation evidence during the penalty phase was to show that petitioner was at the bottom of the pyramid, below others such as Vialva and Sparks. And that fact was evident from the original, handwritten chart, where petitioner was identified in the bottom row of the pyramid by his nickname. See D. Ct. Doc. 661-7. The second chart, regardless of when it was created, added nothing new in that respect.

b. In any event, petitioner fails to show that any of the evidence at issue was material, as a meritorious Brady claim would require. See Kyles v. Whitley, 514 U.S. 419, 433-434 (1995).

"[F]avorable evidence is material * * * 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Ibid. (citation omitted). Here, no reasonable probability exists that either the gang diagrams or Sergeant Hunt's 2018 testimony or both would have caused the jury to recommend a sentence of life imprisonment rather than death.

Petitioner contends (Pet. 6-8) that the evidence was material because of its connection to the non-statutory aggravating factor of "future dangerousness." Petitioner points (Pet. 8) to the government's brief on direct appeal, which petitioner characterizes as "repeatedly assert[ing] that the trial evidence could have persuaded a reasonable juror that Petitioner's status in the gang was a powerful predictor of his likely future dangerousness." At trial, however, the government based its argument regarding future dangerousness primarily on petitioner's past crimes, not his gang affiliation. See D. Ct. Doc. 319, at 26-27, 78-79 (Oct. 25, 2000). The government argued that Vialva wanted to be the "top gangster in Killeen" and that petitioner "assist[ed] in that." Id. at 73. But the government never argued that petitioner's role or relative position in the gang made him dangerous. Cf. Order at 11, Bernard v. Warden, No. 20-cv-616 (S.D. Ind. Dec. 8, 2020) (S.D. Ind. Order) ("[E]vidence of the gang's hierarchy would not have significantly undermined the government's case for a death sentence.").

Indeed, the evidence presented to the jury about petitioner's role relative to his co-defendants, particularly Vialva, already indicated that his position among his peers was low. See S.D. Ind. Order 12 (explaining that "the evidence suggested that Mr. Vialva was ambitious and looking to make a name for himself, but there was no such evidence about [petitioner]"). The jury heard, for example, that Vialva -- not petitioner -- took a leadership role during the offense, including planning the carjacking with Sparks, D. Ct. Doc. 312, at 175-176; recruiting petitioner to participate, D. Ct. Doc. 314, at 149, 150-151, 153; selecting the gang member who would ask the Bagleys for a ride, D. Ct. Doc. 312, at 175; pulling out the gun and pointing it toward Todd Bagley's head, D. Ct. Doc. 314, at 158; demanding Todd Bagley's wallet, id. at 159; threatening to kill the Bagleys if they did not provide the correct PIN number, id. at 165-166; making the decision "to burn the car and kill the people," D. Ct. Doc. 312, at 193; instructing petitioner to get the accelerant to "burn the car," id. at 194, 195-196, 200; directing another gang member to open the trunk, id. at 211; and shooting Todd Bagley in the head, id. at 213-214. Petitioner's counsel argued during the penalty phase that this testimony demonstrated that petitioner was less culpable than Vialva and Sparks, D. Ct. Doc. 319, at 61, and the jury nonetheless recommended a death sentence.

Sergeant Hunt's 2018 testimony that petitioner was "at the very bottom of the chart" -- a chart that petitioner could have

introduced at trial -- would have added little to that evidence. D. Ct. Doc. 661-1, at 9. Moreover, Hunt's testimony about petitioner's role in the gang would not have undercut the evidence about his role in the offense -- i.e., that he willingly agreed to participate in the carjacking, that the weapon used to carjack and shoot the Bagleys belonged to him, that he bought lighter fluid with the money Vialva gave him, that he helped pour lighter fluid in the Bagley's car while the Bagleys were held captive in the trunk, that Stacie Bagley died from the resulting fire, and that he provided and drove the getaway car.

c. Petitioner's Napue claim also lacks merit. Under Napue, the government "may not knowingly use false evidence" to obtain a conviction. Napue, 360 U.S. at 269. Contrary to petitioner's contention, however, the government did not present evidence that conflicted with Sergeant Hunt's later testimony at Sparks's resentencing. Rather, the evidence from the government's witness in petitioner's penalty-phase proceeding indicated that while the gang eschewed titles, it nevertheless had some form of hierarchy. See S.D. Ind. Order 11 (explaining that "the police diagram and Sergeant Hunt's conclusions are easily reconciled with the government's sentencing evidence," and that "the lack of titles and formal hierarchy does not mean there is no informal or loose hierarchy within the gang").

