No. 20A130

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, APPLICANT

v.

COREY JOHNSON

(CAPITAL CASE)

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

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In 1993, a unanimous jury imposed seven death sentences on petitioner for the "cold-blooded" murders of seven people in furtherance of his substantial drug-trafficking organization. United States v. Johnson, No. 92-CR-68, Dkt. 75 (E.D. Va. Nov. 19, 2020) at 11. Petitioner was also convicted for the murder of an eighth person and the assault of a woman whom petitioner and his co-defendants shot six times in front of her three children. Petitioner's direct appeal ended in 1996, and initial postconviction proceedings challenging his conviction and sentence under 28 U.S.C. 2255 ended in 2004. In November 2020, following the completion of a lengthy process of revising the federal execution protocol, the government set a date for petitioner's execution. Today, over 27 years after his conviction, the family members of petitioner's numerous victims have traveled thousands

of miles to Terre Haute, Indiana, to witness the execution of his sentence.

As Judge Wilkinson has observed, petitioner's many eleventh-hour claims, and his delay in pressing them, "betray a manipulative intention to circumvent not only the strictures of AEDPA but [this] Court's warnings against procedural gamesmanship designed to bring the wheels of justice to a halt." United States v. Johnson, No. 20-15, Dkt. 26 at 3 (op. of Wilkinson, J.). This Court has made clear that last-minute stays or injunctions of federal executions "'should be the extreme exception, not the norm,'" Barr v. Lee, 140 S. Ct. 2590, 2591 (2020) (quoting Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019)), and no such extreme exception exists here. Neither of the two claims that he presses now warrants certiorari, let alone the extraordinary relief of a stay. His novel First Step Act claim rests on the untenable premise, which no court of appeals has accepted, that Congress's lowering of the statutory minimums for certain crack-cocaine trafficking crimes entitles him to a resentencing proceeding for his many murders. And his intellectual-disability claim is materially identical to one on which this Court recently denied review sought by another federal capital inmate. Bourgeois v. Watson, 977 F.3d 620 (7th Cir.), cert. denied, 141 S. Ct. 507 (2020). The Court should do the same here. Petitioner's case has received "exhaustive attention" from the federal courts, and "at some point allowing these proceedings

to travel further along this indefinite and interminable road brings the rule of law into disrepute." Johnson, No. 20-15, Dkt. 26 at 4 (op. of Wilkinson, J.).

STATEMENT

1. Between 1989 and 1992, petitioner was one of three partners who together ran "a substantial drug-trafficking conspiracy" that spanned multiple states. United States v. Roane, 378 F.3d 3825, 389 (4th Cir. 2004). Petitioner and his partners obtained wholesale quantities of powder cocaine from suppliers in New York City, converted it into crack cocaine, and then distributed it through a network of 30-40 dealers in New Jersey and Virginia. Id. at 389-390.

In 1992, petitioner and his two partners participated in the murders of ten people in the Richmond, Virginia area. Roane, 378 F.3d at 390. Petitioner was personally involved in, and convicted of, eight of those murders. See id. at 390-391. Petitioner shot Peyton Maurice Johnson 15 times on January 14, 1992, because he was a rival drug dealer. Petitioner later helped murder Louis J. Johnson, who was shot seven times on January 29, 1992, because he was perceived to have threatened petitioner. Petitioner shot Dorothy Mae Armstrong multiple times on February 1, 1992, because she owed $400 on a drug debt and was believed to be cooperating with police. Aiming to eliminate any witnesses to Armstrong's murder, petitioner also killed Bobby Long (shot as he tried to

flee) and Anthony Carter (shot while sitting in a chair), bystanders who happened to be in the wrong place at the wrong time.

Linwood Chiles suffered the same fate as Armstrong. Fearing Chiles was cooperating with police, petitioner and one of his partners instructed Chiles to put his head on a steering wheel and then shot him at close range. Curtis Thorne was also killed in that attack, and two other passengers in the car, Gwen and Priscilla Greene, were critically wounded. Finally, petitioner murdered Torrick Brown over a petty grievance: he was friendly with petitioner's co-defendant's girlfriend. Brown was in an apartment with his sister, Martha McCoy, along with her three children when Johnson and two other men arrived looking for Brown. When McCoy answered the door, the trio began shooting. McCoy jumped over a couch but was shot six times, resulting in 12 wounds.

2. Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of seven capital murders in furtherance of a continuing criminal enterprise (CCE) under 21 U.S.C. 848(e)(1)(A); conspiracy to possess cocaine base with the intent to distribute under 21 U.S.C. 846; engaging in a CCE under 21 U.S.C. 848(a); eleven counts of committing violent crimes in aid of racketeering activity under 18 U.S.C. 1959; five counts of using a firearm in relation to a crime of violence or a drug-trafficking offense under 18 U.S.C. 924(c); and two counts of possession of cocaine base with the

intent to distribute under 21 U.S.C. 841(a)(1). See Roane, 378 F.3d at 391.

Following a penalty hearing on the capital murder counts, the jury recommended that Johnson be sentenced to death for each of the seven murders for which he was convicted under § 848(e). See United States v. Tipton, 90 F.3d 861, 870 (4th Cir. 1996). As relevant here, petitioner presented evidence at his capital penalty proceeding of a learning disability that, his expert opined, rendered him "unprepared to function in society, unprepared to survive on his own when he left institutional care . . . and made him unable to cope and adapt to society in a way that a normal individual would." Pet. Mot. for Authorization (4th Cir. No. 21-2) at 14 (citing 2/10/93 Trial Tr. 3574). Petitioner agreed that he was not "mentally retarded," but "argue[d] that the same reasons underlying the prohibition against executing the intellectually disabled mitigated against the imposition of the death penalty" in his case. United States v. Johnson, 2021 WL 17809, at *3 (E.D. Va. Jan. 2, 2021). The jury nevertheless recommended death sentences.

