APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-3229

ORLANDO CORDIA HALL,
Petitioner-Appellant,

v.

T.J. WATSON, Warden
Respondent-Appellee.

Submitted November 18, 2020
Decided November 19, 2020

Before

Diane S. Sykes, *Chief Judge*
David F. Hamilton, *Circuit Judge*
Amy J. St. Eve, *Circuit Judge*

Appeal from the
United States District Court for the Southern
District of Indiana,
Terre Haute Division.
No. 2:20-cv-00599-JPH-DLP
James P. Hanlon, *Judge*.

O R D E R

Orlando Hall's case is again before us, this time on appeal from the district court's order denying his most recent motion for a stay of execution to permit him to pursue a second petition for habeas relief under 28 U.S.C. § 2241. The new § 2241 petition was filed just seven days before his scheduled execution.

We assume familiarity with our order yesterday affirming the district court's dismissal of Hall's first § 2241 petition and denying a stay of execution. *Hall v. Watson*, No. 20-3216, 2020 WL 6779345 (7th Cir. Nov. 18, 2020). This latest petition is meritless for the reasons explained in Judge Hanlon's comprehensive order dated November 17, 2020. *Hall v. Watson*, No. 2:20-cv-00599-JPH-DLP (S.D. Ind. Nov. 17, 2020) (Order Denying Motion for Stay of Execution), ECF No. 18.

Briefly, Hall proposes to raise a *Batson* claim and a claim that the federal death penalty is applied in a racially disproportionate manner. Neither claim is cognizable under § 2241. Under 28 U.S.C. § 2255(e), a § 2241 petition "shall not be entertained" unless the remedy by motion under § 2255 is "inadequate or ineffective to test the legality of" the prisoner's detention. As we have explained many times, the "Savings Clause," as § 2255(e) is known, is a narrow gateway to the general habeas statute and requires a compelling showing that § 2255 remedy is *structurally* inadequate or ineffective. *Lee v. Watson*, 964 F.3d 663, 666 (7th Cir. 2020); *Purkey v. United*

States, 964 F.3d 603, 617 (7th Cir. 2020). Section 2255 is not a structurally inadequate or ineffective vehicle for the claims Hall proposes to raise in his new § 2241 petition. Indeed, he litigated a *Batson* challenge, lost, and dropped further review of that claim on direct appeal and through multiple rounds of collateral litigation under § 2255. And he long ago raised and lost the systemic-bias claim in his first round of § 2255 litigation in the Northern District of Texas. Finally, neither claim satisfies the Savings Clause under the reasoning of our decision in *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (en banc). Judge Hanlon correctly denied a stay of execution.

The district court's judgment is AFFIRMED. The motion to stay execution, which Hall renewed in this court, is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No.: 2:20-cv-00599-JPH-DLP

ORLANDO CORDIA HALL,

Petitioner,

v.

T.J. WATSON, in his official capacity as Complex Warden of U.S.P., Federal Correctional Complex (FCC) Terre Haute

Respondent.

ORDER DENYING MOTION FOR STAY OF EXECUTION

Orlando Cordia Hall is a federal prisoner scheduled to be executed on November 19, 2020. In 1995, a federal jury in Texas convicted Mr. Hall of multiple crimes related to the kidnapping and murder of 16-year-old Lisa Rene and sentenced him to death on the charge of kidnapping resulting in death. The district judge imposed the death sentence for that conviction and imposed multiple terms of imprisonment for the other counts of conviction. The convictions and corresponding sentences imposed were upheld on appeal. Mr. Hall filed a petition for

postconviction relief under 28 U.S.C. § 2255. In 2004, the district judge in Texas denied Mr. Hall relief, and that ruling was affirmed by the Fifth Circuit. In 2016 and 2020, the Fifth Circuit denied Mr. Hall's requests to file a successive § 2255 motion.

Less than a week ago, this Court denied Mr. Hall's petition for a writ of habeas corpus under 28 U.S.C. § 2241, and Mr. Hall filed a second § 2241 petition. Before the Court is Mr. Hall's motion for a stay of execution pending resolution of his second § 2241 petition. The Court considers several factors

when evaluating this motion, and Mr. Hall must make a "strong showing" that (1) that there is a "structural problem" with § 2255 that prevented him from raising the issues that he presents in this case and (2) he would be entitled to relief on the merits if the issues he raises were relitigated. Because Mr. Hall has not demonstrated a strong likelihood that he can make the required showing, and because Mr. Hall has not demonstrated that he diligently pursued his claims, his motion for stay of execution must be denied.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A full recitation of the facts and procedural background is set forth in *United States v. Hall*, 152 F.3d 381, 389–90 (5th Cir. 1998) ("*Hall I*"), *United States v. Hall*, 455 F.3d 508, 510–13 (5th Cir. 2006) ("*Hall II*"), and *In re: Orlando Cordia Hall*, --- F.3d ----, ----, 2020 WL 6375718, at *1–2 (5th Cir. 2020) ("*Hall III*").

A. Factual Background

While the details of Mr. Hall's crime are not relevant to the ultimate resolution of his legal claims, a brief summary is appropriate for context. The following facts are summarized from Mr. Hall's direct appeal. *See Hall I*, 152 F.3d at 389–90. Mr. Hall and several confederates ran a marijuana trafficking enterprise in Pine Bluff, Arkansas. On September 21, 1994, they traveled to Dallas, Texas, where they paid two local dealers $4700 to purchase marijuana. After the dealers claimed the $4700 was stolen, Mr. Hall and his confederates began surveilling an apartment where they had seen the dealers and concluded the dealers scammed them. The men broke into the apartment and encountered one dealer's sister, Ms. Rene. They kidnapped Ms. Rene and dragged her to a car, where Mr. Hall raped her. The men drove from Arlington, Texas, to Pine Bluff, Arkansas. In Pine Bluff, they rented a motel room, tied Ms. Rene to a chair, and repeatedly raped her. The next day, they took her to a nearby park where they had dug a grave and beat her over the head with a shovel. One of the men covered Ms. Rene in gasoline, and they then buried her alive.

B. Procedural Background

Unless otherwise noted, the following procedural history is summarized from the Fifth Circuit's decision denying a certificate of appealability following the denial of Mr. Hall's § 2255 motion. *Hall II*, 455 F.3d at 512–13.

1. Indictment, trial and sentencing

On October 26, 1994, Mr. Hall was charged in the United States District Court for the Northern

District of Texas, Fort Worth Division, with kidnapping in violation of 18 U.S.C. § 1201 (a)(1). On November 4, 1994, a grand jury returned a six-count superseding indictment charging Mr. Hall with kidnapping in which a death occurred in violation of 18 U.S.C. § 1201(a)(1) and five other offenses. On February 23, 1995, the government filed its notice of intent to seek the death penalty against Mr. Hall.

Mr. Hall's jury trial began on October 2, 1995. He was represented by two attorneys, Jeffrey Kearney and Michael Ware. Assistant United States Attorneys ("AUSAs") Paul Macaluso and Richard Roper represented the government.

Voir dire was conducted from October 2 to October 19. Of the one hundred prospective jurors questioned during voir dire, seven were black. Dkt. 1-9. After strikes for cause, five qualified black prospective jurors remained. The defense struck one black juror due to her strong pro-death-penalty views, and the government peremptorily struck the remaining four, leaving no black jurors. Mr. Hall raised a *Batson* challenge at trial. Dkt. 1-11 at 8–9. The district court overruled Mr. Hall's objections based on the facially neutral reasons stated by the government in support of its strikes. *Id.* at 11–16.

The jury found Mr. Hall guilty of several counts, including kidnapping resulting in death. *Hall I,* 152 F.3d at 390. After a separate penalty phase of the trial, the jury recommended that he be sentenced to death. *Id.* The district court accepted the jury's recommendation and sentenced Mr. Hall to death.

2. Direct appeal of conviction and sentence

Mr. Hall challenged his conviction and sentence on direct appeal, raising 11 issues. *Hall I*, 152 F.3d at 390-391. The Fifth Circuit affirmed the conviction and sentence, *id.* at 427, and the Supreme Court declined review. *Hall v. United States*, 526 U.S. 1117 (1999).

3. Post-conviction challenges to conviction and sentence in the court of conviction

In May 2000, Mr. Hall filed a petition for postconviction relief under 28 U.S.C. § 2255 seeking to vacate his conviction and sentence. He later filed an amended § 2255 motion and a second amended § 2255 motion.

In the second amended motion, Mr. Hall raised the following issues:

(1) Mr. Hall's rights under the Fifth Amendment were violated because the indictment did not allege any aggravating factors that rendered Mr. Hall eligible for the death penalty;

(2) Mr. Hall was denied his right to the effective assistance of counsel;

(3) a juror's contact with the victim's family and other extraneous information that entered into the jury's deliberations violated his Fifth, Sixth, and Eighth Amendment rights;

(4) the government failed to disclose exculpatory information concerning one of its witnesses;

(5) Mr. Hall's Fifth, Sixth, and Eighth Amendment rights were violated because of false testimony;

(6) Mr. Hall's Sixth Amendment rights were violated by using a jail inmate to elicit information from him;

(7) Mr. Hall's Fifth, Sixth, and Eighth Amendment rights were violated when the government provided a statement with false information to the defense to dissuade the defense from calling a witness;

(8) the government interfered with Mr. Hall's right to counsel by advising his first defense team about information that Mr. Hall planned to kidnap his attorneys in an escape attempt; and

(9) Mr. Hall's rights under the Fifth and Eighth Amendments were violated by the racially discriminatory effects of the federal capital sentence scheme.

