No. 20-____

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 D.C. Circuit

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

EMERGENCY APPLICATION FOR A STAY OF EXECUTION

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PARTIES TO THE PROCEEDING

Orlando Cordia Hall, petitioner on review, was the plaintiff-appellant below.

T.J. Watson, Complex Warden, U.S. Penitentiary Terre Haute, is respondent on review and was the defendant-appellee below.

RELATED PROCEEDINGS

There are several related proceedings, as defined in Supreme Court Rule 14.1(b)(iii).

This appeal originates from an Order from the District Court for the Southern District of Indiana. *See Order, Hall* v. *Watson*, No. 2:20-cv-00599 (S.D. Ind. Nov. 18, 2020), Dkt. #18. The District Court case resulted in one appeal to the Seventh Circuit, which was decided on November 19, 2020. *See Hall* v. *Watson* (7th Cir. Nov. 19, 2020).

Mr. Hall previously challenged the same criminal conviction or sentence on direct appeal in *United States* v. *Orlando Cordia Hall*, No. 96-10178 (5th Cir.). The Fifth Circuit denied relief, 152 F.3d 381 (5th Cir. 1998), and this Court denied certiorari, *see* 526 U.S. 1117(1999).

Mr. Hall also previously challenged the same criminal conviction or sentence on proceedings pursuant to 28 U.S.C. § 2255. *See Hall* v. *United States*, Nos. 4:00–CV–422–Y, 4:94-CR-121 (N.D. Tex. Aug. 24, 2004). On July 5, 2006, the Fifth Circuit denied Mr. Hall a certificate of appealability. *United States* v. *Hall*, 455 F.3d 508 (5th Cir. 2006). The Supreme Court denied certiorari on April 16, 2007. *Hall* v. *United States,* 549 U.S. 1343 (2007).

Mr. Hall twice requested leave from the Fifth Circuit to file successive habeas petitions pursuant to 28 U.S.C. § 2255, and was twice denied. *In re Orlando Hall*, No. 16-10670, Doc. 00513555153 (5th Cir. June 21, 2016); *In re Orlando Hall*, No. No. 19-10345, Doc. 00515621458 (5th Cir. Oct. 30, 2020).

Mr. Hall challenged the same criminal conviction on proceedings pursuant to a petition for writ of

habeas corpus under 28 U.S.C. § 2241 by the United States District Court for the Southern District of Indiana, challenging his conviction under 18 U.S.C. § 924(c). On November 18, 2020, the Seventh Circuit denied relief. *See Order*, *Hall* v. *Watson*, No. 20-03216 (7th Cir., Nov. 18, 2020) Dkt. #11.

A related action was filed in the District of Columbia District Court. Judgment in that action was entered November 16, 2020. *See* Order, *Hall* v. *Barr et al.*, No. 20-cv-03184 (D.D.C. Nov. 6, 2020), Dkt. #24; *see also* Mem. Op., *Hall* v. *Barr et al.*, No. 20-cv-03184 (D.D.C. Nov. 16, 2020), Dkt. #23.

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No. 20-

ORLANDO CORDIA HALL.,
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EMERGENCY APPLICATION FOR A STAY OF EXECUTION

To the Honorable Brett M. Kavanaugh, Associate Justice of the United States and Circuit Justice for the Seventh Circuit:

Orlando Cordia Hall is a Black man who was convicted and sentenced to die by an all-White jury. One of the two prosecutors who picked that all-White jury has twice been adjudicated to have violated *Batson*—once by this Court in *Miller-El* and subsequently by the Fifth Circuit.

The case concerns whether Mr. Hall will ever be able to raise his claims that his conviction and sen-

tence were obtained in violation of *Batson* v. *Kentucky*, and that his federal death sentence is the result of racial discrimination in the jury selection process. No court has ever heard or considered the myriad ways that racial bias distorted Petitioner's trial, conviction, and death sentence because at the time of trial and Mr. Hall's § 2255 proceedings, evidence of the prosecutor's history of *Batson* violations was not known..

And if the decision of the court below is permitted to stand, Petitioner will be executed without ever having had an opportunity to litigate his claims, despite the fact that race discrimination is so pernicious, so nefarious, and contrary to our values that tolerating its influence in any criminal case, let alone one that will end in an execution, is manifestly unjust. Race discrimination is so pernicious, so nefarious, and contrary to our values that any amount in a criminal trial is manifestly unjust that tolerating its influence in any criminal case, let alone one that will end in an execution, is manifestly unjust.

Despite the statutory language in 28 U.S.C. §§ 2241 and 2255 and the weight of precedent, the panel majority found that Petitioner had no procedural avenue to bring his claims and erred in (1) summarily concluding that § 2241 does not provide an avenue for relief, without undertaking any substantive review of circuit precedent or engaging in any statutory interpretation and (2) disregarding the weight of new evidence that racial discrimination unconstitutionally tainted a federal death sentence, which this Court has given exceptional importance.

This Court should stay Mr. Hall's execution pending disposition of the pending petition for a writ of certiorari. This case satisfies each consideration relevant to that determination.