The Fourth Circuit affirmed petitioner's conviction and sentence, but merged the Section 846 cocaine conspiracy conviction with the § 848 CCE conviction. Tipton, 90 F.3d at 891, 903. This Court denied a writ of certiorari. Johnson v. United States, 520 U.S. 1253 (1997).

In 1998, petitioner filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. 2255. He contended, among several other claims, that his intellectual disability precluded the government from executing him and that his counsel had been ineffective in failing to make that argument at sentencing. See Roane, 378 F.3d at 408-409. The district court "permitted multiple amendments to the First § 2255 Petition and granted [petitioner] 'another full opportunity to demonstrate that he is mentally retarded.'" Johnson, 2021 WL 17809, at *3 (quoting First § 2255 Op. at 82). One of petitioner's arguments in support of that position was that his prior IQ testing results should have been adjusted downward to reflect a phenomenon known as the "Flynn Effect," and that doing so would support a finding that he is intellectually disabled. See Pet. Mot. for Authorization (4th Cir. No. 21-2) at 17. The district court considered those arguments and rejected petitioner's intellectual-disability claims on the merits, because "the record before the Court demonstrates that Johnson is not mentally retarded." Johnson, 2021 WL 17809, at *4 (quoting First § 2255 Op. at 82). The district court also rejected petitioner's ineffective assistance of counsel claim, finding that defense counsel acted reasonably given that petitioner's own expert concluded that he was not intellectually disabled. Ibid.

The Fourth Circuit affirmed. Roane, 378 F.3d at 408-09. The court acknowledged that under federal law, "[a] sentence of death shall not be carried out upon a person who is mentally retarded," citing both 21 U.S.C. § 848(l) and Atkins v. Virginia, 536 U.S. 304 (2002). But the court found that petitioner's evidence -- including his submission that certain IQ scores "tend[] to inflate * * * over the years" and that his score should therefore be adjusted downward to reflect his true IQ -- failed to demonstrate that he is "barred from execution due to mental retardation." Roane, 378 F.3d at 408-409. The court also rejected petitioner's related ineffective assistance of counsel claim, explaining that petitioner's counsel was not required to "second-guess" the mental health report prepared by petitioner's own expert. Id. at 409. This Court again denied a writ of certiorari. Johnson v. United States, 546 U.S. 810 (2005).

Petitioner states that in 2006, he obtained new counsel, who located additional childhood records relevant to his claim of intellectual disability. Pet. Mot. for Authorization (4th Cir. No. 21-2) at 19. He does not indicate when counsel found those records. In 2016, petitioner filed a petition for clemency that attached expert reports citing those records, among other things. He later withdrew his clemency petition.

3. In July 2019, the federal government announced the completion of an "extensive study" that it had undertaken to

consider possible revisions to the Federal Bureau of Prisons' lethal injection protocol to account for the scarcity of drugs required by the prior three-drug procedure. In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 110 (D.C. Cir. 2020) (per curiam) (Execution Protocol Cases), cert. denied, No. 19-1348 (June 29, 2020). Following a deliberate investigation that had commenced when the prior drug became unavailable in 2011, the government published a revised addendum to its protocol, in which it adopted a single-drug procedure (also used by many States) that would allow the federal government to resume executions. Ibid.

Alongside its adoption of this revised lethal injection protocol, the government also began to set execution dates for federal inmates on death row. See Execution Protocol Cases, 955 F.3d at 111; see id. at 127 (Katsas, J., concurring). After petitioner and several other capital prisoners challenged the federal execution protocol, however, the United States District Court for the District of Columbia entered a preliminary injunction in November 2019 barring the government from carrying out the executions as scheduled. Execution Protocol Cases, 955 F.3d at 111. In April 2020, the D.C. Circuit vacated that preliminary injunction, id. at 108, and this Court subsequently denied certiorari, Bourgeois v. Barr, No. 19-1348 (June 29, 2020). In September 2020, the district court in the District of Columbia

granted summary judgment to the government on most of the asserted claims and denied injunctive relief. In the Matter of Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145, 2020 WL 5594118, at *1 (D.D.C. Sept. 20, 2020). The D.C. Circuit affirmed the denial of injunctive relief. In re Federal Bureau of Prisons' Execution Protocol Cases, No. 20-5329, 2020 WL 6750375, at *1 (D.C. Cir. Nov. 18, 2020) (per curiam). On November 20, 2020, the government informed petitioner that it had set his execution date for January 14, 2021.

4. Meanwhile, petitioner repeatedly sought to challenge his convictions and sentences through successive Section 2255 motions and other filings. Between 2016 and 2019, he filed multiple applications under 28 U.S.C. 2244 seeking authorization from the Fourth Circuit to file successive Section 2255 motions, which the court of appeals denied. In re Corey Johnson, No. 16-4 (4th Cir. 2016), ECF Nos. 2, 10; In re Corey Johnson, No. 16-13 (4th Cir. 2016), ECF Nos. 2, 8; In re Corey Johnson, No. 19-1 (4th Cir. 2019), ECF Nos. 1, 13. On May 22, 2020, petitioner filed another Section 2244 application with the Fourth Circuit, invoking this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019), to challenge his convictions under 18 U.S.C. 924(c). That case is currently held in abeyance. In re Corey Johnson, No. 20-8 (4th Cir. 2020), ECF Nos. 2, 23.

5. As is most relevant here, on December 14, 2020, petitioner filed a motion in the district court to vacate his death sentences under Section 2255, arguing that his intellectual disability precludes his execution under the Federal Death Penalty Act (FDPA), 18 U.S.C. 3596(c). See Johnson, 2021 WL 17809 at *5. The district court dismissed that motion as an unauthorized successive Section 2255 motion. Id. at *11.

