Nos. 20-688 and 20A100

IN THE
Supreme Court of the United States

ORLANDO CORDIA HALL
Petitioner,

v.

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

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

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

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

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REPLY BRIEF FOR PETITIONER

Orlando Cordia Hall respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit, and requests an emergency stay of his execution so that he can litigate his claims.

INTRODUCTION

The government does not contest that Respondent Barr deliberately scheduled Mr. Hall's execution during the peak of an ever-worsening global pandemic that has so far killed nearly 250,000 Americans. It does not contest that Mr. Hall's counsel cannot fulfill their professional obligations without putting

themselves and their families at grave risk. It does not contest that conducting a clemency investigation in light of health risks, quarantine orders, and other restrictions would be functionally impossible. And it does not contest that Appellee Barr has the power to reschedule Mr. Hall's execution date at any time.

Instead, the government argues that Mr. Hall unduly delayed in raising the claims presented by this Petition. No. While this is a familiar refrain from the government when an execution looms, it does not work here. Everyone agrees that Mr. Hall's claims did not arise until September 30 at the earliest. And the only reason his claims were filed so close to his execution date is because the government gave him such scant notice of his execution to begin with.

Nor are the government's arguments regarding Mr. Hall's likelihood of success on his clemency claims availing. Much of the government's brief is directed to arguing that rote compliance with procedure is all that due process and federal law requires. But the core of Mr. Hall's argument is that he has been arbitrarily denied access to the clemency process in the first place. Federal courts have stayed executions on far less egregious facts. In fact, moments ago, another federal court stayed the execution of another federal prisoner raising precisely the same claims that Mr. Hall presents here. Unless this Court acts, Mr. Hall will be put to death without opportunity for review despite another court having found the claims at issue to merit preliminary relief. Montgomery v. Barr, et al., 1:20-cv-3261-RDM (D.D.C. Nov. 19, 2020), ECF No. 19

(Montgomery Order).[1] That would be manifestly unjust.

The district court found the facts of this case "troubling." Pet. App. 15a. The lower courts' decisions to disregard these troubling facts on the basis that Mr. Hall has been afforded "access" to the clemency process in the most technical sense warrants review, and a stay.[2]

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[1] While Judge Moss distinguished Mr. Hall's case on the basis that the district court had "noted that [he] had 13 years to prepare a petition," Montgomery Order at 19, that holding disregarded substantial contrary record evidence and thus was manifestly erroneous. *See infra* section III. Notably, Judge Moss credited the fact that Ms. Montgomery's "execution date came as a complete surprise." Montgomery Order at 19. So too here. Among the things the district court (and Judge Moss) ignored about Mr. Hall's situation is that ***until*** *10 days before the government decided to set his execution amid the pandemic, he had been protected from execution for 13 years by an injunction to which the government had consented*. *See* Order *Roane* v. *Gonzales*, No. 1:05-cv-02337-TSC, ECF No. 68.

[2] The government contends that the relief Mr. Hall seeks is more properly characterized as an "injunction" and therefore he must provide a "significantly higher justification" than the typical standard for a stay. Opp. 2 (quoting *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010)). But *Respect Maine PAC* relied on the fact that granting the requested relief

I. HALL DID NOT UNDULY DELAY

As a threshold matter, the government concedes that the courts below declined to deny Hall relief on the basis of delay. Opp. 9. The government also acknowledges (as did the district court below) that Mr. Hall's claims did not ripen until September 30 *at the earliest*. Opp. 16; Pet. App. 14a. Nevertheless, the government contends that Mr. Hall delayed in filing his claims in this litigation, and that this constitutes an independent bar to relief. Opp. 16-17. This is wrong on the facts and the law.

First, the facts. The government's sole basis for accusing Mr. Hall of "delay" is its apparent belief that he should have filed suit within days of receiving notice of his execution. *Id.* In fact, he did. Mr. Hall filed this litigation—a seven-count complaint supported by seven detailed witness declarations and based on "many events" that the district court acknowledged did not "occur[until] several days before it was filed," Pet. App. 14a—within 34 days after getting that notice.[3] The panel did not disturb these findings; in fact,

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would be a "judicial alteration of the status quo." 562 U.S. at 996. Mr. Hall has sought the opposite relief: preserving the status quo (by keeping him alive) while his claims for relief are pending.

[3] The speed with which Mr. Hall filed stay petitions in unrelated litigation, Opp. Br. 16-17, is irrelevant to whether this case—which did not become ripe until after his execution was set—was delayed. Moreover, the reason the injunction lasted for 13 years is not the result of delay by Mr. Hall, but rather because the

it did not even so much as acknowledge the government's arguments about delay. Pet App 2a-7a.