There is "a reasonable probability" that four Justices will vote to grant certiorari and "a fair prospect" that this "Court will conclude that the decision below was erroneous." *Indiana State Police Pension Trust* v. *Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (internal quotation marks omitted). The panel's decision declined to assess Mr. Hall's *Batson* claim, instead foreclosing relief due to an overly narrow interpretation of 28 U.S.C. § 2255(e)'s "savings clause," which conflicts with its own prior decisions. This was manifestly erroneous, and allowing the government to execute Mr. Hall without even permitting review of the claims he raised, which the district court characterized as "extremely serious," Pet. App. 25a, would be manifestly unjust.

Mr. Hall will suffer irreparable harm absent a stay. Were Mr. Hall's execution to go forward without an opportunity to fully litigate his important constitutional claims, Mr. Hall would suffer "irremediable" harm. *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.). Failure to stay the mandate also risks the "irreparable harm" of "foreclos[ing] * * * certiorari review by this Court." *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers).

Although this is not a "close case" where consideration of the equities is warranted, they too favor a stay. *Indiana State Police Pension Trust*, 556 U.S. at 960 (internal quotation marks omitted). Any mar-

ginal harm the government might face from a potentially short stay pending resolution of the petition for a writ of certiorari pales in comparison to the irreversible harm that "[r]efusing a stay may visit" on Mr. Hall. *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J., in chambers). The public interest in ensuring that constitutional rights are vindicated—an interest that is particularly important in the context of an execution—and judicial economy favor a stay, too.

Mr. Hall thus respectfully asks that this Court stay his execution pending disposition of his petition for a writ of certiorari. Because his execution is scheduled for tonight (November 19, 2020) at 6:00 p.m. EST, Mr. Hall respectfully asks this Court to order briefing on this application before then, or administratively stay the execution pending disposition.

OPINIONS BELOW

The Seventh Circuit denied relief in a decision dated November 19, 2020. Pet. App. 1a-3a. The District Court's order denying the preliminary injunction is available at Appendix 001 attached hereto. Pet. App. 4a-25a.

JURISDICTION

The Seventh Circuit entered judgment on November 19, 2020. Pet. App. 2a-3a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2241(a) provides:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. § 2255(e) provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(h) provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—(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.

The Fifth Amendment to the U.S. Constitution, U.S. Const., amend. IV provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the U.S. Constitution, U.S. Const., amend. VI provides:

> In all criminal prosecutions, the accused shall * * * have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the U.S. Constitution, U.S. Const., amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted

The Fourteenth Amendment to the U.S. Constitution, U.S. Const., amend. XIV provides:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Factual and Procedural History

Mr. Hall was indicted in the fall of 1994 on six counts of: (1) kidnapping in which a death occurred, (2) conspiracy to commit kidnapping, (3) traveling in interstate commerce with intent to promote the possession of marijuana with intent to distribute, (4) using a telephone to promote the unlawful activity of extortion, (5) traveling in interstate commerce with

intent to promote extortion, and (6) using a carrying a firearm during a crime of violence. In February 1995, the government gave notice that it intended to seek the death penalty against him. The government did not seek the death penalty against three of Mr. Hall's co-defendants.[1]

The government made the decision to prosecute in the United States District Court for the Northern District of Texas, which was 80.81% White and 10.41% Black, according to data from the 1990 Census. It could have tried Mr. Hall in the Pine Bluff Division of the Eastern District of Arkansas, which was 35.85% Black in 1990.

Voir dire lasted from October 2–19, 1995. Assistant United States Attorney Paul Macaluso played a critical role in selecting that jury. After strikes for cause, five qualified Black venire members remained. The government struck four of them. The fifth, who had expressed strong pro-death penalty views in her juror questionnaire and during questioning, was struck by the defense. Mr. Hall's defense counsel raised a *Batson* challenge at trial on the basis that "the government . . . used preemptory strikes on four black jurors . . . ." The district court noted its view that this was likely "insufficient to present prima facie case" and, in response the government provided

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[1] The fourth co-defendant, Bruce Webster, recently had his death sentenced vacated and affirmed by the Seventh Circuit on the basis that he is intellectually disabled. *Webster* v. *Watson*, 975 F.3d 667 (7th Cir. 2020). As a result, of the individuals convicted of these crimes, only Mr. Hall remains under a death sentence.

ostensibly "neutral" reasons for its strikes. The government stated that "the Court refused to grant [] challenges" to the four Black jurors in question. However, the government had sought to strike only two of the four, Frances Miller and Lawrence Barrett, for cause. A colloquy followed, at the end of which the court denied the *Batson* challenge without allowing the defense to address the stated reasons for the government's exercise of its peremptory strikes.

There were two Black jurors who were not challenged for cause. Potential Black juror Amy Evans wrote in her juror questionnaire that she supported the death penalty "depend[ing] on the nature of the crime," that it was appropriate for "brutal senseless murders," and that it served "as a means of deterrent from committing the crime." She testified that even if the option of a life sentence without parole was available, she could vote for the death penalty. The government claimed that it struck Ms. Evans, because she "was very, very hesitant on her views on the death penalty." However, the government seated White jurors who gave similar testimony. For example, White prospective juror Mary Ann Herring provided both "yes" and "no" answers on her questionnaire in response to whether she could support a death sentence where life without parole was also an option. She later testified during voir dire that the death penalty should "depend on the circumstances" and "on the crime." The government further cited "concern[]" that Ms. Evans had two brothers-in-law in prison, but asked her no questions about this

topic, and seated multiple White jurors with family members in or recently released from prison.