For example, Texas Ranger John Aycock testified that a particular family was "at the top of a matrix of this group."

D. Ct. Doc. 317, at 111. He further testified that his "understanding" was that the founders of the 212 PIRU Bloods in Killeen "didn't particularly want it to [be] where one person was above another with some sort of title, because they didn't want to cause problems in a newly-formed gang." Id. at 113. And he testified that because of these problems with a "pyramid scheme," the gang's founders "chose not to have any titles, is my understanding." Ibid. But Aycock also testified that Vialva and Sparks were "climbers" who "cause[d] some problems" by trying to make names for themselves. Id. at 114.

The gang members who cooperated and testified for the government painted a similarly nuanced picture of the gang's structure. Terry Brown, a member of an affiliated gang who participated in the Bagleys' murders, testified that there were no "leaders" in the 212 PIRU Bloods because "everyone was considered equal." D. Ct. Doc. 312, at 226; see D. Ct. Doc. 317, at 95. But two 212 PIRU Bloods members indicated that the gang had a "leader" or "crown holder," though they "d[id]n't know" who that person was. D. Ct. Doc. 314, at 17-18 (witness's testimony that he did not know who the leader was because he "wasn't into it like that" but also testifying that every gang has a "crown holder"); id. at 225 ("I don't know the exact person, sir."). A witness who associated with the gang testified that someone named "Fat" was the gang's "leader" or "crown holder." Id. at 64. And a witness testified that Vialva was "in charge" during the gang's attempted

carjacking the night before the murders, D. Ct. Doc. 311, at 86 (Oct. 25, 2000), indicating a de facto hierarchy within the gang. Thus, the evidence indicated at least some kind of hierarchy, and the government did not argue otherwise to the jury.

In short, nothing in Hunt's testimony at Sparks's resentencing undermined the trial evidence or suggested that the government introduced false evidence relating to petitioner's role in the gang. And any alleged Napue error would be harmless, in any event, in light of the ample evidence that petitioner was not a leader in the gang but nevertheless played a substantial role in the Bagleys' murders.

3. The balance of equities weighs heavily against granting petitioner's request for an emergency stay. First and foremost, petitioner belatedly came to this Court seeking a stay only two days before his scheduled execution. This Court has explained that "[a] court considering a stay must * * * apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" Hill v. McDonough, 547 U.S. 573, 584 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 650 (2004)); see Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."). As explained above, petitioner waited until December 8, 2020, to file the instant

petition and stay application, even though the court of appeals had entered judgment on September 9, 2020, and had denied his request for rehearing en banc on November 6, 2020. Pet. App. 1a, 5a-6a. Petitioner could have sought a stay from this Court weeks earlier but chose not to, and that choice should foreclose the equitable relief he now seeks. See pp. 14-15, supra.

Granting a stay at this late date would also prejudice the government's and the victims' "important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (quoting McDonough, 547 U.S. at 584). 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). Delaying petitioner's execution thus "would frustrate the [government's] legitimate interest in carrying out a sentence of death in a timely manner." Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion). That interest is particularly strong in a case, like this one, where the prisoner is seeking to circumvent statutory limitations enacted to streamline post-conviction challenges and thereby prevent delays in the execution of capital judgments.

Finally, the government's interest is further magnified in this case by the heinous nature of petitioner's crime. Petitioner murdered Todd and Stacie Bagley more than 20 years ago, burning Stacie alive in the trunk of her car. Petitioner has received

extensive direct and collateral review. He is not entitled to any further delay of his lawful capital sentence.

CONCLUSION

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

Respectfully submitted.

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