Hall v. United States, No. 4:00-cv-00422-Y, 2004 WL 1908242, at *4 (N.D. Tex. Aug. 24, 2004).

In support of the claim that the federal capital sentence scheme violates the Fifth and Eighth Amendments, Mr. Hall submitted an affidavit from Kevin McNally discussing racial disparities in the application of the death sentence in federal cases. *Hall v. United States*, No. 4:94-cr-00121-Y, dkt. 1071-2 ("McNally Affidavit May 12, 2000"). Mr. McNally noted that he had collected information, including the defendant's race, for "all potential federal death penalty cases" dating back to 1988. *Id.*, ¶¶ 2, 4.

After an evidentiary hearing limited to Ground 3, the district court denied Mr. Hall's § 2255 petition in an 89-page order that addressed each of the claims presented. The Fifth Circuit denied Mr. Hall leave to appeal, *Hall II*, 455 F.3d at 524, and the Supreme

Court denied certiorari, *Hall v. United States*, 549 U.S. 1343 (2007).

In 2016 and 2019, Mr. Hall sought authorization from the Fifth Circuit to file successive § 2255 motions challenging the constitutionality of his firearm conviction under 18 U.S.C. § 924(c). In both instances, the Fifth Circuit denied leave to file. *In re Hall*, No. 16-10670 (5th Cir. June 20, 2016); *In re Hall*, --- F.3d ----, ----, 2020 WL 6375718, at *2 (5th Cir. Oct. 30, 2020).

4. Post-conviction challenges in this Court

Mr. Hall filed a § 2241 petition in this Court raising the same challenges to his firearms conviction that he raised in the Fifth Circuit. *Hall v. Watson*, No. 2:17-cv-00176-JPH-DLP. On November 14, 2020, the Court dismissed his petition because the Fifth Circuit had ruled on the merits of his challenges to the firearms conviction. *Id.* at dkt. 48.

On November 12, 2020, seven days before the scheduled execution date, Mr. Hall filed another § 2241 petition in this Court raising two constitutional challenges. Dkt. 1. First, he alleges that "race-based peremptory strikes infected [his] trial at every stage." Second, he contends that statistical evidence shows race-based differences in application of the federal death penalty between black and non-black defendants. Along with the § 2241 petition, Mr. Hall filed a motion to stay execution. Dkt. 3. The Court entered a briefing schedule ordering Respondent to file a response by 5:00 p.m. on November 16, 2020, and for Mr. Hall to file any reply by 12:00 p.m. on November 17, 2020.

II.

DISCUSSION

A motion for stay of execution requires the Court to consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

A. Likelihood of Success on the Merits

Because this is a § 2241 petition, Mr. Hall must make a "strong showing" that (1) there is a "structural problem" with § 2255 that prevented him from raising the issues that he presents in this case and (2) he would be entitled to relief on the merits if the issues he raises were relitigated. *Lee v. Watson*, 2019 WL 6718924, at *1 (7th Cir. Dec. 6, 2019). While these are distinct issues, they are intertwined and analyzed together. The Court first sets forth the applicable Section 2255(e) framework, and then evaluates the merits of Mr. Hall's claims in the context of that framework.

1. Section 2255 and the Savings Clause

"As a general rule, a federal prisoner wishing to collaterally attack his conviction or sentence must do so under § 2255." *Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019). Congress created within § 2255 a narrow exception to the "general rule" that requires a federal prisoner to bring a collateral attack under § 2255. Section 2255(e), aptly described by the Seventh Circuit as the "savings clause" and the "safety valve,"

"recognizes a narrow pathway to the general habeas corpus statute, section 2241." *Purkey v. United States*, 964 F.3d 603, 611 (7th Cir. 2020); *see Webster v. Daniels*, 784 F.3d 1123, 1135 (7th Cir. 2015) (en banc).

Under the savings clause, a prisoner can seek a writ of habeas corpus under § 2241 only if the prisoner can show "that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Without that showing, a district court cannot reach the merits of the arguments raised in the petition. *Id.* (petition otherwise "shall not be entertained"); *Webster*, 784 F.3d at 1124 (petition "must be dismissed at the threshold" if § 2255(e) is not satisfied).

Section 2255 is inadequate or ineffective as applied to a specific case only where there is "some kind of structural problem with section 2255." *Webster*, 784 F.3d at 1136. A structural problem requires "something more than a lack of success with a section 2255 motion." *Id.* Section 2255 is inadequate or ineffective where the court finds that the federal prisoner did not have "a reasonable opportunity [in a prior § 2255 proceeding] to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *Chazen*, 938 F.3d at 856 (alteration in original) (quoting *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998)).

Here, Mr. Hall relies on the path described by the Seventh Circuit in *Webster*. Dkt. 1 at 22 ("It is appropriate for this Court to hear this case under § 2241 through the path outlined in *Webster*."). In *Webster*, the Seventh Circuit held for the first and only time that the Savings Clause was met for a

constitutional claim. The petitioner in *Webster* sought to challenge his death sentence as barred by *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment forbids the execution of a person with an intellectual disability. Although the petitioner had raised an *Atkins* claim in his § 2255 proceeding, he wished to present "newly discovered evidence" to support that claim in his § 2241 petition. *Webster*, 784 F.3d at 1125.

The Seventh Circuit found that "there is no categorical bar against resort to section 2241 in cases where new evidence would reveal that the Constitution categorically prohibits a certain penalty." *Id.* at 1139. The structural problem identified by the Seventh Circuit was based on at least two concerns. First, § 2255(h)(1) only allows a second or successive § 2255 motion if newly discovered evidence meets a certain threshold to demonstrate that the petitioner is not guilty of the *offense*. *Id.* at 1134–35, 1138. It does not allow for such motions if the petitioner presents newly discovered evidence that the petitioner is ineligible to receive his *sentence*. *Id.* Second, Congress could not have contemplated whether claims of categorical ineligibility for the death penalty should be permitted in second or successive § 2255 motions because the relevant cases—*Atkins* and *Roper v. Simmons*, 543 U.S. 551 (2005)[1]—had not been decided when § 2255 was enacted. *Webster*, 784 F.3d at 1138 ("[T]he fact that the Supreme Court had not

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[1] In *Roper*, the Supreme Court held that "imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed" violates the Eighth and Fourteenth Amendments. 543 U.S. at 578.

yet decided *Atkins* and *Roper* at the time AEDPA was passed supports the conclusion that the narrow set of cases presenting issues of constitutional ineligibility for execution is another lacuna in the statute."); *id.* at 1139 ("In Webster's case, the problem is that the Supreme Court has now established that the Constitution itself forbids the execution of certain people: those who satisfy the criteria for intellectual disability that the Court has established, and those who were below the age of 18 when they committed the crime.").

Webster is the first and only time the Seventh Circuit permitted a constitutional claim to proceed through the Savings Clause. Indeed, the court "took great care to assure that its holding was narrow in scope." *Poe v. LaRiva*, 834 F.3d 770, 774 (7th Cir. 2016). It limited its holding to the narrow legal and factual circumstances presented in the case, stating explicitly that the case "will have a limited effect on future habeas corpus proceedings." *Webster*, 784 F.3d at 1140 n.9; *see Poe*, 834 F.3d at 774 ("[T]here is nothing in *Webster* to suggest that its holding applies outside the context of new evidence.").

Evidence must meet three conditions to be considered "new" within the meaning of *Webster*:

> First, the evidence sought to be presented must have existed at the time of the original proceedings. . . . Second, the evidence must have been unavailable at the time of trial despite diligent efforts to obtain it. Third, and most importantly, the evidence must show that the petitioner is constitutionally ineligible for the penalty he received. Because the Supreme Court has declared only two types of

> persons (minors and the intellectually disabled) categorically ineligible for a particular type of punishment, our ruling is as a matter of law limited to that set of people—those who assert that they fell into one of these categories at the time of the offense. These three limitations are more than adequate to prevent the dissent's feared flood of section 2241 petitions[.]

Webster, 784 F.3d at 1140 n.9.

The Court now evaluates the evidence that Mr. Hall characterizes as "new evidence" in this context.