Potential Black juror Billie Lee stated in her juror questionnaire that she favored the death penalty for "extremely brutal" crimes and it should be available for "child molesters who kill their victims." During voir dire, she testified that she believed the death penalty was warranted for "[a]nything that involves children, murder of children, [and] cruelty to children" (Mr. Hall was tried for the killing of a minor). She also testified that, though she may initially lean toward a life sentence over the death sentence, she could impose a death sentence "depend[ing] on evidence, the cruelty of the act, all of that would have to be considered." The government nevertheless claimed that it struck Ms. Lee because of her anti-death penalty views. Again, however, the government accepted White jurors who expressed similar views. For example, just like Ms. Lee, seated white juror Stacey Donaldson had selected on her jury form that despite deep misgivings about capital punishment, "as long as the law provides for it, I could assess it, under the proper set of circumstances." And seated juror Cindy Boggess testified during voir dire that she had always connected the death penalty to "the murder of a child or really coldblooded, calculated . . . sort of murder," and observed that "it would have to be one that was literally no doubt whatsoever, otherwise . . . I could not do it." The government also claimed that it struck Ms. Lee that she was "on a prior jury trial for robbery and found the defendant not guilty." This was untrue. And, once again, the government accepted a White juror

who served on a prior jury and acquitted a defendant on a charge of murder. Upon noticing this mistake, the government changed its story, claiming that Ms. Lee was struck be-cause she "had a brother-in-law who was a criminal defense attorney, which caused me some concern." But, again, the government asked Ms. Lee no questions about this topic and seated a White juror whose brother-in-law was a public defender.

Trial proceeded from October 24-31. The defense presented no evidence and waived closing argument. On October 31, 1995, the all-White jury convicted Mr. Hall of all counts. The penalty phase commenced the following morning. From November 1-3, the same all-White jury heard testimony and argument regarding Mr. Hall's sentence. On November 6, 1995, the jury recommended the death penalty.

The district court entered judgment on February 12, 1996, formally sentencing Mr. Hall to death. Mr. Hall appealed and the Fifth Circuit affirmed.

B. Subsequent Developments Following Mr. Hall's Conviction.

Mr. Hall appealed his conviction and that appeal was denied by the Fifth Circuit. *United States* v. *Hall*, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 526 U.S. 1117 (1999), *denying reh'g* on Oct. 1, 1998. In May 2000, Mr. Hall moved to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. *United States* v. *Hall*, No. 4:94-cr-00121-Y, Doc. 958 (N.D. Tex. May 16, 2020). The district court ultimately denied his claims. *Hall* v. *United States*, No. 4:00-cv-00422-Y, 2004 WL 1908242, at *37 (N.D. Tex. Aug. 24, 2004). Mr. Hall sought permission to appeal

from both the district court and the Fifth Circuit. Leave to appeal was denied. *United States* v. *Hall*, 455 F.3d 508 (5th Cir. 2006), cert. denied, 549 U.S. 1343 (2007).

After Mr. Hall's 28 U.S.C. § 2255 proceedings concluded, this Court decided *Miller-El* v. *Dretke*, 545 U.S. 231 (2005), holding that the Texas prosecutors involved, including Paul Macaluso—who prosecuted Mr. Hall and helped select the all-White jury that convicted him and sentenced him to death—violated *Batson* by striking Black jurors. The Court specifically rejected the justifications that Macaluso and others had proffered for their exercise of peremptory strikes in that case, holding unequivocally that they were pretextual. Of particular importance, this Court credited evidence that the Dallas County District Attorney's Office—where Macaluso trained and practiced for 15 years—"had adopted a formal policy to exclude minorities from jury service. . . . A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors." 545 U.S. at 264. The Court found that "the manual was written in 1968" and "remained in circulation until 1976, if not later." *Id*. (quoting *Miller-El* v. *Cockrell*, 537 U.S. 322, 334 (2003)).

The Sparling Manual was unequivocal in its discriminatory directives. Most importantly for the present case, it advocated to avoid minority jurors because "[m]inority races almost always empathize with the Defendant." *Miller-El* v. *Dretke,* No. 03-9659, 2004 WL 2899955, *99-114 (2004) *see also id.* ("You are not looking for any member of a minority

group which may subject him to oppression – they almost always empathize with the accused."). The manual further advocated against Jewish jurors because they "have a history of oppression and generally empathize with the accused." And about women jurors it stated, "I don't like women jurors because I can't trust them . . . Young women too often sympathize with the Defendant; old women wearing too much make-up are usually unstable, and therefore are bad State's jurors." *Id.* Realizing that "[i]t is impossible to keep women off your jury," the manual instructed prosecutors to "try to keep the ratio at least seven to five in favor of men." *Id.*

