No. 20-5398

IN THE

Supreme Court of the United States

LEZMOND CHARLES MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

EMERGENCY APPLICATION FOR A STAY OF EXECUTION PENDING FINAL DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

Execution Scheduled for August 26, 2020 (time to be determined)

CUAUHTEMOC ORTEGA
Interim Federal Public Defender
CELESTE BACCHI*
Celeste_Bacchi@fd.org
JONATHAN C. AMINOFF
Jonathan_Aminoff@fd.org
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012
Tel: (213) 894-5374; Fax: (213) 894-0310
Attorneys for Petitioner
LEZMOND CHARLES MITCHELL
**Counsel of Record*

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioner, Lezmond Mitchell, respectfully requests a stay of his execution, which is scheduled for August 26, 2020. (The government has not yet announced the time of the execution.) Mitchell asks this Court to stay his execution to preserve the Court's jurisdiction to review his petition for certiorari to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1). That petition was submitted on August 13, 2020. The issues raised will become moot if Mitchell is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring). Pursuant to Supreme Court Rules 23.1 and 23.2 and under the authority of 28 U.S.C. § 2101(f), the stay may lawfully be granted.

INTRODUCTION

Lezmond Mitchell, a Navajo man, was sentenced to death by a jury comprised of 11 white persons and one Navajo for a crime with Navajo victims that occurred on Navajo land. Mitchell sought to interview the jurors in his case, but was prevented from doing so by an Arizona district court local rule which requires a defendant to establish good cause before the court will grant permission to reach out to jurors. Mitchell's motion to interview jurors pursuant to the local rule presented evidence suggesting that racial bias infected his prosecution, conviction, and sentencing. Nevertheless, the district court found that Mitchell had failed to establish good cause.

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After this Court's decision in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), Mitchell sought to re-open his proceedings under Federal Rule of Civil Procedure 60(b)(6), arguing that local rules governing access to jurors cannot validly bar death-sentenced inmates from interviewing trial jurors concerning racial bias during deliberations. The district court denied relief, and the Ninth Circuit affirmed. This case thus presents an extraordinary circumstance in which Mitchell faces imminent execution despite never having been able to interview the jurors who sentenced him to death.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). "'[I]n a close case it may [also] be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Indiana State Police Pension Trust*, 556 U.S. at 960 (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). Those standards are satisfied here.

I. There is a reasonable probability that this Court will grant certiorari.

Mitchell's certiorari petition raises two "important question[s] of federal law that ha[ve] not, but should be, settled by this Court," Sup. C. R. 10(c). The first

question is one explicitly left open in *Peña-Rodriguez*: whether lower courts, based on local rules, may deny death-sentenced defendants access to their trial jurors such that they are barred from investigating racial bias in deliberations. *Peña-Rodriguez* is a landmark decision that drastically changed the age-old no-impeachment rule in an effort to address the "familiar and recurring evil" of racial bias. *Peña-Rodriguez*, 137 S. Ct. at 868. This Court reasoned that racial bias is such a stain on American history and notions of fair justice, and such a clear denial of the jury trial guarantee, that general evidentiary rules must be modified to root out racism in the criminal justice system. *Id.* at 871. Notwithstanding this Court's recognition that racial bias is "a familiar and recurring evil," *id.* at 868, the Ninth Circuit's opinion has left *Peña-Rodriguez* without any force. If "[t]he work of "purg[ing] racial prejudice from the administration of justice" is far from done, *Tharpe v. Ford*, 139 S. Ct. 911, 913 (2019) (Sotomayor J., respecting the denial of certiorari), then it is incumbent on this Court to recognize that *Peña-Rodriguez* is not just an exception to the rules of evidence, but also to the rules barring post-conviction interviews with jurors. Otherwise, for those like Mitchell who find themselves in a jurisdiction that requires evidence of racial bias on the jury before they can investigate and present evidence of racial bias on the jury, *Peña-Rodriguez* "comes dangerously close to creating a right without a remedy, something which is strongly disfavored in American jurisprudence." *United States v. Pulliam*, 405 F.3d 782, 796 (9th Cir. 2005) (Wardlaw, J., dissenting).

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Indeed, Mitchell's view of *Peña-Rodriguez*'s impact is supported by at least three Supreme Court Justices, indicating that certiorari is reasonably likely to be granted. *Peña-Rodriguez*, 137 S. Ct. at 884 and n.15 (Alito, J., dissenting, joined by Roberts, C.J., and Thomas, J.) (for those jurisdictions with rules that actually prohibit or restrict post-verdict contact with jurors, "whether those rules will survive today's decision is an open question . . . under the reasoning of the majority opinion, it is not clear why such rules should be enforced when they come into conflict with a defendant's attempt to introduce evidence of racial bias."). As Justice Alito correctly recognized, "it is doubtful that there are principled grounds for preventing the expansion of this holding." *Id.* Far from supporting a limitation like Arizona Local Rule 39.2, the *Peña-Rodriguez* Court instructed lower courts to treat racial bias with added precaution, holding that a "constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* at 869.