2. Likelihood of Meeting *Webster*'s Test

Mr. Hall has not made a strong showing that either of his claims relies on (1) evidence that existed at the time of his original proceedings but (2) was unavailable to him at those proceedings.

a. *Batson* Claim

In support of his *Batson* claim, Mr. Hall points first to *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), where the Supreme Court discussed a manual entitled "Jury Selection in a Criminal Case," ("the Sparling Manual"), which was circulated in the Dallas County District Attorney's Office from 1968 to 1976, and explicitly urged prosecutors to exclude minorities from jury service. *Id.* at 264; *see also* dkt. 1-6 (Sparling Manual Excerpt). Mr. Hall argues this is material to his *Batson* claim because AUSA Macaluso worked in that office while the Sparling Manual was in use. Mr. Hall claims that at the time of his trial, this "critical evidence was unavailable, secreted away in the Dallas County District Attorney's Office," dkt. 1 at 10, insinuating that the

manual's existence only came to light with the issuance of the Supreme Court's decision in *Miller-El II* in 2005. But the Sparling Manual was referenced by the Supreme Court in a February 2003 opinion involving the same litigants involved in *Miller-El II*, *see Miller-El v. Cockrell*, 537 U.S. 332, 334–35 (2003) ("*Miller-El I*"), and Mr. Hall's § 2255 petition was not ruled on until August 2004.[2] In fact, the Supreme Court cited the Sparling Manual excerpt referenced in *Miller-El II* while Mr. Hall's § 2255 petition was pending.

Mr. Hall also alleges that the judicial findings that AUSA Macaluso violated *Batson* in *Miller-El II* and *Reed v. Quarterman*, 555 F. 3d 364 (5th Cir. 2009), constitute new evidence because *Miller-El II* tied AUSA Macaluso to the Sparling Manual by name and both decisions demonstrated a pattern of his racist jury-selection practices. Dkt. 1 at 35 (citing *Flowers*, 139 S. Ct. at 2245). While the 2005 *Miller-El II* opinion was the first Supreme Court opinion to reference AUSA Macaluso by name, AUSA Macaluso's employment history as a prosecutor in the Dallas County District Attorney's Office was a matter of public record easily discoverable by defense counsel well before 2005. And more specific to the precise claim presented by Mr. Hall, a 2002 article

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[2] Indeed, the Sparling Manual and the controversy surrounding it has been a matter of public record since 1986, when it was discussed in a *Dallas Morning News* story about the Dallas County Office's practice of excluding black jurors. *See* Associated Press, *Racial Bias Pervades Jury Selection* (Mar. 9, 1986), *available at https://apnews.com/article/15a4d9c91869b22db37feb26ba874718*.

cited by Mr. Hall shows that AUSA Macaluso's ties to the Sparling Manual were also known while Mr. Hall's § 2255 petition was pending before the district judge in Texas. *See* Associated Press, *Race Is Key in Death Penalty Appeal* (Feb. 15, 2002), *available at* https://www.mrt.com/news/article/Race-Is-Key-in-Death-Penalty-Appeal-7756301.php; Sara Rimer, *In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate*, N.Y. Times, Feb. 13, 2002, *available at* https://www.nytimes.com/2002/02/13/us/in-dallas-dismissal-of-black-jurors-leads-to-appeal-by-death-row-inmate.html (discussing Macaluso's role in Miller-El's case).

News articles, court opinions, and underlying briefs are all matters of public record, discoverable through searches on the Internet and legal databases. Thus, Mr. Hall's situation is not comparable to Mr. Webster's, where defense counsel sought the relevant Social Security records but was told they did not exist when in fact they did. Nor is it comparable to that of the petitioner in *Foster v. Chatman*, where an open records request resulted in the accidental release of incriminating prosecution notes that revealed the prosecutor's discriminatory intent in striking black jurors. 136 S. Ct. 1737, 1744 (2016).

The other evidence in support of Mr. Hall's *Batson* claim also was available before he filed his § 2255 motion. This includes:

- The 1990 census data that shows only 10.41% of the population in the Fort Worth Division where Mr. Hall was tried was black, compared with 35.85% of the population in the Pine Bluff Division in the Eastern District of

Arkansas, where Mr. Hall also could have been tried, dkt. 1-8 at 2;

- AUSA Roper's representation to the trial court that the government had challenged all four of the black jurors it peremptorily struck for cause, when, in fact, only two had been challenged for cause, dkt. 1-12;
- AUSA Roper's stated reasons for dismissing Juror Amy Evans, which were inconsistent with Ms. Evans's answers during voir dire and in her questionnaire, dkts. 1-11, 1-13, 1-14; and
- Side-by-side comparisons of the questioning of dismissed black jurors with seated white jurors, dkts. 1-11, 1-14, 1-20–1-33.

In short, the facts underlying Mr. Hall's *Batson* claims were available through diligent search during Mr. Hall's § 2255 proceedings. *Webster*, 784 F.3d at 1146 (To determine whether relevant evidence was previously unavailable, "the district court must also evaluate [prior] counsel's diligence."). Mr. Hall's current *Batson* claim does not involve evidence that is "newly discovered" but new lawyers looking at the same evidence that has been available to Mr. Hall for many years. And "nothing formally prevented him" from raising the claims earlier. Mr. Hall raised a multitude of issues on direct appeal and in his § 2255 petition, but the denial of his *Batson* challenge at trial was not among them. Mr. Hall therefore has not demonstrated a strong likelihood that he can show § 2255 was "structurally unavailable." *Purkey*, 964 F.3d at 615.

b. Discriminatory Application of the Death Penalty

Mr. Hall argues that, as administered by the government, the federal death penalty is racially discriminatory and that this violates the Constitution. Dkt. 1 at 45, 50, 52. He asserts that data shows that federal capital cases are impermissibly influenced by race. *Id.* In support of this claim, Mr. Hall points to statistics maintained by the Kevin McNally of the Federal Death Penalty Resource Counsel Project, which he alleges demonstrate that "the authorization process by which the DOJ selects which defendants will face the death penalty . . . [is] impermissibly influenced by race." *Id.*

These statistics cited by Mr. Hall show that the death penalty is authorized by the DOJ 1.8 times as often against black defendants as compared to white defendants. Dkt. 1 at 46. With these statistics as the backdrop, Mr. Hall asserts that he was sentenced to death in federal court in Texas, "a state with a long and shameful history of racially discriminatory use of the death penalty." *Id.*

Mr. Hall points to a 2011 study by sociologist Scott Phillips, Ph.D., who was hired by another death row inmate to "conduct a statistical analysis regarding the possible effect of race on the federal death penalty in Texas." Dkt. 1 at 48; *see* dkt. 1-7 (Phillips Declaration Mar. 29, 2011). This study examined "all potential death penalty cases filed in the four federal judicial districts in Texas" from 1988 to 2010. *Id.* The study revealed that during the relevant period, a death verdict was about sixteen times more likely to be returned for a black defendant. Dkt. 1 at 49. In

the Northern District of Texas (where Mr. Hall was prosecuted), the disparities were "technically speaking, slightly greater" than those in other federal districts in Texas. Dkt. 1 at 49-50. According to Mr. Hall, this study was not available to him until it was discussed in an August 2020 report by the Inter-American Commission on Human Rights. *Id*. at 48.

Recognizing that "a racially disproportionate pattern of criminal charging, standing alone, is insufficient to demonstrate purposeful racial discrimination," dkt. 1 at 56, Mr. Hall asserts that his statistical evidence is buttressed here by "case-specific evidence of personal racial animus on the part of the prosecution team." *Id.*

The evidence in support of Mr. Hall's discriminatory application claim runs afoul of *Webster*'s first requirement: "the evidence sought to be presented must have existed at the time of the original proceedings." 784 F.3d at 1140 n.9. Without this requirement, "there would never be any finality" where a petitioner raises a claim, such as discriminatory application of the death sentence, for which new evidence is regularly created. *Id.* at 1140; *cf. Purkey*, 964 F.3d at 615 (holding that petitioner could not satisfy savings clause, in part, because his argument would open the door to "a never-ending series of reviews and re-reviews"). Mr. Hall therefore cannot rely on the study to satisfy § 2255(e) under *Webster*.

To the extent Mr. Hall relies on the underlying data Dr. Phillips used, particularly data that existed before Mr. Hall's § 2255 proceedings concluded, he fails to satisfy *Webster*'s second requirement: "the

evidence must have been unavailable at the time of [the original proceedings] despite diligent efforts to obtain it." 784 F.3d at 1140 n.9. Dr. Phillips relied on data compiled and maintained by Kevin McNally "on the cases of all criminal defendants in Texas who were eligible for a federal death sentence from the reinstatement of the federal death penalty in 1988 through 2010." Dkt. 1-7 at 3 (Phillips Affidavit Mar. 29, 2011). Mr. Hall had access to Mr. McNally's data at the time of his § 2255 proceedings.[3] Indeed, he relied on it in support of the discriminatory application claim he raised in those proceedings. *See United States v. Hall*, No. 4:94-cr-00121-Y, dkt. 1071-2 at 124–32 (McNally Affidavit May 12, 2000). Because Mr. Hall had this data and relied upon it in his § 2255 proceedings, it was not previously unavailable as required by *Webster*.

Mr. Hall has not made a strong showing that his discriminatory application claim relies upon any evidence that existed but was unavailable at the time of trial or his initial § 2255 proceedings. Therefore, he has not made a strong showing that he can satisfy § 2255(e) as to this claim.