The Court also noted that "[t]he prosecutors used their peremptory strikes to exclude 91% of the eligible African–American venire members," a disparity "unlikely to [be] produce[d]" by "[h]appenstance." *Id.* at 241. The Court also instructed that a "side-by-side comparison[] of some black venire panelists who were struck [with] white panelists allowed to serve" is "[m]ore powerful than . . . bare statistics." *Id.* Thus, "[i]f a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise-similar nonblack who is permit-ted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.*

Four years later, the Fifth Circuit determined, in a separate case, that Macaluso had once again struck Black jurors on the basis of their race in violation of *Batson*. *See Reed*, 555 F.3d at 382 ("One of the same lawyers that conducted the voir dire in Miller–El's case, Paul Macaluso, also questioned prospective jurors for Reed's trial"). Like this Court, the Fifth

Circuit credited evidence concerning the Sparling manual, noting that given "the historical evidence of racial bias among the[] prosecutors" (including Macaluso), "we view this exact same evidence as persuasive here." *Id*.

Also after Mr. Hall's conviction, appeal, and § 2255 proceedings, new data became available demonstrating that the federal death penalty has been disproportionately meted out based on race—and particularly in Texas, where Mr. Hall was prosecuted. The data shows that federal prosecutors in Texas were nearly six times more likely to request authorization to seek the death penalty against a Black defendant than a non-Black defendant. Authorization was nearly eight times more likely to be granted in cases with a Black defendant than a non-Black defendant. And a death verdict was nearly sixteen times more likely to be rendered in a case with a Black defendant than a non-Black defendant. In the Northern District of Texas, where Mr. Hall was sentenced, the racial disparity was consistent with that seen across all four Texas federal districts and even "slightly greater."

On November 12, 2020, Mr. Hall filed a petition for habeas corpus relief in the district where he is confined, the United States District Court for the Southern District of Indiana. He contemporaneously sought a stay of his execution. Mr. Hall's motion was denied on November 17, 2020. Mr. Hall's subsequent appeal was dismissed on November 19, 2020.

The execution is scheduled to go forward today, November 19, 2020, at 6:00 pm.

REASONS FOR GRANTING THE STAY

To obtain a stay pending the disposition of a petition for a writ of certiorari, the applicant must demonstrate "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Indiana State Police Pension Trust*, 556 U.S. at 960 (quoting *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). "'[I]n a close case it may [also] be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Id.* (quoting *Conkright*, 556 U.S. at 1402). Those standards are satisfied here.

I. THE PETITION PRESENTS A COMPELLING CASE FOR CERTIORARI, AND THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT REVIEW.

Mr. Hall's petition raises important questions regarding two separate issues. Mr. Hall need only show that certiorari is likely as to one. Despite the statutory language in 28 U.S.C. §§ 2241 and 2255 and the weight of precedent, the panel majority found that Petitioner had no procedural avenue to bring his claims and erred in (1) summarily concluding that § 2241 does not provide an avenue for relief, without undertaking any substantive review of circuit precedent or engaging in any statutory interpretation and (2) disregarding the weight of new evidence that racial discrimination unconstitutionally tainted a

federal death sentence, which this Court has given exceptional importance.

II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL HOLD THAT THE SEVENTH CIRCUIT'S DECISION WAS ERRONEOUS.

There is at least "a fair prospect" that this Court will conclude the Seventh Circuit erred with respect to at least one of the two questions presented in the petition. At this stage, Mr. Hall need not show that outcome is a certainty (or anything close to certainty). *See Araneta* v. *United States*, 478 U.S. 1301, 1304 (1986) (Burger, C.J., in chambers) ("such matters cannot be predicted with certainty"); *Bd. of Educ. of City of L.A.* v. *Super. Ct. of Cal., Cty. of L.A.*, 448 U.S. 1343, 1347 (1980) (Rehnquist, J., in chambers) (comparing this exercise to "the reading of tea leaves"). Instead, the arguments in the petition need pass only the threshold of "plausibility." *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers); *accord California* v. *Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers). Although it is enough to make that showing with respect to any of the questions presented in the petition, here, Mr. Hall clears that bar with respect to both questions presented.

A. The Panel Manifestly Erred In Concluding That Mr. Hall Could Not Pursue Habeas Relief Via 28 U.S.C. § 2241, Thereby Foreclosing Any Avenue For Him to Litigate Race Discrimination

Claims The District Court Characterized As "Extremely Serious."

As this Court has recognized, the "Great Writ" exists "to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968). The panel's decision below guts this historic safety valve, foreclosing access to any possibility of habeas relief for Mr. Hall despite the fact that he has raised compelling evidence of race discrimination at his trial by a prosecutor adjudicated to have committed *Batson* violations on at least two occasions, including by this Court, and despite the fact that this evidence was not reasonably available when Mr. Hall litigated his § 2255 petition. Unless this Court intervenes to correct the Court of Appeals' error and hold that Mr. Hall may proceed pursuant to the "Savings Clause" of 28 U.S.C. § 2255(e), he will be executed without any court ever hearing claims that the district court characterized as "extremely serious." Pet. App. 25a.