The district court rejected petitioner's claim that his motion was not, actually, "second or successive" because it was not ripe until now. Johnson, 2021 WL 17809 at *7. The court found "unconvincing[]" petitioner's comparison of "his intellectual disability claim to the incompetency claim of [Stewart v. Martinez-Villareal, 523 U.S. 637 (1998),] and similar litigants whose claims were not ripe or did not arise until after they filed their first request for federal habeas relief," because that comparison "confuse[s] intellectual disability with the temporary condition of incompetency, which may come and go." Johnson, 2021 WL 17809 at *8 (quoting Bourgeois, 977 F.3d at 637). The district court explained that unlike incompetency, intellectual disability is based on a "mental state [that] manifests early in life and would not change as a defendant's execution nears," and that courts therefore adjudicate intellectual disability claims "at all phases of the trial and sentence." Ibid. Indeed, the district court observed, both it and the court of appeals had previously "ruled

on [petitioner's] intellectual disability claim on the merits, rather than dismissing it as unripe." Id. at *9.

The district court also rejected petitioner's argument that the FDPA, § 3596(c), permitted re-adjudication of his intellectual disability claim. Johnson, 2021 WL 17809 at *9. That statute states, as relevant here, that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. 3596(c). The court found no support for petitioner's claim that the FDPA provides a "more specific process" to consider intellectual-disability claims, noting that, in reality, FDPA claims are often considered alongside and under the same standard as Atkins claims, as they were in this very case. Ibid. The court also found nothing in the statutory text indicating that a determination of intellectual disability must occur immediately before an execution. Ibid.

Ultimately, the district court agreed with the Seventh Circuit in Bourgeois, supra, that § 3596(c) does not create an "end-around § 2255(h)" by entitling every defendant to "a new intellectual disability determination before execution." Johnson, 2021 WL 17809 at *10. The district court thus determined that "the Present § 2255 Petition constitutes a successive petition, such that the Fourth Circuit must first authorize [petitioner] to file it." Id. at *11. The court dismissed the petition and denied a certificate of appealability. Ibid.

On January 8, 2021, petitioner filed in the Fourth Circuit an application for a stay of execution related to this Section 2255 motion. See United States v. Johnson, No. 21-1, Dkt. 10 (4th Cir. Jan. 8, 2021). He did not seek a stay from the district court. The Fourth Circuit panel denied relief unanimously, with Judge Wilkinson explaining that the Fourth Circuit had previously "squarely rejected [petitioner's] contention that he is intellectually disabled." Johnson, No. 20-15, Dkt. 26 at 4. The en banc Fourth Circuit denied reconsideration based on a divided vote. Johnson, No. 20-15, Dkt. 31. Judge Wynn's solo dissenting opinion took the view that petitioner's FDPA argument was "compelling." Id. at 5.

6. Separately, on August 19, 2020, petitioner filed a motion in the district court under the First Step Act of 2018, arguing that the district court should reduce his capital sentences pursuant to that statute. See United States v. Johnson, No. 92-CR-68, Dkt. 38 (E.D. Va.). The district court denied that motion on November 19, 2020, determining that the "laws passed to reduce the sentencing disparities between non-violent crack and powder cocaine offenses" did not apply to petitioner's "sentences imposed for running a drug enterprise and committing multiple murders in furtherance of the drug enterprise." Johnson, No. 92-CR-68, Dkt. 75 at 1.

The district court explained that Congress passed the Fair Sentencing Act in 2010 to reduce the sentencing disparity between certain crack- and powder-cocaine trafficking offenses. United States v. Roane, No. 92-CR-68, 2020 WL 6370984, at *6 (E.D. Va. Oct. 29, 2020). It further explained that the Fair Sentencing Act did not, however, "amend the statutory penalties for violent crimes in furtherance of trafficking crack cocaine"; to the contrary, Congress instructed the Sentencing Commission to increase the offense levels for purposes of Guidelines calculations for such violent defendants. Ibid. In December of 2018, Congress then passed the First Step Act, which allowed the retroactive application of the Fair Sentencing Act's reduced-sentencing provisions. Ibid. Subsection 404(a) of the First Step Act defines which offenses are "covered" by that retroactivity provision: "the term 'covered offense' means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." Ibid. (quoting First Step Act, § 404(a), 132 Stat. at 5222). The First Step Act provides that a "court that imposed a sentence for a covered offense, may * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." Ibid. (quoting First Step Act, § 404(b), 132 Stat. at 5222). Such a sentencing reduction is discretionary, however, as the First Step Act also states that "[n]othing in this

section shall be construed to require a court to reduce any sentence." Ibid. (quoting First Step Act, § 404(c), 132 Stat. at 5222).

The district court determined that petitioner's capital murder convictions under 21 U.S.C. 848(e)(1)(A) were not "covered offenses" under the First Step Act. Roane, No. 92-CR-68, 2020 WL 6370984, at *8. Sections 2 and 3 of the Fair Sentencing Act, the court explained, "expressly affected three criminal statutes: 21 U.S.C. § 841(b)(1), 21 U.S.C. § 960(b) and 21 U.S.C. § 844(a)." Ibid. The Fair Sentencing Act did not explicitly mention 21 U.S.C. 848, the court stated, "for good reason: as § 848 targets dangerous drug kingpins while the Fair Sentencing Act seeks to address the sentencing disparity between low-level crack dealers and large-scale powder cocaine distributors." Ibid. The court observed that some provisions of § 848 -- in particular, § 848(b) -- do cross-reference other statutes that were modified by the Fair Sentencing Act, but that petitioner's own capital convictions were pursuant to Section 848(e)(1)(A), which creates "'a separate crime'" of "killing in furtherance of any one of three distinct predicate offenses." Id. at *9-*10. The statutory penalty for that crime, the court explained, was unchanged by the Fair Sentencing Act: it was, and remains, death or life imprisonment with a statutory minimum of 20 years of imprisonment. Id. at *10.