Turning to the law, the government cites *Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019) and *Gomez* v. *U.S. Dist. Ct.*, 503 U.S. 653 (1992) for its extraordinary contention that Mr. Hall's supposed delay—which by the government's own concession is *at most* days' long—precludes relief. Opp. 16. In *Bucklew*, the plaintiff waited until just 12 days before his execution to challenge the state's lethal injection protocol, *id.* at 1120, and received a last-minute stay from this Court. *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. And in *Gomez*, the delay was "more than a decade" long. 503 U.S. at 654. he Court should not impose such a harsh penalty in a death penalty case, where the stakes could not be higher, particularly since the government cites no case supporting its argument.[4]

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government dragged its feet in introducing a new execution protocol.

[4] That other prisoners have submitted clemency applications during the pandemic, Opp. 19, is likewise irrelevant. Just as in pursuing a defense strategy, what may have been adequate for one prisoner is not *de facto* sufficient for another. And unlike Mr. Hall, the prisoners the government points to had access to resources to pursue clemency before the pandemic. Dist. Ct. Dkt. 3 at 7. Further, the fact that they

II. MR. HALL DOES NOT SEEK TO REGULATE A PURELY EXECUTIVE FUNCTION.

The government's argument that Mr. Hall asks this Court to regulate an exclusively executive function is wrong. Opp. 18. No court below has made any such finding, nor has Mr. Hall advanced such an argument. All Mr. Hall seeks to vindicate his constitutionally guaranteed right to *meaningfully access* the clemency process with a guarantee of minimal due process in the clemency procedure.[5]

III. THE DECISION BELOW IS MANIFESTLY INCORRECT AND MR. HALL IS LIKELY TO SUCCEED ON THE MERITS.

A. Mr. Hall Has Been Denied Access To The Clemency Process In Violation Of Due Process.

The government asks this Court to misconstrue Mr. Hall's legal claims while ignoring the abundance of factual evidence that he has provided in support. It should decline that invitation.

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submitted clemency applications does not mean those applications were adequate.

[5] While federal courts have avoided intruding into the executive's prerogative to make clemency decisions, courts have had no trouble intervening to ensure meaningful access to the clemency process. *See e.g., Young* v. *Hayes*, 218 F.3d 850 (8th Cir. 2000); *Wilson* v. *U.S. Dist. Ct. for N. D. Cal.*, 161 F.3d 1185, 1187 (9th Cir. 1998).

1. The Existence Of Procedure Does Not Guarantee Meaningful Access.

The government does not dispute that *Woodard* is the "controlling Supreme Court precedent," Pet. App. 17a, and that, "at a minimum," clemency procedures require "adequate notice and opportunity to be heard." *Id*. Rather, the government contends that because Mr. Hall was permitted to file a clemency petition and told it would be reviewed, his rights have been safeguarded. But "meaningful access" to clemency, which this Court has required, *Harbison* v. *Bell*, 556 U.S. 180, 194 (2009), demands that the process afforded beo more than "a meaningless ritual." *Douglas* v. *People of State of Cal*,, 372 U.S. 353, 358 (1963). A man's life hangs in the balance, and through its choice to schedule Mr. Hall's execution in the midst of a raging health crisis that prevents Mr. Hall's counsel from conducting any investigation, the government has "arbitrarily denied [him] any access to its clemency process." *Woodard*, 523 U.S. at 289.

The government doubles down on its argument that process, even devoid of value, is all that is required. But what it has provided Mr. Hall stops far short of even the "minimal" process afforded in *Woodard*. *See* Pet. 21-22

The courts below also incorrectly concluded that Mr. Hall could have filed his clemency petition before the start of the pandemic or at any point since 2007, Pet. App. 5a, 19a, which the government parrots. Opp. 21-22.. This ignores the substantial record evidence that (i) much of the evidence supporting Mr. Hall's case for mercy did not exist until recently; (ii) during the entire "thirteen year" period the panel suggested Mr.

Hall could have been developing his clemency claims, he was protected by an injunction that prevented his execution, and his counsel faced severe resource limitations that made a clemency investigation impossible; and (iii) clemency is by design a mechanism of last resort, designed to be filed only after litigation has essentially ceased. *See* Pet. 22-24; *see* also 65 FR 48379, 48380 ("Because clemency is a remedy of last resort, a capital defendant should file his clemency petition only after the predictably available judicial proceedings concerning the case . . . are terminated . . . Accordingly, once an execution date has been set . . . the defendant may file a request for reprieve").

2. The Panel Manifestly Erred In Concluding That Mr. Hall's Statutory Right to Counsel Pursuant To 18 U.S.C. ¶ 3599 Was Satisfied.