Last, Mr. Hall cannot satisfy the third *Webster* factor because he is not categorically ineligible for the death penalty. The Supreme Court has declared only two types of persons (minors and the intellectually disabled) categorically ineligible to be

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[3] To be sure, some of Mr. McNally's 2010 data did not yet exist at the time of Mr. Hall's § 2255 proceedings. Mr. Hall cannot rely on this data for the same reason he cannot rely on the Phillips study: because "the evidence sought to be presented must have existed at the time of the original proceedings." *Webster*, 784 F.3d at 1140 n.9.

executed. *Webster*, 784 F.3d at 1140 n.9. Persons in those categories cannot be executed—ever. Here, even if Mr. Hall were to prevail on the merits of his claims, he would still be eligible for the death penalty.

3. Additional § 2255(e) arguments

Mr. Hall further argues that § 2255 was ineffective or inadequate due to lack of funding in his initial § 2255 litigation and the slim hopes for bringing a successful *Batson* challenge in the Fifth Circuit before *Miller-El II*, *see* dkt. 15 at 5–6, but he has not made a strong showing that he is likely to succeed on the merits of these arguments.

The bounds of the savings clause are not "rigidly defined" by *Webster* and the other cases where the Seventh Circuit has found that the savings clause is satisfied. *Purkey*, 964 F.3d at 611. But to move beyond those cases, a petitioner must make "a compelling showing that, as a practical matter, it would [have been] impossible to use section 2255 to cure a fundamental problem." *Id.* at 615.

Mr. Hall identifies and explains many of the limitations that his counsel faced at trial, on appeal, and in litigating his initial § 2255 motion. These limitations, while real, did not make it practically impossible for Mr. Hall to litigate his *Batson* and discriminatory application claims. Instead, they forced counsel to make difficult strategic decisions about how to litigate in an uncertain legal environment with limited resources, including choosing which claims to bring and which claims to forego.

Allowing Mr. Hall's claims to be brought now in this § 2241 proceeding would be contrary to the framework Congress created for federal prisoners seeking postconviction relief. Congress amended § 2255 in 1996 as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA") to limit federal prisoners to one § 2255 motion unless they receive authorization from the Court of Appeals to file a second or successive § 2255 motion. 28 U.S.C. § 2255(h). This limitation was designed to curtail the problem of "repetitive filings" from federal prisoners challenging their convictions. *Garza v. Lappin*, 253 F.3d 918, 922 (7th Cir. 2001).

Congress chose to "steer[] almost all [federal] prisoner challenges to their convictions and sentences toward § 2255." *Shepherd v. Krueger*, 911 F.3d 861, 862 (7th Cir. 2018). It did so by requiring § 2255 motions to be filed in the district of conviction, *Light v. Caraway*, 761 F.3d 809, 812 (7th Cir. 2014), and limiting federal prisoners' access to § 2241 by way of the Savings Clause. *See Davenport*, 147 F.3d at 609 ("The purpose behind the enactment of section 2255 was to change the venue of postconviction proceedings brought by federal prisoners from the district of incarceration to the district in which the prisoner had been sentenced." (citing *United States v. Hayman*, 342 U.S. 205, 212–19 (1952)). Section 2255 "not only relieved the district courts where the major federal prisons were located from a heavy load of petitions for collateral relief; it also enhanced the efficiency of the system by assigning these cases to the judges who were familiar with the records." *Webster*, 784 F.3d at 1145.

The savings clause "must be applied in light of [§ 2255's] history." *Taylor v. Gilkey*, 314 F.3d 832 (7th Cir. 2002); *see Unthank v. Jett*, 549 F.3d 534, 535 (7th Cir. 2008) (same). It cannot be interpreted so expansively that it undermines "the careful structure Congress has created." *Garza*, 253 F.3d at 921; *see Chazen*, 938 F.3d at 865 (Barrett, J., concurring) (expressing "skeptic[ism]" of an argument that, if accepted, "risks recreating some of the problems that § 2255 was designed to fix"). To allow Mr. Hall to now raise these claims in a § 2241 petition would undermine the structure of § 2255. "If error in the resolution of a collateral attack were enough to show that § 2255 is inadequate or ineffective, many of the amendments made in 1996 would be set at naught." *Taylor*, 314 F.3d at 836.

B. Other *Nken* factors

Mr. Hall argues that the other factors also weigh in favor of a stay. First, he will be irreparably harmed without a stay because he faces death. Dkt. 3-1 at 21. Second, he argues that a brief delay to allow him to litigate him claims will not result in substantial harm to the government. Dkt. 3-1 at 22. Finally, Mr. Hall argues that the public interest is served by a stay because when racial discrimination impacts criminal sanctions it "poisons public confidence in the judicial process." Dkt. 3-1 at 7. (quoting *Buck v. Davis*, 137 S. Ct. 759, 778 (2017)).

The government argues that the harm to Mr. Hall is outweighed by the interest of the government and the public in timely enforcement of criminal judgments, including the death sentence. Dkt. 12 at 44. Moreover, the government accuses Mr. Hall of "sitting on his claims until the eve of his scheduled

execution" and argues that Mr. Hall should not benefit from this practice. *Id.*

There is no doubt that Mr. Hall faces irreparable harm if a stay is denied, and that the issues he raises are extremely serious. Mr. Hall's delay in bringing his claims, though, weighs heavily against granting a stay. *See Lee v. Watson*, 2019 WL 6718924, at *2 (7th Cir. Dec. 6, 2019) ("The grant of a stay entails equitable as well as legal considerations. . . . [S]omeone who waits years before seeking a writ of habeas corpus cannot, by the very act of delay, justify postponement of the execution."). The balance of interests weighs against staying Mr. Hall's execution.

III.

CONCLUSION

Mr. Hall's motion for stay of execution, dkt. [3], is **DENIED**. The motion for oral argument, dkt. [4], is **DENIED** as moot.

SO ORDERED.

Date: 11/17/2020.

/s/ James Patrick Hanlon

James Patrick Hanlon
United States District Judge
Southern District of Indiana

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

No. 2:20-cv-599

ORLANDO CORDIA HALL,

Petitioner,

v.

T.J. WATSON, in his official capacity as Complex Warden of U.S.P., Federal Correctional Complex (FCC) Terre Haute

Respondent.

Death Penalty Case

Execution Date: November 19, 2020

DECLARATION OF ROBERT C. OWEN PURSUANT TO 28 U.S.C. § 1746

I, Robert C. Owen, declare and state the following:

1. I am an attorney licensed to practice in Texas and Illinois and am a member in good standing of the bars of both states.

2. I hold a bachelor's degree in Comparative Literature (1984) and a master's degree in Speech Communication (1986) from the University of

Georgia. I earned my J.D. degree at Harvard Law School (1989).

3. I am a criminal defense attorney and for the most part limit my practice to capital cases. I was first licensed as a lawyer in 1989. From 1995-1998, I served as an Assistant Federal Public Defender in Seattle, Washington, and in that role handled a wide range of non-capital matters in addition to a few capital cases. Other than during that interval, I have devoted almost my entire thirty-year legal career to defending clients facing the death penalty, primarily in appellate and post-conviction litigation. I have done so in a variety of practice settings (in a non-profit law office, in a public defender agency, in a small private practice, in a law school clinic, in a solo practice). My cv (circa 2019) is attached as Exhibit 1.

4. In the current iteration of my practice, I directly represent individual clients in capital cases in state and federal court. By virtue of a contract funded by the Defender Services Division of the Administrative Office of the United States Courts, I also serve as a consultant and advisor to other attorneys handling such cases.

5. I have successfully argued four capital cases at the Supreme Court of the United States (*Tennard v. Dretke* (2004), *Abdul-Kabir v. Quarterman* (2007), *Brewer v. Quarterman* (2007), and *Skinner v. Switzer* (2011)). I am regularly invited to present at national training programs focusing on capital defense. I directed or co-directed death penalty defense clinics at the law schools of the University of Texas at Austin (1998-2012) and Northwestern University (2013-2019). In 2011, I received a medal from the

Bar of the City of Paris (France) in recognition of my work in the struggle for human rights.

6. I have represented Orlando Cordia Hall since May 1999. I was initially appointed for Mr. Hall's initial post-conviction proceeding under 28 U.S.C. § 2255, as co-counsel to Marcia A. Widder. In that initial § 2255 proceeding, we filed three iterations of Mr. Hall's motion for relief (an initial motion, a first amended motion, and a second amended motion). Although we raised other complaints about the racially discriminatory character of the federal death penalty, none of those pleadings advanced a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986).

7. Paul Macaluso was one of the Assistant United States Attorneys who prosecuted Mr. Hall at trial, and one role he played on the prosecution team was helping select the jury. In *Miller-El v. Dretke*, 545 U.S. 231 (2005), which was decided after Mr. Hall's § 2255 proceedings had concluded, the Supreme Court named Mr. Macaluso as having intentionally struck Black jurors on account of their race when he was a state-court prosecutor in Dallas County, Texas, and as having offered false pretextual reasons in defense of his conduct when required to account for it. This declaration addresses why, after *Miller-El*, Ms. Widder and I did not attempt to litigate a potential *Batson* claim in Mr. Hall's case to take advantage of the Supreme Court's having identified Mr. Macaluso as a *Batson* violator.