The district court rejected petitioner's contention that his Section 848(e)(1)(A) convictions were nonetheless covered on the theory that they included a covered offense -- "engaging in an offense punishable under section 841(b)(1)(A)" -- as a predicate. Roane, No. 92-CR-68, 2020 WL 6370984, at *10. Instead, the district court explained, the indictment, jury instructions, and verdict form all made it clear that the predicate for petitioner's capital murder convictions under § 848(e)(1)(A) was his engagement in a continuing criminal enterprise, and "neither the Fair Sentencing Act nor the First Step Act extinguished his criminal liability for his CCE conviction." Id. at *10-*11. Although the CCE conviction, "in turn, rested on violations of § 841(b)(1)(A)," the district court explained that the Fair Sentencing Act's modifications to statutory penalties in § 841 did not affect petitioner's own substantive liability or his statutory penalty under Section 848. Id. at *11-*12. In these circumstances, the district court determined, the First Step Act would only apply to petitioner's capital convictions if it defined a covered offense not only as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010," but also to include "a violation of a Federal criminal statute that rests on the violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010."

Id. at *12. But "Congress did not write the First Step Act this broadly." Ibid.

The district court also observed that following the First Step Act's instruction to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 * * * were in effect at the time the covered offense was committed" would be nonsensical as applied to petitioner's capital murder convictions, because the Fair Sentencing Act -- which adjusted the penalty scheme for offenses involving certain quantities of crack cocaine -- had no effect on the penalty or any other aspects of petitioner's sentencing for those crimes. Roane, No. 92-CR-68, 2020 WL 6370984, at *13. And the court further observed that resentencing petitioner pursuant to the First Step Act would be in tension with the statute under which petitioner was convicted, which "mandated the imposition of the death penalty upon the jury's recommendation." Id. at *16. The First Step Act did not, the district court noted, "expressly vest the courts with the discretion or authority to impanel a new sentencing jury." Ibid. Especially given the First Step Act's permissive language about resentencing, the district court declined to find in it discretion to reopen a capital sentencing proceeding and resentence "the most violent drug offenders." Ibid. The district court observed that while several courts had considered "similar, but not identical" issues, in "the only published circuit court opinion to address

an § 848(e)conviction under the First Step Act, the Sixth Circuit came to the same conclusion as the Court does here." Id. at *17 (citing United States v. Snow, 967 F.3d 563, 564 (6th Cir. 2020)).

Finally, the district court agreed that two of petitioner's non-capital convictions were for "covered offenses" under the First Step Act, but declined to exercise its discretion to reduce petitioner's sentences for those counts. Johnson, No. 92-CR-68, Dkt. 75 at 10. The court emphasized that petitioner "murdered multiple people on different occasions in cold blood" and "maimed several others," and that his victims included "innocent bystanders." Id. at 11. Although the district court considered petitioner's "good conduct and rehabilitative efforts while in prison," the court determined those factors did not outweigh the numerous factors militating in favor of petitioner's existing sentence. Id. at 11-13. Ultimately, the district court observed, petitioner's "jury -- speaking on behalf of the community -- unanimously decided that this heinous serial killer" deserved the death penalty, and the court "refuse[d] to overturn the will of the community." Id. at 14.

Petitioner filed a notice of appeal from the district court's denial of his First Step Act motion, but he did not seek to expedite that appeal. See United States v. Corey Johnson, No. 20-15 (4th Cir.). Then, on January 7, 2021, again without first seeking a stay from the district court, petitioner filed a motion in the

Fourth Circuit for a stay of execution based on First Step Act motion. See id. Dkt. 15. A panel of the Fourth Circuit denied petitioner's motion for a stay. Judge Motz dissented because, in her view, "[petitioner]'s claim that his conviction under 21 U.S.C. § 848(e)(1)(A) is a covered offense under the First Step Act presents a novel question that is deserving of further consideration." Id. Dkt. 26 at 8. The en banc Fourth Circuit then denied rehearing. Id. Dkt. 31. Judge Wynn, in an opinion that the other dissenting judges did not join, opined that petitioner's capital murder convictions were "covered offenses" under the First Step Act. Id. at 4.

ARGUMENT

The application for a stay of execution should be denied. A movant seeking a stay pending review must establish "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" in addition to "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). The movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted). And once the movant satisfies those prerequisites, the Court considers whether a stay is appropriate in light of the "harm to the opposing party" and "the public interest." Nken v. Holder, 556 U.S. 418, 435 (2009).

This Court has applied "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Hill v. McDonough, 547 U.S. 573, 584 (2006). And where, as here, "the relief requested" was not "first sought" in the district court, an "application for a stay will not be entertained" except "in the most extraordinary circumstances." Supreme Ct. R. 23.3.

Petitioner cannot satisfy those standards. His claims are both factually and legally infirm, and the balance of equities weighs heavily against relief.

I. PETITIONER HAS FAILED TO SHOW THAT THIS COURT IS LIKELY TO REVIEW AND REVERSE THE SEVENTH CIRCUIT'S DECISION

A. Petitioner Cannot Establish A Likelihood Of Success On The Merits of His FDPA Claim

Petitioner's FDPA claim fails twice over: This is an unauthorized successive habeas petition, and petitioner has not established that he is intellectually disabled. This Court rejected a similar argument by a death-row inmate in Bourgeois v. Watson, 977 F.3d 620 (7th Cir.), cert. denied, 141 S. Ct. 507 (2020), and should follow that same course here.

1. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a state or federal prisoner may not file a "second or successive" motion for federal post-conviction relief without first obtaining authorization from the

appropriate court of appeals. 28 U.S.C. 2244(b)(2) and (3), 2255(h). The court of appeals may authorize such a motion only if the court certifies that the motion contains: "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h); see 28 U.S.C. 2244(b)(2)(A) and (B). When, as here, the prisoner has not obtained the required certification, the district court lacks jurisdiction to entertain the motion. See Burton v. Stewart, 549 U.S. 147, 153 (2007) (per curiam).