1. The Courts Below Erred by Finding That § 2255 Was Not Structurally Inadequate or Ineffective.

Section 2255(e), often referred to as the "savings clause" or "safety valve," permits a prisoner to petition the federal courts for a writ of habeas corpus under 28 U.S.C. § 2241, but only if "the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of [the] detention.'" *Roundtree* v. *Krueger*, 910 F.3d 312, 313 (7th Cir. 2018) (quoting § 2255(e)).

That the relief sought under § 2241 is based on grounds that "could not have [been] invoked . . . by means of a second or successive § 2255 motion" and seeks to remedy "an error [that] was indeed a miscarriage of justice" are key to the Seventh Circuit's interpretation of the savings clause. *Brown* v. *Rios*, 696 F.3d 638, 640 (7th Cir. 2012) (citation omitted). While "[t]he mere fact that [a] petition would be barred as a successive petition under § 2255 . . . is not enough to bring the petition under § 2255's savings clause," *Garza* v. *Lappin*, 253 F.3d 918, 921 (7th Cir. 2001), a petitioner is able to access the savings clause by showing the presence of "something more." *Webster* v. *Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (en banc).

The en banc Seventh Circuit in *Webster* read "section 2255(e) as encompassing challenges to both convictions and sentences that as a structural matter cannot be entertained by use of the 2255 motion." 784 F.3d at 1139. It further recognized that, in exceptional circumstances, constitutional claims can be brought under § 2241. And it granted relief, finding that a failure to do so would "condon[e] an execution that violates the [constitution]," and that "there is no reason to assume that our procedural system is powerless to act in such a case." *Id*. at 1139–40. So too here.

While it may be true that a case presenting the exact facts of *Webster* would be "rare," 784 F.3d at 1141, the Seventh Circuit has not required strict adherence to a "rigid categor[y]," *Purkey* v. *United States*, 964 F.3d 603, 614 (7th Cir. 2020). Mr. Hall's case fits into this narrow, rare category. The evi-

dence that he seeks to present is, like Mr. Webster's, exceptionally compelling and grounded in the vindication of his most fundamental constitutional rights. Allowing Petitioner to challenge his execution, based on a sentence handed down by an all-White jury fabricated on the basis of racial prejudice, is within the "core purpose of habeas corpus." *Webster*, 784 F.3d at 1139. The evidence that he seeks to present is of the type by which "the very integrity of the courts is jeopardized." *Miller-El* v. *Dretke*, 545 U.S. 231, 238 (2005); *see also See also* Br. of *Amicus Curiae* NAACP Legal Def. & Educ. Fund, Inc. In Support of Pet'r-Appellant at 4-5, *Hall* v. *Watson*, No. 2:20-cv-00599 (S.D. Ind. Nov. 18, 2020); *see also id.* at 15 (urging the Court to hold that "the § 2241 safety valve is available when, as here, a petitioner facing execution by the United States has presented compelling evidence that his sentence of death is tainted by racism").

2. Precluding Mr. Hall From Litigating His Claims Would Result In A Fundamental Miscarriage of Justice.

Allowing the panel's decision to stand would "result in a 'fundamental miscarriage of justice.'" *Coleman* v. *Thompson*, 501 U.S. 722, 749-50 (1991) (internal quotation omitted). Racial bias in a criminal trial is so antithetical to constitutional values that this Court has gone to great lengths to repeatedly condemn it. *See, e.g.*, *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 868 (2017) ("The unmistakable principle underlying these precedents is that discrimination on the basis of race, 'odious in all aspects, is especial-

ly pernicious in the administration of justice.'") (quoting *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979)).

Indeed, "[s]ome toxins can be deadly in small doses." *Buck* v. *Davis*, 137 S. Ct. 759, 777 (2017). And here, the toxins were more than small. The all-White jury that convicted Mr. Hall and sentenced him to death was selected by a prosecutor with the remarkable track record of having twice been adjudicated, by two different courts—including this one—to have violated *Batson*, in decisions that repeatedly identified him by name and expressly found that the justifications he proffered for the strikes at issue were false and pretextual. *See Miller-El*, 545 U.S. at 248-50; *Reed*, 555 F.3d at 371, 376, 382.

Because the execution of a death sentence imposed on the basis of racial discrimination works a fundamental "miscarriage of justice," *see Wainwright* v. *Sykes*, 433 U.S. 72, 91 (1977), a habeas petitioner may prevail if he puts forth evidence tending to show that his case satisfies the "miscarriage-of-justice exception." *See House* v. *Bell,* 547 U.S. 518, 536 (2006) (quoting *Schlup* v. *Delo*, 513 U.S. 298, 324 (1995)). The racial animus that infected Mr. Hall's capital trial is a "fundamental miscarriage of justice" that can be corrected on habeas review despite any claimed procedural bar. *Coleman*, 501 U.S. at 750. *See also* Br. of *Amicus Curiae* NAACP Legal Def. & Educ. Fund, Inc. In Support of Pet'r-Appellant at 2, *Hall* v. *Watson*, No. 2:20-cv-00599 (S.D. Ind. Nov. 18, 2020) ("It would be a fundamental miscarriage of justice for the United States to carry out an execution without providing courts an opportunity to consider and resolve the merits of Mr. Hall's sub-

stantial claims that his death sentence is unlawfully tainted by racial discrimination."); *see also id.* at 11-14 (discussing that it would be a fundamental miscarriage of justice for the United States to carry out an execution based on a death sentence influenced by [racial] discrimination").