8. First, in our judgment there was no route, certainly no obvious one, for getting the *Batson* claim into court. By the time *Miller-El* was announced, Mr. Hall's initial post-conviction proceeding under 28 U.S.C. § 2255 had concluded in district court and

was pending before the Fifth Circuit where we were seeking a Certificate of Appealability. It was not possible to inject the issue into the appellate proceedings at that stage.

9. Nor did we believe the *Batson* issue would support a motion in the Court of Appeals to authorize a successive application under § 2255. The relevant statute, 28 U.S.C. § 2255(h), appears to require either a showing of factual innocence or a newly minted and retroactive constitutional rule from the Supreme Court. A *Batson* claim would not have satisfied either of these criteria. First, we did not possess "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 [Mr. Hall] guilty." *See* 28 U.S.C. § 2255(h)(1). And *Miller-El* by definition could not have announced a previously unavailable "new rule of constitutional law," *see* 28 U.S.C. § 2255(h)(2), because it arose on federal habeas review.

10. In the abstract, I can imagine conjuring up some other procedural vehicle in the convicting court by which we might have asserted Mr. Hall's *Batson* claim after *Miller-El*. Fed. R. Civ. P. 60(d)(1), for example, contemplates that a district court has the power to "entertain an independent action to relieve a party from a judgment, order, or proceeding." But even contemplating how we might reopen the proceedings in the Northern District of Texas was unlikely, given our deeply frustrating experiences litigating Mr. Hall's initial § 2255 action in that court.

11. To appreciate why, it is important to understand that from an advocate's point of view, the key to a post-conviction proceeding is investigating and developing facts outside the trial record to support the client's constitutional claims for relief. The ability to introduce such extra-record evidence is essentially what distinguishes such a proceeding from a direct appeal. When I was first contacted about the prospect of joining Mr. Hall's counsel team, I was enthusiastic about the idea. I had just completed three years as an Assistant Federal Public Defender and had a high opinion of the quality of judicial process typically afforded in federal court. I had never previously worked on a federal capital prosecution, although I had represented many death-sentenced state prisoners in Texas and Washington in seeking federal habeas relief. My experience led me to believe that there would be adequate resources available for fact-development in a § 2255 proceeding arising from a death penalty prosecution.

12. That expectation was not realized. From start to finish, the district court in Mr. Hall's case resisted accommodating many of the most basic tasks of post-conviction fact development in a capital case.

13. Start with the fact that whether measured by the financial cost to the court or by the hours of services provided by trial counsel, Mr. Hall's trial was defended on the cheap. Because his trial counsel spent far fewer hours preparing for trial than defense teams in comparable cases, the total cost of litigating Mr. Hall's case at the trial level fell far

below that of comparable federal capital prosecutions.[1]

14. Mr. Hall's trial counsel claimed to have recognized from early in the case that there would be little dispute about Mr. Hall's guilt and thus that their energies should primarily be focused on developing the case for sparing his life. But they nevertheless neglected basic social history investigation in favor of other tasks which, while essential to the defense (such as reviewing documents provided by the government in discovery), did not help them prepare for sentencing. Indeed, trial counsel did not begin investigating Mr. Hall's life history until jury selection was underway.

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[1] The authoritative 1998 report of the Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation ("FDPR") compiled data on the costs of defense services in federal capital prosecutions through 1997. Using that data, one can show that the amount spent for legal services in Mr. Hall's case was only 65% of what was paid for such services in the average federal capital prosecution of the era ($139,800 in Mr. Hall's case, versus an average cost of $216,016). And the sum authorized by the trial court for non-attorney fees (that is, for investigative and expert services) in Mr. Hall's case was just 47% of the average ($25,000 in Mr. Hall's case, versus an average of $53,143). *See* FDPR at 22. The FDPR (Chart C-7, "Average Number of Attorney Hours Billed in Capital and Non-Capital Homicide Cases") also shows that through 1997, the average amount of time billed by defense counsel in federal capital cases that went to trial was 1,889 hours, representing 409 hours of in-court time and 1,480 hours of out-of-court time. Mr. Hall's trial counsel, by contrast, billed a total of approximately 1,106 hours (59% of the average), representing approximately 229 hours of in-court time (56% of the average) and 877 hours of out-of-court time (59% of the average).

15. Thus, for me and Ms. Widder to provide Mr. Hall adequate representation in his § 2255 proceeding, we had to attempt to conduct the penalty-phase investigation trial counsel had never pursued, in order to develop a detailed account of Mr. Hall's background. Given that we could demonstrate objectively through the time and payment records of Mr. Hall's trial counsel that they had failed to perform this necessary foundational work, we anticipated that the trial court would be willing to support our efforts in that regard.

16. That is not how things turned out. At the outset of the case, the district court did authorize payment of up to $7500 for a fact investigator (not a mitigation specialist). That investigator's assistance in locating and interviewing certain witnesses related to the government's case in aggravation was essential to our work, but it could not substitute for assistance in developing the case in mitigation that should have been presented at trial. Moreover, the court required that the approved $7500 cover both fees and expenses (*i.e.*, the substantial costs associated with our fact investigator's travel from his residence in Texas to and around Arkansas, where many of the relevant witnesses were located).

17. In June 2000, after filing Mr. Hall's initial § 2255 motion and with permission to amend that motion at a later date, we sought funds to obtain appropriate expert assistance in completing the mitigation investigation. Specifically, we sought appointment and authorization for payment of Jill Miller, M.S.W., a forensic social worker with expertise in traumatic stress disorders and the investigation, development and presentation of

mitigating evidence. Ms. Miller had sterling qualifications, including having been appointed to assist defense teams in at least eighteen federal capital cases in the preceding twelve years. Two months later, after we pleaded with the court to pay our fact investigator's travel expenses in full, the court closed the books altogether on money for fact development: it ordered our fact investigator paid a grand total of $8,603.42, refused to appoint or pay Ms. Miller, and ruled that it would entertain no further requests for authorization to pay for investigation or experts.

18. With the court unwilling to support our fact-development efforts, we had to expend our own resources. Ms. Widder and I eventually paid a total of about $10,000 out of our own pockets to hire Ms. Miller (a figure significantly below the cost of the time she invested in the case, but all we could afford at the time). Ms. Miller in turn found a neuropsychologist who was willing to work for free as a favor to her, and who conducted an evaluation of Mr. Hall that produced useful results. I asked a colleague who was a criminal defense lawyer with a national reputation – Michael E. Tigar, who had headed the defense of Terry Nichols, co-defendant of Oklahoma City bomber Timothy McVeigh – to review the record and assess trial counsel's performance in light of prevailing national standards for capital defense practice. Professor Tigar likewise spent many hours on the case for which he was never compensated.

19. In addition to refusing to fund investigation and experts, the district court imposed unusual limitations on paying me and Ms. Widder for our

legal work on Mr. Hall's case. For example, for any tasks we performed jointly (such as meeting with a witness together, or conferring by phone to discuss the case), we were required to bill at only half the applicable CJA rate, effectively meaning that anytime Ms. Widder and I worked together on the case, the court was paying only as much as it would have paid for a single lawyer. And in April 2002, the district court declared that from that point forward, it would not compensate me or Ms. Widder for any investigative work we performed to further develop Mr. Hall's claim of ineffective assistance of counsel at sentencing. We sought mandamus relief from the district court's order in the Fifth Circuit but were unsuccessful.

20. The financial constraints imposed on our fact-development efforts would not have been as burdensome had the district court given us access to any of the traditional tools of discovery, which in habeas cases are available only if the court authorizes them. We made numerous and detailed requests but were granted no discovery whatsoever. We were never allowed to interview the trial jurors despite making repeated requests to do so, and despite the fact that information in trial counsel's files strongly suggested that a juror may have been exposed to extraneous information or influence during sentencing deliberations. Other information relevant to that allegation may have been contained in video footage of post-verdict juror interviews by local news media; our requests that the district court allow us to subpoena the footage were rejected. Nor were we permitted any discovery on any potential prosecutorial misconduct (FBI 302s suggested that

federal agents may have had a previous relationship with a jail inmate who testified against Mr. Hall at sentencing), nor any information related to racial discrimination in the administration of the federal death penalty.

21. We fought tirelessly for a fair process in the district court, but our efforts were mostly futile. We sought a protective order when we anticipated that Mr. Hall's trial counsel would engage in ex parte communications with the government regarding the allegations in our ineffective assistance of counsel (IAC) claim. It was denied, and trial counsel predictably huddled with the government to prepare and file lengthy affidavits disputing our IAC claim. We were refused an evidentiary hearing on every claim in our petition but one: a juror misconduct issue, as to which the district court barred us from interviewing the potentially implicated juror before she took the witness stand, and refused to let us speak with any other members of the jury or call them as witnesses. Unsurprisingly, the hearing produced no revelations. We were specifically denied an evidentiary hearing on our penalty-phase IAC claim despite the fact that telephone records we submitted to the court in seeking a hearing proved that a key claim in the affidavit submitted by one of Mr. Hall's trial attorneys was false.