The statutory phrase "second or successive" as used in AEDPA is a "term of art." Magwood v. Patterson, 561 U.S. 320, 332 (2010) (quoting Slack v. McDaniel, 529 U.S. 473, 486 (2000)). In Panetti v. Quarterman, 551 U.S. 930 (2007), this Court held that a prisoner's claim that his current mental illness rendered him incompetent to be executed, see Ford v. Wainwright, 477 U.S. 399 (1986), raised for the first time in a second petition for writ of habeas corpus, was not "second or successive" because it was not ripe until after his first petition was filed. Panetti, 551 U.S. at 946-947. The Court explained that Ford claims generally "are not ripe until after the time has run to file a first federal

habeas petition," and they ripen, if at all, only when execution is imminent. See id. at 943, 946.

As the district court recognized, petitioner's claim of permanent intellectual disability is not comparable to the competency claim at issue in Panetti, and petitioner therefore errs in asserting that his claim was "unripe" until now. Johnson, 2021 WL 17809 at *8-*9. Unlike competency, which may "come and go," intellectual disability is "a permanent condition that must manifest before the age of 18." Bourgeois, 977 F.3d at 637 (citing Atkins, 536 U.S. at 318); see Busby v. Davis, 925 F.3d 699, 714 (5th Cir. 2019), cert. denied, 140 S. Ct. 897 (2020); Williams v. Kelley, 858 F.3d 464, 472 (8th Cir. 2017). Petitioner's intellectual disability claim not only "ripened years ago," he in fact pursued it "years ago" and received rulings on the merits from the district court and court of appeals. Johnson, 2021 WL 17809, at *8; see Roane, 378 F.3d at 408–09.

Petitioner contends that he has discovered new evidence since then, and that medical literature has evolved, but those discoveries would not make his claim newly ripe, nor would they make claims alleging such evidence non-successive. To the contrary, AEDPA explicitly addresses the issue of claims based on newly discovered evidence by allowing some -- but not all -- such claims to be brought as successive collateral attacks under § 2255(h)(1). Petitioner has sought to circumvent rather than to

satisfy that provision of AEDPA here. He cites no court of appeals that would permit this approach to successive post-conviction litigation, and the government is aware of none.

Petitioner also contends that, regardless of whether he was able to, and did, litigate an intellectual-disability claim in the past, "[21 U.S.C.] § 848 and [18 U.S.C.] § 3596 create an independent, substantive prohibition on the implementation of the sentence based on intellectual disability" that permits readjudication of intellectual disability immediately prior to an execution. Pet. Stay Mot. (4th Cir. 21-1) at 8.[1] Specifically, petitioner argues that the FDPA's prohibition on executing a person who "is" intellectually disabled means that he must be given the opportunity to bring a new intellectual-disability claim today, based on current medical standards. But as the district court explained, petitioner's reliance on the verb tense is misplaced. Johnson, 2021 WL 17809, at *10. Congress's use of the present tense simply reflects the fact that "[i]ntellectual disability is a permanent condition that must manifest before the age of 18."

[1] Petitioner was convicted prior to the enactment of the FDPA, and his sentence is controlled by the now-repealed procedures in 21 U.S.C. Section 848. As the district court observed, however, "§ 848(l) and § 3596(c) contain identically worded prohibitions on executing intellectually disabled individuals." Johnson, 2021 WL 17809, at *4 n.5. Because petitioner has focused his claim on the FDPA provision, the government does so as well.

Bourgeois, 977 F.3d at 637 (emphasis added); see Atkins, 536 U.S. at 318.

Given the early manifestation and continuous nature of intellectual disability, it would not have made sense for Congress to have phrased the statute differently, so as to proscribe, for example, "the execution of someone who merely 'was' intellectually disabled when they were sentenced, or who 'will be' intellectually disabled when their sentence is carried out." Bourgeois, 977 F.3d at 637. Thus, unlike a competency claim -- which challenges the implementation of the sentence during a particular, potentially transient, period of time -- a claim of intellectual disability asserts that the sentence can never be carried out and is thus fundamentally unlawful. Such a challenge to the inherent lawfulness of the sentence is the proper subject of a Section 2255 motion, see 28 U.S.C. 2255(a), and petitioner errs in suggesting that his claim that he "is" intellectually disabled is different from the claim adjudicated in his Section 2255 proceedings. The district court and court of appeals in those proceedings considered whether petitioner "is" intellectually disabled and determined that he is not. See Johnson, 2021 WL 17809, at * 9.

For the same reasons, petitioner errs in arguing that the FDPA's mention of pregnancy, incompetency, and intellectual disability in proximity to each other supports his claim. As the district court explained -- and the plain text confirms --

§ 3596(c) "concerns who the Government may not execute. It does not concern when to determine ineligibility." Johnson, 2021 WL 17809, at *10. That pregnancy and incompetency are conditions evaluated at the eve of execution therefore does not mean that a court must also "re-review a determination of intellectual disability, particularly when the defendant's ineligibility would stem from a condition that has not developed since the previous determination." Ibid. Notably, although Congress provided that a death sentence could not be carried out "upon a woman while she is pregnant," 18 U.S.C. 3596(b) (emphasis added) -- implying a transient condition -- it did not use the same language in Section 3596(c).