B. The Lower Courts Committed Manifest Error in Failing to Consider the New Evidence of *Batson* Violations Tainting Petitioner's Death Sentence.

The circuit court and district court below erred in denying consideration of the evidence of *Batson* violations. Though the district court conceded that the allegations were "extremely serious," the court denied Petitioner's motion to consider such claims on the grounds that they were delayed. Pet. App. 25a. The evidence of *Batson* violations was validly before the courts below pursuant to § 2241, as Petitioner sought to raise his *Batson* claim on the basis of newly discovered evidence of a grave constitutional violation, which justifies access to a petition under § 2241 through the savings clause in § 2255(e).

Racial discrimination permeates government decisions made in this case. The government chose to prosecute Mr. Hall in the Northern District of Texas, Fort Worth Division, a decision that seated the case in a jurisdiction with only a 10.41% Black population in 1990, rather than the 38.5% Black population in the Pine Bluff Division of the Eastern District of Arkansas at that time. Petition for Writ of Habeas Corpus at 23, No. 2:20-cv-00599, *Hall* v. *Watson*, (S.D. Ind. Nov. 12, 2020), ECF No. 1 ("Petition"). As a result, of the 100 prospective jurors questioned

during voir dire, only seven were Black. *Id.* After challenges for cause, when only six Black prospective jurors remained, *id.* at 23 n.6, the government struck four of the five qualified Black venire members in the group from which the 12-member jury would be selected. The fifth Black juror was struck by the defense due to her strong pro-death penalty views, and the sixth was selected as the third alternate. *Id.* at 23. As a result, Mr. Hall, who is Black, was convicted and sentenced to death by an all-White jury.

One of the two prosecutors who conducted voir dire, Paul Macaluso, began his career in the Dallas County District Attorney's Office, which this Court found, "for decades[,] . . . had followed a specific policy of systemically excluding blacks from juries." *Miller-El* v. *Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"). In proceedings brought under 28 U.S.C. § 2254, this Court vacated Miller-El's conviction and death sentence, finding that Macaluso had struck Black jurors on the basis of their race, in violation of *Batson* v. *Kentucky*,[2] and then *lied* about why he had struck them. *Id.* Several years later, the Fifth Circuit Court of Appeals found in a separate capital habeas case that Macaluso had done the same. *Reed* v. *Quarterman*, 555 F.3d 364 (5th Cir. 2009). Both decisions mentioned Macaluso by name numerous times.

Mr. Hall's lawyers raised a *Batson* objection to the prosecution's strikes, and the district court asked the

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2 476 U.S. 79 (1986).

government to explain them. Considering the government's proffered reasons, in light of the voir dire transcript and jury questionnaires demonstrates that Macaluso brought his bias with him when he came to work at the United States Attorney's Office prosecuting Mr. Hall. As in *Miller-El II* and *Reed*, the proffered race neutral reasons are not borne out by the record, as they contain several misstatements, and, importantly, a comparison of non-Black jurors the government accepted and reasons the government claimed was the basis for their strikes establishes that the proffered reasons, though race neutral, were in fact pretexts for race discrimination. These included AUSA Richard Roper's claim that the government had attempted to remove all four Black jurors they struck for cause when it only in fact challenged two of them.

With respect to the two jurors not previously challenged, a side-by-side comparison of the government's proffered bases for its strikes provides useful context:

Amy Evans. Amy Evans wrote in her jury questionnaire that she was in favor of the death penalty "depend[ing] on the nature of the crime," that it was appropriate for "brutal senseless murders," and that it served "as a means of deterrent from committing the crime." Juror Questionnaire of Amy Evans at Q,46, Q.48, Q.52a, No. 2:20-cv-00599, *Hall* v. *Watson*, (S.D. Ind. Nov. 12, 2020), ECF No. 1-14 ("Evans Questionnaire"). She testified that the death penalty was "appropriate" in instances "where a crime was committed intentionally without . . . any regard[] for life." Vol. 10, Tr. of Trial at 92:8-11 (Voir Dire Exam-

ination of Amy Evans), No. 2:20-cv-00599, *Hall* v. *Watson*, (S.D. Ind. Nov. 12, 2020), ECF No. 1-13 ("Examination"). The government nonetheless used a peremptory strike on her, claiming Ms. Evans "was very, very hesitant on her views on the death penalty." Vol. 12, Tr. of Trial (Hearing on Peremptory Strike List) at 11:4-6, No. 2:20-cv-00599, *Hall* v. *Watson*, (S.D. Ind. Nov. 12, 2020), ECF No. 1-11 ("*Batson* Hr'g"). But the government seated other non-Black jurors who gave similar testimony. For example, White juror Mary Ann Herring, like Ms. Evans, Ms. Herring provided both "yes" and "no" answers in her questionnaire, Juror Questionnaire of Mary Ann Herring at Q.52a, No. 2:20-cv-00599, *Hall* v. *Watson*, (S.D. Ind. Nov. 12, 2020), ECF No. 1-23, writing that the application of the death penalty "would depend on the crime," *id.*; and she testified during voir dire that the death penalty should "depend on the circumstances" and "on the crime," Vol. 7, Tr. of Trial at 118:24, 119:2–3 (Voir Dire Examination of Mary Ann Herring), No. 2:20-cv-00599, *Hall* v. *Watson*, (S.D. Ind. Nov. 12, 2020), ECF No. 1-20. There is no appreciable difference between the views espoused by Ms. Evans and Ms. Herring, yet one was struck while the other one sat on the jury.