22. We were discouraged when the district court denied relief on Mr. Hall's § 2255 motion in the late summer of 2004, but hoped we might persuade the Court of Appeals that the process had been inadequate to reliably resolve Mr. Hall's substantial allegations. Unfortunately, because the district court denied a Certificate of Appealability as to any of Mr.

Hall's claims for relief, we were not entitled to a merits appeal and instead had to apply to the Fifth Circuit for a COA. Our first request to the Court of Appeals, to allow us to file an over-length COA application, was rejected. We cut down our application to a point at which the Fifth Circuit would accept it, but that was effectively the end of the process. There was no oral argument, and in the summer of 2006 the Fifth Circuit issued an opinion denying COA. Our cert petition challenging the Fifth Circuit's COA decision was denied on April 16, 2007.[2]

23. Many things about our experience litigating Mr. Hall's § 2255 motion in the trial court and the Fifth Circuit, thus, made it unlikely that we would try to devise some procedurally innovative way to get the *Batson* claim into one of those courts after *Miller-El*.

24. There were two other significant development in Mr. Hall's case around the same time as our initial 2255 proceeding came to an end. One was that in October 2007, we initiated a proceeding before the Inter-American Commission on Human Rights

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[2] My fee vouchers were cut for the work I performed on both the COA appeal in the Fifth Circuit and Mr. Hall's petition for writ of certiorari. The Fifth Circuit cut my payment for the appeal by 22% (I was paid a little over $19,000). The voucher I submitted for legal services performed with respect to Mr. Hall's cert petition fared worse. I initially sought payment for $6,797.10, and the Fifth Circuit balked, offering to pay me $5,639.80. I invested the time and effort to appeal, explaining why I felt the reduction was unwarranted. The Court responded to my appeal with a further reduction in payment. I surrendered and was paid a total of $4,133.50 for my work on Mr. Hall's cert petition – a cut of about 40%.

("IACHR"), alleging violations of Mr. Hall's rights under Articles I, II, XVIII, XXV and XXVI of the American Declaration on the Rights and Duties of Man. The petition we filed drew on the work we had done in the 2255 proceedings and did not entail additional costs or investigation.

25. The other and ultimately much more significant development was that Mr. Hall became one of the plaintiffs in a civil suit filed in federal district court in the District of Columbia challenging the federal government's lethal injection protocol. That suit was filed in December 2005 as *Roane v. Gonzales*, No. 05-2337 (D.D.C). Mr. Hall moved to intervene as a plaintiff in In April 2007 (the same month cert was denied on our initial § 2255 proceeding). He also moved to enjoin the government from setting an execution date or carrying out his execution until the court had completed its review of the legality and constitutionality of the federal government's lethal injection protocol. The government did not oppose either request, and an injunction was entered. Two months later, the government moved to stay discovery pending litigation of dispositive motions, for judgment on the pleadings, and to lift the Plaintiffs' injunctions. The court nevertheless enjoined the government from setting an execution date for Mr. Hall, and the government did not appeal. As discussed below, that injunction remained in place for more than thirteen years, until September 20 of this year.

26. The law firm of Steptoe & Johnson, LLP, was recruited to represent Mr. Hall in the lethal injection litigation. Because Steptoe attorney Owen Bonheimer had interest and experience in

international law, he offered to represent Mr. Hall on his petition to the IACHR. The firm's representation of Mr. Hall, however, was limited to those two matters.[3]

27. From those developments in the *Roane* litigation, Ms. Widder and I drew hope that for the foreseeable future, Mr. Hall would not be threatened by an execution date. That inference was strengthened, even if only slightly, when in July 2008 the IACHR granted precautionary measures on behalf of Mr. Hall. That is, the Commission officially requested that the United States refrain from executing Mr. Hall while it considered his claims of human rights violations. While that request did not carry the force of law, it did implicate the United States' relationship with and goodwill toward the other nations in the Organization of American States and thus had diplomatic significance, especially heading into the Administration of President Obama, who had promised to promote human rights. In our view, the IACHR's request to the U.S. government represented at least some pressure that might help discourage the government from attempting to

[3] In much the same fashion, a few years later the law firm of Sidley Austin LLP agreed to help us bring a successive habeas challenge to Mr. Hall's conviction for violating 18 U.S.C. § 924(c) based on then-recently-decided cases from the U.S. Supreme Court. Although Sidley attorneys also assisted us in making a request that then-President Obama grant clemency to Mr. Hall, the firm never agreed to take on Mr. Hall as a client for any other or subsequent matters, and indeed today continues to limit its work on Mr. Hall's behalf to the ongoing § 924(c) litigation.

proceed with Mr. Hall's execution, if other legal barriers fell away.

28. Later that year, however, another event occurred that raised questions about how long Mr. Hall would remain out of danger. In December 2008, the judge who had presided at Mr. Hall's trial abruptly issued an order giving the government thirty days to show cause why "the death sentence imposed by this Court has not been carried out." Order to Show Cause, *United States v. Hall*, No. 4:94-CR-121-Y(2), Doc. 1190 (Dec. 10, 2008). The government filed a response describing the lethal injection litigation underway in the District of Columbia and explaining that the court there had enjoined Mr. Hall's execution while that case was being litigated. Government's Response to Order to Show Cause, *United States v. Hall*, No. 4:94-CR-121-Y(2), Doc. 1191 (Jan. 8, 2009).

29. The combination of the pressure from the trial judge and ongoing developments in the Roane lethal injection litigation in D.C. raised concerns that we should begin preparing for possible clemency proceedings in Mr. Hall's case. Accordingly, in November 2009 we moved the trial court to authorize funds to enable us to prepare a clemency application on Mr. Hall's behalf. *See* Defendant's Motion for Authorization for Funds to Prepare Clemency Application to the President of the United States and Brief In Support, *United States v. Hall*, No. 4:94-CR-121-Y(2), Doc. 1192 (Nov. 2, 2009). Perhaps unsurprisingly, given our experience with funding applications to the trial court, that motion was denied outright in short order. *See* Order Denying Defendant's Motion for Authorization for Funds to

Prepare Clemency Application to the President of the United States, *Hall v. United States*, No. 4:00-CV-422-Y, Doc. 4 (Dec. 10, 2009).

30. For more than a decade after that denial of funds, Mr. Hall remained protected from the setting of an execution date by the longstanding injunction in the *Roane* lethal injection case. Because of that fact, Ms. Widder and I never felt an overriding urgency to try to find a vehicle by which we could bring Mr. Hall's *Batson* claim to court, nor did we have any expectation that we would be compensated for doing so, or receive authorization for funding.

31. Moreover, during the decade that preceded the lifting of that injunction in September 2020, I continued to be heavily involved in litigating both Texas state-court death penalty cases, including numerous cases with imminent execution dates, and federal death penalty matters, even as I worked full-time as a clinical professor of law (first at the University of Texas at Austin and then from 2013-2019 at Northwestern Law in Chicago). Between teaching, academic service, and litigating active cases (and supervising law students working under my direction), my professional life was very full. If a death penalty case in which I was counsel was dormant for any period of time, I did not look that gift horse in the mouth but instead tended to the other capital cases on my docket that needed urgent attention.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 17, 2020.

/s/ Robert C. Owen
Robert C. Owen

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

No. 2:20-cv-599

ORLANDO CORDIA HALL,

Petitioner,

v.

T.J. WATSON, in his official capacity as Complex Warden of U.S.P., Federal Correctional Complex (FCC) Terre Haute

Respondent.

Death Penalty Case

Execution Date: November 19, 2020

DECLARATION OF MARCIA A. WIDDER
PURSUANT TO 28 U.S.C. § 1746

I, Marcia A. Widder, declare and state the following:

1. My involvement in Mr. Hall's case dates back to early 1997. Six or so months after I completed a two-year judicial clerkship for the Honorable James L. Dennis, my former mentor at the Loyola Death Penalty Resource Center in New Orleans, R. Neal Walker, asked me if I would be interested in working

on a federal capital appeal to which he was being appointed. I began reading the record once it was sent to me, with the understanding that I would be focusing on sentencing phase issues, while Mr. Walker focused on issues pertaining to jury selection. Michael Ware, one of the trial attorneys, remained on the case and planned to write up sections of the brief addressing the admissibility of Mr. Hall's confessions and the district court's denial of a motion to continue the trial.

2. Shortly after I began working on the case, Mr. Walker was struck by a car and almost killed. With the assistance of Federal Resource Counsel attorneys Kevin McNally and, I believe, David Bruck, I filed a motion asking to be appointed under the Criminal Justice Act and took over as lead counsel on the case, with the understanding that Federal Resource Counsel would oversee my work due to my lack of experience. Mr. Hall received a few extensions of time in which to file his brief, and Mr. Walker recuperated sufficiently to draft portions of the brief addressing cause challenges.