Petitioner also argues that § 3596(c) "demonstrates that [a] determination must be made [as to a defendant's intellectual disability] when an execution date is set" because it limits the circumstances in which a sentence of death may "be carried out" or "implemented." Pet. Stay Mot. (4th Cir. 21-1) at 9; Stay App. 17-18. But while it is true that § 3596(c) bars the death penalty from being "carried out" on a person with an intellectual disability, "it does not follow," as the district court recognized, "that a determination on a defendant's intellectual disability must occur shortly before execution." Johnson, 2021 WL 17809, at *10. To the contrary, if petitioner had proven his intellectual disability when he previously raised the issue -- at sentencing,

or in his first collateral attack -- that finding would have "prevent[ed] the death sentence from being 'carried out'" or "implemented" at any time. Ibid.[2]

Petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals. The Seventh Circuit's decision in Bourgeois, on which the district court relied, is the only circuit-court decision to address the availability of successive intellectual disability claims under the FDPA. Bourgeois, 977 F.3d 620. That decision is consistent with other courts of appeals' decisions that have rejected similar attempts to relitigate intellectual-disability claims. See Williams v. Kelley, 858 F.3d 464, 472 (8th Cir. 2017) (per curiam), (explaining that "an Atkins claim ripens before an execution is imminent and thus is governed by the requirements of [AEDPA] if raised in a second or successive habeas petition."); Busby v. Davis, 925 F.3d 699, 713 (2019), cert. denied, 140 S. Ct. 897 (2020) (explaining that intellectual disability is "a permanent condition that must have manifested before the age of 18," and

[2] Contrary to petitioner's suggestion, the government did not endorse his reading of § 3596(c) in United States v. Higgs, No. 20-927. See Stay App. at 18 n.5. The issue in Higgs pertains to § 3596(a), not § 3596(c). Section 3596(a) addresses which state's law will govern the manner of implementation of a death sentence, and thus implicates a condition that can -- and in Higgs, did -- change. The onset of intellectual disability, however, must occur by age 18, and is not a circumstance that changes between the imposition and implementation of the sentence. Bourgeois, 977 F.3d at 637.

"[a] person who is found to be intellectually disabled is permanently ineligible to be executed").[3]

2. Even if petitioner's claim were not barred by AEDPA, it would fail because he cannot demonstrate that his underlying intellectual disability claim has merit. The district court and Fourth Circuit were correct in rejecting petitioner's intellectual disability claims in his first § 2255 petition. By filing this action shortly before his execution, petitioner has deprived the courts and the government of the time to conduct a fine-grained analysis of each of his contentions. Fortunately, however, the extensive evidence from prior proceedings establishes that petitioner does not have an intellectual disability that precludes the application of the death penalty.

Petitioner was convicted of being an "organizer, supervisor, or manager with respect to five or more persons" in a continuing criminal enterprise -- specifically, "a substantial drug-trafficking conspiracy that lasted from 1989 through July of 1992" and that spanned multiple states. Tipton, 90 F.3d at 868. The court of appeals found "more than sufficient" evidence to support the supervisory aspect of this charge, as the "record reveals -- certainly supports findings beyond a reasonable doubt -- that"

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[3] To the extent that petitioner briefly relies on legislative history, see Stay App. 19, that argument lacks merit for the reasons explained in the government's opposition brief in Bourgeois, supra.

petitioner and two of his co-defendants supervised multiple "'workers'" while "acting as principal 'partners' in a concerted drug trafficking enterprise, and that some of these [workers] served variously not only as street dealers for the enterprise but as sometime chauffeurs, hideout providers, weapons-keepers, and general underlings for each" defendant. Id. at 890. As the district court aptly stated, "[t]he transcript is simply littered with testimony supporting the supervision element" under § 848(c). District Ct. Op. at 31 n.11 (citing for petitioner's conviction, Trial Tr. at 1162, 1582–83, 1683–84, 1690–92, 1705–8, 1711, 1720, 1888, 1891, 1895, 1897, 1899, 1901, 1921, 2321–22, 2340, 2343, 2374, 2546–48, 2550, 2698, 2703, 2706, 2709, 2720)).

That evidence is inconsistent with petitioner's current claim that he is so intellectually disabled that he cannot function in society, is easily manipulated by others, and ultimately lacks the "moral culpability" for his crimes that justifies imposition of the death penalty. Hall v. Florida, 572 U.S. 701, 709 (2014) (explaining that "[r]etributive values are * * * ill-served by executing those with intellectual disability" because "[t]he diminished capacity of the intellectually disabled lessens moral culpability"). Indeed, in cross-examining petitioner's expert during the penalty proceeding, the government asked, "[i]f the testimony was that indeed [petitioner] was one of the people who organized and supervised people to distribute drugs, that's

inconsistent with mild mental retardation, or close to it." Trial Tr. at 3701. Petitioner's expert responded, "I would be very skeptical of that, yes." Ibid. The jury acted well within its discretion in weighing the evidence that petitioner presented on his intellectual abilities and concluding that the seven death sentences were warranted.

In opining on whether petitioner has an intellectual disability that precludes a death sentence, the experts on whom he now relies -- the same experts whose reports he submitted in connection with his 2016 clemency petition -- avoid discussing whether petitioner's multi-year criminal conduct can be squared with their conclusions about his intellectual disability. Petitioner's new experts never confront the voluminous trial record and ignore the jury's factual findings, upheld by the Fourth Circuit on appeal. Instead, petitioner's new experts focus on the expert trial testimony of Dr. Dewey Cornell, a professor at the University of Virginia, who determined that petitioner was not intellectually disabled.

Dr. Cornell had at the time of petitioner's trial conducted forensic examinations of between 400 to 500 criminal defendants for both the defense and the government, and had testified 40 to 50 times. Trial Tr. at 3563-64. In reaching his conclusions in petitioner's case, Dr. Cornell evaluated not just petitioner's IQ results, but reviewed well over 500 pages of records, conducted

interviews of multiple people, and referred petitioner to a neuropsychologist for evaluation. See, e.g., Trial Tr. at 3568–71. Dr. Cornell spoke to six people who had previously prepared reports about petitioner, Trial Tr. at 3581, and conducted multiple tests beyond the IQ test, Trial Tr. at 3682–85. Thus -- contrary to one of petitioner's current expert reports -- Dr. Cornell did not "conclude that the IQ score of 77 was the end of the inquiry [in] determin[ing] that Corey Johnson did not have intellectual disability." Pet. Mot. for Authorization (4th Cir. 21-2) Ex. 2(b). Instead, when Dr. Cornell was asked during his testimony, "IQ is only one of a number of factors that are to be considered when determining whether someone is mentally retarded or not?", he responded, "[t]hat's probably the main one and first one, but it is not the only factor." Trial Tr. at 3704. He also testified that due to the seriousness of the inquiry, he "checked [his] scores, went back, and saw [petitioner] a second time. I consulted with colleagues. I wanted to make sure that this was an accurate score. Because the definition of mental retardation is not a hard and fast absolute. It is a grey area." Id. at 3691.