That Mr. Hall had the formality of appointed counsel does not mean that his counsel was able to provide "meaningful" representation as is Mr. Hall's right.[6] Indeed, the government does not contest any of the key facts showing that in Mr. Hall's case, his counsel was arbitrarily prevented from adequately representing him in his clemency proceedings. It does not deny that it scheduled Mr. Hall's execution with the shortest notice period in the history of the modern federal death penalty, and during a worsening global

[6] The government's argument that Mr. Hall was provided access to phone calls with counsel misses the point. Opp. 22. Mr. Hall does not argue that he could not speak with counsel, but that his counsel could not conduct an adequate investigation necessary for a meaningful clemency petition.

pandemic. Nor does it deny that while travel is required to conduct an adequate clemency investigation, Mr. Hall's appointed counsel suffer from health conditions that make travel during the pandemic unsafe. This necessarily denies Mr. Hall "meaningful access to the 'fail-safe' of our justice system." *Harbison*, 556 U.S. at 194 (citation omitted). Indeed, another federal court granted a stay to another condemned prisoner on the very same grounds Mr. Hall has raised here. *Montgomery* v. *Barr, et al.*, 1:20-cv-3261-RDM (D.D.C. Nov. 19, 2020), ECF No. 19.

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

The government makes three arguments in opposition to Mr. Hall's showing that the BOP's action is ultra vires, but none of the arguments have any merit.

First, the Government asserts that Hall is precluded from making the ultra vires claim because the district court ruled against him on the issue and the ruling was not appealed. Opp. 23. The government similarly argued earlier, in a November 14, 2020 opposition brief in a related proceeding, that the district court's ultra vires ruling was non-final and non-appealable See Appellee Br. 44-45, In re Matter of the Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5329 (D.C. Cir. Nov. 14, 2020). In response, the plaintiffs in the consolidated action requested entry of partial final judgment on the ultra vires claim and, on November 16, 2020, the district court granted the request. Order, *In re Matter of the Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-00145-TSC

(D.D.C. Nov. 16, 2020), ECF No. 315. It was only then that the district court's ruling became final and appealable. Therefore, issue preclusion does not apply to Mr. Hall's *ultra vires* claim. *Indeed*, the government made the very same preclusion argument below and the panel rejected it by considering the merits of the *ultra vires* issue rather than holding that it was precluded. Pet. App. 5a-7a.

Second, the government relies on Judge Katsas' concurrence in earlier execution protocol litigation as evidence that Mr. Hall's "argument is wrong." Opp. 23. Judge Katsas was the only panel member who accepted the government's interpretation of the U.S. Marshal's role under the protocol, and it is telling that the panel below did not adopt his reasoning (after making note of it). Pet. App. 6a. In any event, Judge Katsas' concurrence is not binding and there is good cause for the Court to reach a different conclusion. Mr. Hall pointed out in his opening brief that the unfettered ability of the BOP to alter the procedures in the execution protocol—which, notably, the Government does not dispute— contradicts the *FDPA's* express mandate that the U.S. Marshal shall supervise the implementation of executions. It is undisputed that, under the execution protocol, the BOP has the power to strip the U.S. Marshal of any role at all, which flies in the face of the FDPA's plain language and Congress' selection of the U.S. Marshal as the sole supervisor of executions.

Third, the government cites the panel's erroneous holding on the standard for preliminary injunctions and stays, in which it required a link between every claim at issue and irreparable harm. *See* Opp. 24-25.

There is no case law support for such a standard. The panel cited *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), but, as discussed in Mr. Hall's opening brief, *Winter* does not impose such a requirement. The government cites other cases for the unremarkable proposition that a movant must show that he would suffer harm arising out of the claims in the case. Here, Mr. Hall has demonstrated that, absent a preliminary injunction or a stay, he will suffer irremediable injury as a result of his execution. *See infra* section IV. No further showing on irreparable harm is necessary.

IV. WITHOUT A STAY, MR. HALL WILL SUFFER IRREPARABLE HARM.

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, Mr. 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 Mr. Hall's execution.

V. THE BALANCE OF EQUITIES STRONGLY FAVORS A STAY.

Failure to grant a stay will "have the practical consequence of rendering the proceeding moot" or otherwise cause irreparable harm to Mr. Hall. *Mikutaitis* v. *United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers). The government would not "be significantly prejudiced by an additional short delay," *id*.—particularly given that until just two months ago, the government was content to permit a stay preventing Mr. Hall's execution for 13 years to stand. *Id.* "In light of these considerations," this Court should "grant the application." *Id.*

CONCLUSION

For the foregoing reasons, and those discussed in the Petition for Writ of Certiorari and Mr. 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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