3. The direct appeal brief that was eventually filed did not contain a claim that the prosecutors' use of peremptory challenges to remove Black jurors on the basis of their race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). While it is my professional belief and opinion that the transcript of Mr. Hall's trial contains strong evidence of racial bias by the government during jury selection, I also am aware that (i) until its post-*Miller-El II* decision in *Reed v. Quarterman* in 2009, the Fifth Circuit had never granted relief in a case raising a *Batson* challenge (including in the case of Mr. Miller-El

himself) and (ii) courts often have required "something more" than a trial record to find a *Batson* violation and/or to make the weighty determination that a prosecutor's proffered justifications for the exercise of peremptory strikes were pretextual. Until the evidence concerning Paul Macaluso and the Dallas County Prosecutor's Office and its "Sparling Manual" came to light in *Miller-El II*, we did not have that "something more" (and even if we had, would have been barred from introducing such evidence on direct appeal). Part of appellate counsel's job is "winnowing out weaker claims on appeal and focusing on those more likely to prevail . . . ." *Burger v. Kemp*, 483 U.S. 776, 784 (1987) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

4. While it is my view that the *Batson* claim in Mr. Hall's case is strong based on the trial record alone, given the Fifth Circuit's jurisprudence on this issue, it is my opinion that had Mr. Hall raised a *Batson* claim on appeal or in a post-conviction petition at that time, however, it almost certainly would have lost, just as his co-defendant Bruce Webster's claim would later lose, in the Fifth Circuit. *See United States v. Webster*, 162 F.3d 308, 348-50 (5th Cir. 1998). It appears that, until 2009, not a single criminal litigant had ever succeeded on the merits of a *Batson* claim in the Fifth Circuit. *See Chamberlin v. Fisher*, 885 F.3d 832, 846 (5th Cir. 2018) (Costa, J., dissenting) (observing that "only two of the hundreds of *Batson* decisions in our circuit have ever found that a strike was discriminatory (a few others vacated convictions based on procedural error in application of the *Batson* framework") (citing *Hayes v. Thaler*, 361 Fed. Appx. 563 (5th Cir.2010),

and *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009)).

5. In June 2005, nine or so months after the district court had denied Mr. Hall's § 2255 motion, the United States Supreme Court issued its decision in *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*). In that case, the Supreme Court reversed the Fifth Circuit's denial of relief on a *Batson* claim, expressly finding that Dallas County prosecutor Paul Macaluso had struck Black jurors because of their race. *See* 545 U.S. at 264; *see also id.* at 248-50, 256 (mentioning Paul Macaluso's name ten times). As the Court explained in that case, the Dallas County District Attorney's Office, during the time Paul Macaluso worked there, used a jury selection training manual that "outlin[ed] the reasoning for excluding minorities from jury service." *Miller-El v. Dretke II*, 545 U.S. at 264 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 334-35 (2003) (*Miller-El I*)). *See also Miller-El I*, 537 U.S. at 335 (explaining that a separate circular distributed to attorneys in the Dallas County prosecutor's office "instructed its prosecutors to exercise peremptory strikes against minorities: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'").[1]

6. By the time *Miller-El II* was decided, it was too late to amend Mr. Hall's § 2255 motion to add a

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[1] Following *Miller-El II*, moreover, the Fifth Circuit found that Paul Macaluso had struck Black jurors on the basis of race in another Texas capital trial, relying heaving on the similarities between that case and *Miller-El II*, including the fact that Paul Macaluso was the prosecutor in both cases. *Reed*, 555 F.3d 364.

Batson claim—his case was already pending in the Fifth Circuit. *See, e.g.*, *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) ("Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction-even claims couched in the language of a true Rule 60(b) motion-circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. § 2244(b)(2).").

7. The only argument that Mr. Hall's trial lawyers had made at the *Batson* colloquy following jury selection was identifying the six Black prospective jurors who had qualified after voir dire and the four the prosecutors had struck with peremptory challenges. *See* Pet. Exhibit 12, ECF No. 1-11. At the direct appeal stage, Mr. Walker had not himself conducted any analysis of the *Batson* issue. It was, in other words, a completely undeveloped claim.

8. I know from experience that working up a *Batson* claim requires a significant investment of time. "[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (quoting *Miller-El II*, 545 U.S. at 239). *See also, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) ("As we have said in a related context, s[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available.'") (citation omitted). In Mr. Hall's case, that included careful review of the 11-volume voir dire and a banker's box

of juror questionnaires in order to be able to undertake the comparative juror analysis that is "a centerpiece of the *Batson* analysis." *Boyd v. Newland*, 467 F.3d 1139, 1150 (9th Cir. 2006). *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2248-51 (conducting comparative juror analysis of prosecutor's strike of one Black juror); *Foster v. Chatman*, 136 S. Ct. 1737, 1749-54 (conducting comparative juror analysis of prosecutor's strike of two Black jurors); *Snyder*, 552 U.S. at 483-84 (conducting comparative juror analysis of prosecutor's strike of one Black juror); *Miller-El II*, 545 U.S. at 241-52 (engaging in extensive comparative juror analysis of the prosecutor's strikes against two Black jurors); *see also Chamberlain*, 885 F.3d at 849 (Costa, J., dissenting) ("Comparative juror analysis is a tool that helps determine whether this disproportionate exclusion of black jurors was the extraordinary coincident it would take to defy the[] odds" of randomly striking a greatly disproportionate number of Black jurors).

9. Further, until the Seventh Circuit decided *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (en banc), there did not appear to be any procedural avenue for raising Mr. Hall's *Batson* claim. By that time, however, Mr. Hall was protected from getting an execution date by a preliminary injunction entered in 2007 in lethal injection litigation pending in the District of Columbia District Court. See Order, *Roane v. Gonzales*, No. 1:05-cv-02337-TSC (June 11, 2007), ECF No. 68. And also, by that time, I was working full-time at the Georgia Resource Center representing Georgia's condemned in federal habeas proceedings, clemency proceedings, and warrant

litigation. At the Resource Center I have a full, really over-full, case load of habeas cases brought under 28 U.S.C. § 2254, which are pending in various federal courts. *See* Curriculum Vitae, attached as Exhibit 1. I have, additionally, since the time *Webster* was decided, been a key participant in warrant litigation undertaken on behalf of seven Georgia prisoners who received execution dates, all but one of whom was ultimately executed. All of which is to say that, once *Webster* provided a potential path to litigate Mr. Hall's racial discrimination claims, I was not in a position to expend the resources to develop those claims, particularly in light of the fact that Mr. Hall was protected against execution. He remained insulated from execution until September 20, 2020, when the district court denied relief on all claims in the lethal injection litigation and lifted the preliminary injunction.

10. Since Mr. Hall's § 2241 petition was filed last week, I have obtained copies of the voir dire conducted in the case of Mr. Hall's co-defendant Bruce Webster. Mr. Webster was tried several months after Mr. Hall by the same set of prosecutors, including Paul Macaluso. I did not receive electronic copies of the Webster voir dire until late in the day on November 13. I have since reviewed the transcripts to identify the jurors who were questioned, the prosecutor who conducted the voir dire, and the ultimate status of each jurors.

11. According to my review of the transcripts, 86 prospective jurors were questioned during voir dire to seat the jury and five alternates. Paul Macaluso questioned 41, Richard Roper questioned 40, and Delonia Watson questioned one. Four prospective

jurors were excused after the court questioned them. Each side exercised 20 peremptory strikes to seat the jury and 3 strikes to seat alternates. At the conclusion of voir dire, the parties appear to have exercised blink strikes. The strike sheets are attached as Exhibit 2.

12. After the jury was struck, but before the alternates were selected, the defense raised a *Batson* challenge, arguing that the prosecution had used peremptory challenges to remove all five qualified Black jurors and one Asian juror. *Webster*, Vol. 15 at 3 (attached as Ex. 3). The defense identified the struck Black jurors as Ernestine Goss (No. 3), Miles Nelson (No. 49), Herman Dean Mallory, (No. 69), Phyllis Williams (No. 89), Larry Charles Reed (No. 103), and the struck Asian juror as Ai-Lien "Duong"[2] (No. 123). *Id.* at 4. According to the defense, the only minority member of the jury was Ms. Gonzales, who was Hispanic. *Id.*

13. The district court expressed doubt that this established a prima facie case, but ordered the government to provide race neutral reasons for its strikes. *Id.* AUSA Roper indicated he would provide reasons, but asked the Delonia Watson be allowed to supplement them because she had taken notes throughout the voir dire, but was not able to attend court that day. *Id.* at 4-5. Ms. Watson was permitted to supplement the record two days later, on April 4, 1996. *See Webster*, Vol. 15 (attached as Ex. 4).

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[2] Based on the transcript of her voir dire, it appears the juror's last name was "Dunong." Vol. 12 at 133.