Nor does any other aspect of petitioner's evidence support a determination -- 27 years after his conviction, 15 years since he retained new counsel who mined his records for evidence of intellectual disability, and five years after preparing new expert reports on that purported disability -- that petitioner has a

mental disability. Some of his evidence involves cherry-picked IQ test results, discarding a prior score of 88 and revising downward others pursuant to the Flynn effect, including the score of 77 that petitioner obtained after he was facing capital charges in this case and had a powerful incentive to malinger. See, e.g., Webster v. Watson, 975 F.3d 667, 686 (7th Cir. 2020) (noting such malingering concerns); Raulerson v. Warden, 928 F.3d 987, 1008 (11th Cir. 2019), cert. denied, 140 S. Ct. 2568 (2020) ("[T]here is no consensus about the Flynn effect among experts or among the courts."). Other "new evidence" is facially insufficient, such as ratings of petitioner's intellect that one of his new experts collected from three people -- a relative, a close family friend, and a former teacher -- who were asked to recall petitioner's childhood decades ago, at a time when they knew that their answers might help him to avoid his lawfully imposed punishment. Moreover, the expert gathering these ratings had himself already announced his conclusion that petitioner is intellectual disabled and had been retained by the defense to give that opinion.

B. Petitioner Cannot Establish A Likelihood Of Success On The Merits of His First Step Act Claim

Petitioner's First Step Act claim fails on the merits because his capital convictions under § 848(e)(1)(A) are not "covered offenses" under that statute. The First Step Act does not, sub silentio, provide authority to invalidate a capital sentencing proceeding and reimpanel a capital sentencing jury. In addition,

the district court has indicated that it would not reduce petitioner's capital sentences even if they were covered by the First Step Act.

1. Under the First Step Act, a "covered offense" is "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010, that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. at 5222. Application of that statute here is straightforward: because the "statutory penalties" for "a violation of" 21 U.S.C. § 848(e)(1)(A) were not "modified by" the Fair Sentencing Act, that criminal violation is not a "covered offense." See, e.g., United States v. Guerrero, 813 F.3d 462, 464-465 (2d Cir. 2016) ("The [Fair Sentencing] Act makes no mention of § 848(e)(1)(A)."). The penalties under § 848(e)(1)(A) are precisely the same now as they were when petitioner was convicted: "any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or * * * death."

That simple textual analysis accords with the purpose and history of the First Step Act, which was designed to alleviate disparities between certain crack- and powder-cocaine dealers -- not to provide a windfall for defendants, like petitioner, who were convicted of murders whose penalties were unchanged by the Fair Sentencing Act. Petitioner resists the text of the statute, and its common-sense inapplicability to his case, by contending

that other subsections of Section 848 may contain "covered offenses," and arguing that every crime described in the different subsections of § 848 should therefore be lumped together as one "covered offense." See Stay App. at 30-31. But that approach is contrary to basic principles of federal criminal law, which recognize that different statutory subsections create distinct criminal violations with their own elements and statutory penalties. See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Alleyne v. United States, 570 U.S. 99, 103 (2013). Indeed, Congress specifically defined a "covered offense" as a particular "violation of a Federal criminal statute." First Step Act § 404(a), 132 Stat. at 5222 (emphasis added).

Petitioner does not, and cannot, dispute that Section 848(e)(1)(A) proscribes a criminal "violation" that is distinct from the crimes in other subsections of § 848. See, e.g., United States v. NJB, 104 F.3d 630 (4th Cir. 1997) (holding that § 848(e) is a separate substantive offense). Specifically, Section 848(e)(1)(A) criminalizes intentional killings by "any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title." One of those potential predicates -- violations of Section 841(b)(1)(A) -- may be a "covered offense" under the First Step Act, but Section 848(e)(1)(A) is separable

from its underlying predicates. Those predicates function as elements that must be found by a jury, not "statutory penalties" for Section 848(e)(1)(A) that were modified by the Fair Sentencing Act. First Step Act § 404(a), 132 Stat. at 5222.

In any event, as the district court explained at length, petitioner's predicate offense for the purposes of his § 848(e)(1)(A) convictions was not a violation of § 841(b)(1)(A), but rather his engagement in "a continuing criminal enterprise," § 848(e)(1)(A). See Tipton, 90 F.3d at 887 ("The Government's evidence expressly linked each of the nine § 848(e) murders of which the appellants were severally convicted to a furtherance of the CCE's purposes: either silencing potential informants or witnesses, eliminating supposed drug trafficking rivals, or punishing underlings for various drug-trafficking misfeasances."); Roane, 2020 WL 6370984, at *10 ("Simply put, Defendant's convictions in no way rest on the second prong — engaging in an offense punishable under § 841(b)(1)(A)."). Thus, even if the variant of § 848(e)(1)(A) that incorporates a § 841(b)(1)(A) violation were a "covered offense" -- which it is not -- it would have no bearing on petitioner's case.

Furthermore, the courts of appeals to have considered whether Section 848(e) was affected by the Fair Sentencing Act or is a "covered offense" under the First Step Act have correctly answered those questions in the negative, even in cases in which the

defendant was convicted under the prong of § 848(e)(1)(A) that requires proof of a violation § 841(b)(1)(A). See Guerrero, 813 F.3d at 456-466; United States v. Snow, 967 F.3d 563, 564 (6th Cir. 2020) ("[T]he First Step Act's text and structure do not support extending resentencing relief to Snow's § 848(e)(1)(A) conviction."). Petitioner's murder convictions here -- which required the government to prove his participation in "a continuing criminal enterprise," not his "engaging in an offense punishable under section 841(b)(1)(A)," § 848(e)(1)(A) -- are even further attenuated from any statute whose penalties were modified by the Fair Sentencing Act. Unable to address those precedents, petitioner ignores them entirely.