The government also stated that Ms. Evans "had very long pauses in her answers and was very hesitant in what she said," *Batson* Hr'g at 11:8-9, which the record does not support. And the prosecutor claimed that he was "concerned" that Ms. Evans had two brothers-in-law in prison, even though he asked her no questions about this topic, *id.* at 11:1-3, and seated multiple non-Black jurors with family mem-

bers either currently in or released from prison. *See* Petition at 33.

Billie Lee. Potential juror Billie Lee stated in her questionnaire that she favored the death penalty for "extremely brutal" crimes and it should be available for "child molesters who kill their victims." Juror Questionnaire of Bille Lee at Q.45, Q.48, No. 2:20-cv-00599, *Hall* v. *Watson*, (S.D. Ind. Nov. 12, 2020), ECF No. 1-29. She later testified that the death penalty was warranted for "[a]nything that involves children, murder of children, [and] cruelty to children." Examination at 125:16-19. (Mr. Hall was tried for the killing of a minor). When asked if she could "give honest and fair consideration" of the death penalty, she responded that she could, "depending on evidence, the cruelty of the act, all of that would have to be considered." *Id.* at 127:19-21.

The government claimed it struck Ms. Lee because she had stated in her juror questionnaire that she did not believe in the death penalty but could assess it. Yet again, a side-by-side comparison of jurors the government accepted for service belies this explanation; indeed, the prosecution seated multiple White jurors who expressed misgivings about capital punishment.

The government also proffered as a reason to exclude Ms. Lee that she was "on a prior jury trial for robbery and found the defendant not guilty . . . ." *Batson* Hr'g at 13:18-29. Not only is this false, but the government actually *accepted* a White juror who served on a prior jury and acquitted a defendant on a charge of murder. *See* Juror Questionnaire of Dana Crittendon at Q.87, No. 2:20-cv-00599, *Hall* v. *Wat-*

son, (S.D. Ind. Nov. 12, 2020), ECF No. 1-32. Yet, this fact went unexplored by the prosecution, whose only question about her prior jury service was to clarify that she was already familiar with the voir dire and trial process. Vol. 1, Tr. of Trial at 91:9–14, 98:2–7 11 (Voir Dire Examination of Dana Crittendon), No. 2:20-cv-00599, *Hall* v. *Watson*, (S.D. Ind. Nov. 12, 2020), ECF No. 1-33. Upon noticing the mistake as to Ms. Lee's jury service, the prosecutor changed his story, claiming that Ms. Lee was struck because she "had a brother-in-law who was a criminal defense attorney, which caused [ ] some concern." *Batson* Hr'g at 14:5-9. But the prosecution asked Ms. Lee no questions about this topic, which belies a claim that it actually caused the government any concerns. *See Miller-El II*, 545 U.S. at 246 ("[F]ailure to engage in any meaningful voir dire examination on a subject the [government] alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (internal quotation marks omitted)). And, once again, the government seated a White juror whose brother-in-law was a public defender. Petition at 37.

While it is true that Mr. Hall's trial counsel raised a *Batson* challenge at trial, and that the trial record contains evidence supporting a *Batson* claim, this traditionally has not been enough, as courts have been reluctant to conclude that a prosecutor intentionally discriminated on the basis of race without something more than a cold trial record. In *Foster* v. *Chatman*, for example, this "something more" was a set of prosecution notes that came to light many years after Foster's trial showing that the prosecu-

tion had flagged all of the Black jurors on their strike sheets, written "No Black Church," and made a recommendation for who to pick if they "had to pick a black juror," 78 U.S. ___ , 136 S. Ct. 1737 (2016). In this Court's most recent *Batson* decision, *Flowers* v. *Mississippi*, the "something more" was evidence that across its history of six trials prosecuting Flowers, prosecutor Doug Evans struck 41 of 42 prospective Black jurors. 588 U.S. __, 139 S. Ct. 2228 (2019). And in *Miller-El*, the "something more" was new evidence that the prosecution office at issue had adopted a formal policy to exclude racial minorities from jury service and that the specific prosecutors who tried Miller-El had been trained to strike Black jurors via the infamous "Sparling Manual." *Miller-El* v. *Dretke*, 545 U.S. 231, 264 (2005)