14. I do not currently have the material necessary to conduct a thorough and complete analysis of the *Batson* claim raised in Mr. Webster's case. For instance, I do not have the jury questionnaires, so do not know the racial makeup of the pool of prospective jurors who were examined and cannot conduct a meaningful comparative-juror analysis. However, AUSA Roper (the other AUSA who, along with Paul Macaluso, picked the jury in Mr. Hall's case) gave reasons for striking two minority jurors that are in fact racist on their face. He explained that he had that he struck juror Ai-Lien Dunong, because she might not be able to understand "Black" English:

> I think though she could under and communicate, I think she wouldn't understand southern black - we're going to have co-defendants testify that have a definite accent, I think, kind of a southern dialect, and I think it would just make it almost impossible for her to hear, and I'm afraid she would miss that crucial testimony and she wouldn't be able to render a decision. Otherwise, I thought she was qualified.

15:6.

15. On its face, the prosecutor's response that Ms. Dunong would not understand "southern black" is race-based and reveals a discriminatory viewpoint that colors all the prosecutor's explanations. *See, e.g.*, *State v. Tomlin*, 384 S.E.2d 707, 710 (S.C. 1989) (prosecutor's explanation that he struck juror who "shucked and jived' to the microphone" relied on a "racial stereotype [that] evidence[d] the prosecutor's subjective intent to discriminate" in violation of *Batson*); *United States v. Wilson*, 884 F.2d 1121,

1124 (8th Cir. 1989) ("Where as here the testimony of the prosecutor indicates a stereotypical racial reason for striking the potential black juror Brooks, the district court's finding that "race was not in any way a factor" in the Government's exercise of its challenge receives no support from the record. The prima facie case of discrimination has not been overcome.").

16. Moreover, when one reviews Ms. Dunong's voir dire, it seems dubious at best that she would have appreciably more trouble understanding witnesses than anyone else. She testified that she was born in Vietnam, came to this country when she was 21, and was naturalized in 1985. Vol. 12 at 136.[3] In Vietnam, she had worked as a language teacher for an American minister. *Id.* She had studied engineering at two American universities located in the South –the University of Arkansas and the University of Alabama, and had worked for a tech company performing oil and fuel analysis for a variety of companies in the United States, including Union Pacific Railroad. *Id.* at 145-46, 147-49. Her work involved both oral and written communication with other people at various stations in the United

[3] The transcripts of the *Webster* voir dire are voluminous. I reviewed them quickly to determine what happened to each of the jurors and which prosecutor questioned each juror, and then took a closer look at some of the jurors subject to *Batson* challenges. In order to avoid overwhelming the Court with additional transcripts, the voir dire transcripts (other than the *Batson* colloquy and the Watson supplement) are not attached here. They are, however, in the government's possession and can be made available to the Court upon request.

States. *Id.* at 149-59. Ms. Dunong recalled the case from hearing about it once on the radio (presumably in English), but testified that would not influence her decision as a juror. *Id.* at 137-39. Although the transcript of her testimony corroborates that she was a non-native speaker, it also shows that she appropriately answered the questions posed to her by the court, the prosecutor, and defense counsel, and asked appropriate questions of her own. *See id.* at 133-51.

17. AUSA Roper also relied on racial stereotyping to explain his strike of prospective juror Phyllis Williams, who he claimed the government struck, in part, because she "had two children, apparently out of wedlock," aged 17 and 22, but "didn't mention she was divorced" and "[i]t's apparent from the questionnaire that they were born out of wedlock." Vol. 15 at 17-18. In addition, Roper went on, "she's still living with someone." *Id.* at 18. Roper claimed that he was "not trying to be a moralist," and instead just felt that she was "not consistent" and "there's a good chance that she's not walking the walk. She's talking the talk," because Ms. Williams also reported that "she listens and donates money to Cleflo Dollar, an evangelist" and "her lifestyle is not consistent" with Cleflo Dollar's "real conservative minist[ry]." *Id.*

18. The image of Ms. Williams as an unwed mother, living in sin, is a racial stereotype. *See, e.g.*, *Kesser v. Cambra*, 465 F.3d 351, 369 n.6 (9th Cir.2006) (prosecutor's explanation that he struck Asian woman because "'she was somewhat insecure and she impressed me as a woman who would walk two steps to the left and one to the rear'" and "'put up with a great deal from her husband,'" about whom

she did not testify, "smacks of racial and ethnic stereotypes of the subservient Asian woman"); *Tomlin*, 384 at 710 (prosecutor's claim to strike 43-year-old Black woman "because she walked slow, talked low, and might not be able to withstand the trial" and trial court's "suggest[ion] that [she] had a lack of education, was extremely sluggish and . . . would be a 'filler' if seated on the jury" were "racial stereotypes" violating *Batson*). It thus cannot serve as a legitimate basis for the strike and its patently racist nature should carry significant weight in addressing the rest of the prosecutor's proffered reasons. Indeed, the prosecutor's additional reasons for striking Ms. Williams appear pretextual in light of her voir dire testimony based on the record I have been able to review.

19. AUSA Roper claimed that he struck Ms. Williams because (1) she had relatives in Pine Bluff and El Dorado, Arkansas, where the case was "real big news" and he worried that her relatives "are going to end up calling her and talking to her about it, and she's going to have a lot of pressure put on her"; (2) that "[s]he did put down a couple of real answers to the questions in her [questionnaire] chart that caused me a bunch of concern, and I asked her about those and her answers to me were kind of meek" and "not very strong" and "I got the impression she's kind of meek, and I just feel like the pressure sitting on the jury, when it got right down to it, all of us . . . felt like she would have a problem in this case, especially if it turns out there was some kind of outside influence"; and (3) her cousin murdered his girlfriend and got five years, although she did testify that she thought he should still be in

jail." Vol. 15 at 15-17. After detailing her presumed out-of-wedlock motherhood, Roper noted that she had listed Reverend Jesse Jackson as someone she respected and that "Mr. Macaluso said that he thought that her answers were very weak and meek, and . . . don't evidence somebody that could come back and really make a strong decision on the death penalty in a case such as this." *Id.* at 18. The district court accepted these as race neutral reasons "sufficient to overcome any prima facie case, if it has been made, to suggest it was based on race," and overruled the objection. *Id.*

20. Notably, Ms. Williams testified that she supported the death penalty and felt it served a purpose because "it would give other people – they will think more before they do that" and "no one has the right to take any else's life." Vol. 9 at 121. She testified that she could sign her name to a verdict "knowing that it would result in the death some day of another human being" and that she had no hesitation about her ability to do that in an appropriate case: "Yes, I could do that." *Id.* at 121-22. She also testified that the availability of life without the possibility of release would not change that—"If they took a person's life or whatever, if that is the case, if they get the death penalty, I think they deserve it."—and agreed she meant she could still consider the death penalty even if life was an option. *Id.* at 122-23.

21. When AUSA Roper asked her about her cousin's murder conviction, she explained:

> It's been at least 22, 23 years maybe. * * * He [was prosecuted and] went to prison and he's out. * * * I feel that he still should be in there.

> He admitted to doing it. He really should be there. I don't think he should have been let out. I mean, he wasn't really in there that long, maybe five years, and I really don't think he should be out, period.

Id. at 123. She testified that her cousin's prosecution would not impact her ability to be fair. *Id.* The prosecutor asked Ms. Williams *zero* questions about her marital status or motherhood, or how it related to listening to Cleflo Dollar (if she in fact so stated in her questionnaire). When defense counsel questioned her about her connections to Pine Bluff, where Bruce Webster was from, she testified it had been 19 years since she had last been there. *Id.* at 126.

22. Nothing in Ms. Williams actual testimony indicates that she was "meek" or "weak." Rather, she provided thoughtful responses to questions and was not afraid to ask defense counsel to clarify one of his questions. *See id.* at 130. Moreover, the prosecutor's suggestion that Ms. Williams would somehow cave in to pressure from Pine Bluff relatives about the case is predicated on the wholly unsubstantiated inference that she would violate her oath as a juror by advertising her status on the jury and then talking about the case with others. There was no reason to suspect that she would do so and such suspicions would have been grounds for challenging her for cause.

23. Based on my 20+ years of experience doing capital appellate and habeas work, it is my opinion that the Fifth Circuit Court of Appeals would have conducted a very different analysis of the voir dire had they known of Paul Macaluso's shameful track record at the time of Mr. Webster's direct appeal. *See*

United States v. Webster, 162 F.3d 308, 350 (5th Cir. 1998) (concluding that the district court did not clearly err in overruling the *Batson* objections and noting that "Webster offers no direct evidence of purposeful discrimination" and that his comparative juror analysis was unavailable because the jurors "had different combinations of qualities, and some had more government-desired qualities than did the jurors the government preempted"); *cf. Reed v. Quarterman*, 555 F.3d 364, 382 (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.* (considering "the historical evidence of racial bias among the[] prosecutors," including Macaluso, the "we view this exact same evidence as persuasive here.")

I declare under the penalty of perjury of perjury under the laws of Georgia that the foregoing is true and correct and was executed this 17th day of November in Atlanta, Georgia.

/s/ Marcia A. Widder

Marcia A. Widder