It could hardly be clearer that petitioner's murder convictions were unaffected by the Fair Sentencing and First Step Acts: those statutes did not affect petitioner's liability, his statutory penalties, nor even anything about "the instructions or evidence given to the jury in the penalty phase." Roane, 2020 WL 6370984, at *13. A court conducting a resentencing today "would have no new statutory penalties on which to base a reduced sentence." Ibid. As the district court explained, petitioner "comes before the Court with unaltered convictions under a statute with unaltered statutory penalties and asks the Court to alter his sentence." Id. at *18. That request must fail.

2. That petitioner was sentenced to death by a jury -- seven times -- for his violations of § 848(e)(1)(A) makes this point even clearer. Petitioner contends that the First Step Act entitles him to a full capital resentencing hearing, but the statute itself makes no such provision. See Pet. Stay Mot. (4th Cir. 20-15) at 12. Instead, the First Step Act simply states that a "court" "may" "impose a reduced sentence" for a covered offense, in its discretion. First Step Act, § 404(b)-(c), 132 Stat. at 5222. In contrast, the statute under which petitioner was convicted "mandated the imposition of the death penalty upon the jury's recommendation." Roane, 2020 WL 6370984, at *16 (citing 21 U.S.C. 848(1)).[4] The First Step Act does not contemplate the vacatur of any death sentences, the reimpaneling of a capital sentencing jury, or the imposition of any new capital sentences -- making it plain that Congress did not include capital crimes like petitioner's within the scope of "covered offenses."

3. Finally, even if a district court could resentence petitioner for his violations of § 848(e)(1)(A), petitioner would still not be entitled to the relief he seeks. Sentence reductions under the First Step Act are purely discretionary. See First Step

[4] As noted above, petitioner was convicted prior to the enactment of the Federal Death Penalty Act. His sentence was controlled by the now-repealed provisions of 21 U.S.C. § 848. See United States v. Stitt, 552 F.3d 345, 353 (4th Cir. 2008); see also Tipton, 90 F.3d at 902; Roane, 2020 WL 6370984, at *16 n.8.

Act § 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."); United States v. Jackson, 952 F.3d 492, 502 (4th Cir. 2020) ("Under the First Step Act, a district court is "not obligated to reduce [the defendant's] sentence at all."). For the reasons explained by the district court, the 18 U.S.C. 3553(a) factors do not support reducing petitioner's sentences even for any convictions that are covered offenses under the First Step Act:

> Defendant murdered multiple people on different occasions in cold blood in furtherance of his drug trafficking. Defendant maimed several others in the commission of those murders. Defendant did not limit his violence to others engaged in drug trafficking—innocent bystanders fell victim to Defendant simply as a result of finding themselves in the wrong place at the wrong time.

Johnson, No. 92-CR-68, Dkt. 75 at 11. For those reasons, the district court specifically "refuse[d] to overturn the will of the community" reflected in the jury's "unanimous[] deci[sion] that this heinous serial killer" deserved the death penalty. Id. at 11-14. Petitioner therefore has no prospect of success in his request for resentencing.

II. EQUITABLE CONSIDERATIONS WEIGH HEAVILY AGAINST A STAY

Equitable considerations also weigh strongly against entry of a stay in this case. This Court has repeatedly emphasized that "[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (quoting Hill v. McDonough,

547 U.S. 573, 584 (2006)). Once post-conviction proceedings "have run their course," "an assurance of real finality" is necessary for the government to "execute its moral judgment." Calderon v. Thompson, 523 U.S. 538, 556 (1998). That interest in carrying out petitioner's sentence is magnified by the heinous nature of his crimes and the length of time that has passed since his sentence. Delaying petitioner's execution "would frustrate the [federal government's] legitimate interest in carrying out a sentence of death in a timely manner." Baze, 553 U.S. at 61 (plurality opinion).

Last-minute stays or injunctions of federal executions in particular "'should be the extreme exception, not the norm.'" Barr v. Lee, 140 S. Ct. 2590, 2591 (2020) (quoting Bucklew, 139 S. Ct. at 1134). This Court has held that "[a] court considering a stay must * * * apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" Hill, 547 U.S. at 584 (quoting Nelson v. Campbell, 541 U.S. 637, 650 (2004)). That equitable presumption should be particularly strong for petitioner, whose actions "betray[] a manipulative intention to circumvent not only the strictures of AEDPA but [this] Court's warnings against procedural gamesmanship designed to bring the wheels of justice to a halt." Johnson, No. 20-15, Dkt. 26 at 4 (op. of Wilkinson, J.). Had

petitioner filed his Section 2255 motion when he first had notice of the factual basis for those claims, or promptly pursued appellate relief with respect to his First Step Act motion, those cases would have run their course by now. Having instead waited until days before his execution to seek the stays at issue here, petitioner has no equitable right to demand that his execution be further postponed. See Hill, 547 U.S. at 584.

The public and the many victims' families have an overwhelming interest in implementing the capital sentence imposed more than a quarter-century ago. See, e.g., Bucklew, 139 S. Ct. at 1133-1134. Petitioner is a convicted serial killer who murdered and maimed multiple people on different occasions, and whose victims included innocent bystanders. Their families have waited decades for the sentence to be enforced and are currently in Terre Haute, Indiana for the execution. "The time has long since passed for the judgment of the jury and that of so many courts thereafter to be carried out." Johnson, No. 20-15, Dkt. 26 at 5 (op. of Wilkinson, J.).

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

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