Here, the Court need not search for "something more" because one of the very same prosecutors that the Supreme Court (and later the Fifth Circuit, in a different case) concluded had violated *Batson* on the basis of the office policy and Sparling Manual in *Miller-El* helped pick the jury that convicted and sentenced Mr. Hall. And just as in *Miller-El*, this evidence bears directly on the Court's inquiry into the genuineness of the prosecution's stated reasons for its strikes of 80% of the qualified Black venire members at Mr. Hall's trial. *Batson*, 476 U.S. at 96-97 ("all relevant circumstances" must be considered in determining whether a violation has occurred). As the Supreme Court noted in *Miller-El II*, "[i]f anything more is needed for an undeniable explanation of what was going on, history supplies it." 545 U.S. at 266. That is doubly so given that the "history" here

is the very same piece of history on which this Court relied in *Miller-El* to find that Paul Macaluso violated the Equal Protection Clause in that case. *See also Reed* v. *Quarterman*, 555 F.3d 364, 371 n.3 (5th Cir. 2009) ("One of the same lawyers that conducted the voir dire in Miller–El's case, Paul Macaluso, also questioned prospective jurors for Reed's trial"); *id.* (given "the historical evidence of racial bias among the[] prosecutors," including Macaluso, "we view this exact same evidence as persuasive here."). And it dispatches any notion that the jury selection process at Mr. Hall's trial was race neutral, as the Constitution requires.

The courts below erred by failing to consider Mr. Hall's *Batson* claims.

III. MR. HALL WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

There is a clear "likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc.*, 561 U.S. at 1302. That is true for at least two reasons: Absent a stay, (i) Mr. Hall will be executed amid arbitrary denials of his constitutional rights; and (2) this Court will effectively be deprived of its jurisdiction to consider the petition for a writ of certiorari.

First, the harm of being executed is inarguably "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent [it]." *League of Women Voters of the U.S.* v. *Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (internal quotation marks omitted); *see also Wainwright* v. *Booker*, 473 U.S. 935, 935 n.1. (1985)

(Powell, J., concurring) (In capital cases, irreparable harm is "necessarily present."). If this Court does not stay Mr. Hall's execution, Mr. Hall will be executed without the opportunity to fully litigate his meritorious constitutional claims. That is an "irremediable" harm. *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986).

Second, failure to grant a stay risks "foreclos[ing] * * * certiorari review by this Court," which itself constitutes "irreparable harm." *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord, e.g.*, *John Doe Agency*, 488 U.S. at 1309. "Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals." *John Doe Agency*, 488 U.S. at 1309 (alteration in original) (quoting *New York* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers)). Allowing the government to execute Mr. Hall while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison*, 468 U.S. at 1302. Because "'the normal course of appellate review might otherwise cause the case to become moot,' issuance of a stay is warranted." *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); *see also Chafin* v. *Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants "stays as a matter of course").

IV. THE BALANCE OF EQUITIES AND RELATIVE HARMS WEIGH STRONGLY IN FAVOR OF GRANTING A STAY.

In addition to the stay factors identified above, "'in a close case it may be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Indiana State Police Pension Trust*, 556 U.S. at 960 (quoting *Conkright*, 556 U.S. at 1402). Because the other factors plainly point in favor of granting the requested stay, this Court need not consider the balance of equities here. But, if it does, this additional factor reinforces that result.

First, "[r]efusing a stay may visit an irreversible harm on [Mr. Hall], but granting it will * * * do no permanent injury to respondents." *Philip Morris USA Inc.*, 561 U.S. at 1305. While the government has an interest in the finality of Mr. Hall's case, the delay that will come from staying his execution to allow him to litigate his "extremely serious" claims, Pet. App. 25a, will not cause substantial harm to Defendants. That is particularly true given that Mr. Hall was protected by a stay of execution for 13 years, Order, *Roane* v. *Gonzales*, No. 1:05-cv-02337-TSC (D.D.C. June 11, 2007), ECF No. 68; a reprieve to which the government had consented and which was not lifted until September 20, 2020—ten days before the government decided to suddenly notice Mr. Hall's execution in the midst of a global pandemic, *In the Matter of the Fed. Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-00145-TSC (D.D.C. Sept. 20, 2020), ECF Nos. 265 & 266. In light of this history, "[a] brief stay to permit the orderly conclu-

sion of the proceedings in this court will not substantially harm the government . . . ." *Purkey*, 964 F.3d at 618.

Second, the public has an interest in ensuring that Mr. Hall's constitutional rights are fully litigated. "[I]t is always in the public interest to prevent violation of a party's constitutional rights." *In re Ohio Execution Protocol*, 860 F.3d 881, 901 (6th Cir. 2017) (Moore, J., dissenting); *see also Gannett Co.* v. *DePasquale*, 443 U.S. 368, 383 (1979) (acknowledging public interest in protection of constitutional rights); *Cooey* v. *Taft*, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006) ("The public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights."); *Harris* v. *Johnson*, 323 F. Supp. 2d 797, 810 (S.D. Tex. 2004) ("Confidence in the humane application of the governing laws . . . must be in the public's interest."). Indeed,"[a]pplying the law in a way that violates the Constitution is never in the public's interest." *Minney* v. *U.S. Office of Pers. Mgmt*., 130 F. Supp. 3d 225, 236 (D.D.C. 2015).

On balance, a stay is therefore warranted. Failure to grant one "may 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," and a stay would serve both the public interest and judicial economy. *Id.* "In light of these considerations," this Court should "grant the application." *Id.*

CONCLUSION

For the foregoing reasons, Mr. Hall respectfully requests the Court should stay his execution pending disposition of his petition for certiorari.

Respectfully submitted,

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