The second question deserving of this Court's attention asks whether a change in decisional law, such as *Peña-Rodriguez*, can be an extraordinary circumstance that justifies re-opening a case under Federal Rule of Civil Procedure 60(b)(6). The latter question also justifies certiorari because it would allow the court to settle a circuit split regarding the correct application of Rule 60(b)(6) in the post-conviction context. As explained in his petition for certiorari, the circuit courts are

in need of guidance on this issue, as the legal patchwork that now exists in circuit courts threatens the fair and accurate administration of justice.

Thus, there is a reasonable probability that at least four justices will vote to grant certiorari in this case.

II. There is a fair prospect that this Court will hold that the Ninth Circuit's interpretation of the scope and import of *Peña-Rodriguez* was erroneous.

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

This Court noted that the "practical mechanics of acquiring and presenting [evidence of racial bias amongst jurors] will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors." *Peña-Rodriguez*, 137 S. Ct. at 869. Seizing on this language, the Ninth Circuit's opinion holds that *Peña-Rodriguez* did not affect the

law governing juror investigation, but instead interpreted that case as supporting limitations on access to jurors. *Mitchell III*, 958 F.3d at 790.

But this narrow focus is inconsistent with the scope and impact of *Peña-Rodriguez*. As one justice noted, the majority opinion is a "startling development" that drastically changes "the age-old" no-impeachment rule such that "it is doubtful that there are principled grounds for preventing the expansion of [that] holding." *Peña-Rodriguez*, 137 S. Ct. at 874 (Alito, J., dissenting). And there are no principled grounds for prioritizing local rules that virtually eliminate the ability of capital defendants to interview jurors over the clearly established constitutional right to a jury trial free from racism. To exemplify the limits on juror access that the *Peña-Rodriguez* Court actually contemplated, the opinion cited to jury instructions from Colorado, Florida, Massachusetts, and New Jersey, none of which impose any limitation on an attorney contacting a juror. *Id.* at 870. Rather, each of these instructions merely informs the jurors that they may be approached by counsel after the trial, and that they are under no obligation to speak with counsel, but may do so if they wish. *Id*. Far from supporting a limitation like Arizona Local Rule 39.2, this Court instructed lower courts to treat racial bias with added precaution, holding that a "constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id*. at 869.

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Here, the Ninth Circuit incorrectly answered the question left open by *Peña-Rodriguez,* finding that if a death-sentenced petitioner finds himself in the unfortunate position of being sentenced in a jurisdiction which bars jury interviews, then that petitioner may not investigate potential violations of his constitutional rights. However, this interpretation violates the spirit of *Peña-Rodriguez* because it stymies the ability of a petitioner to investigate, and leaves meaningless a constitutional right to present evidence of juror bias in the absence of a right to investigate.

The Ninth Circuit's opinion also failed to address Mitchell's argument that equity favors departing from Local Rule 39.2. This omission conflicts with longstanding Supreme Court precedent requiring heightened reliability in capital proceedings. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972); *Woodson v. North Carolina*, 428 U.S. 280 (1976). In order to achieve such increased reliability, courts should consider more evidence, not less, in deciding capital cases. *United States v. Fell*, 360 F.3d 135, 143 (2d Cir. 2004) (citing *Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976)); *United States v. Lee*, 374 F.3d 637, 648 (8th Cir. 2004). Yet, the Ninth Circuit's opinion closes the door on petitioners, like Mitchell, from investigating and then proffering evidence in his case.

Not only is the Ninth Circuit's analytical approach all wrong, its result leads to arbitrariness with regard to which defendants will have the opportunity to develop evidence of racial bias. Indeed, Mitchell is barred from investigating evidence of juror bias in his case purely by virtue of the fact that he was tried in

federal court in Arizona. (Petitioners convicted in Arizona state court face no such bar.) The fact that Mitchell's ability to conduct an adequate post-conviction investigation is entirely dependent on the location of his trial indicates that the death-penalty process is marred by arbitrariness of the sort this Court found intolerable in the death-penalty context. *California v. Brown*, 479 U.S. 538, 541 (1987) ("death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion").

III. Mitchell will suffer irreparable harm absent a stay.

Mitchell's request for stay of execution is not a "last-minute attempt[] to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quoting *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam)). Rather, it was the Government's decision to schedule Mitchell's execution while litigation was still pending before the Ninth Circuit that brings us to this point. And there is no question that Mitchell will suffer irreparable harm if this Court declines to grant a stay of his August 26, 2020 execution. The harm of being executed is inarguably "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent [it]." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (internal quotation marks omitted); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (Powell, J., concurring) (stating that the requirement of irreparable harm if stay is not granted "is necessarily present in capital cases"). There is a substantial likelihood that this Court will hold that capital defendants like Mitchell may not be prevented from interviewing their jurors about racial bias. There is also a

substantial likelihood that Mitchell's jury was, in fact, impacted by racial bias. Without a stay, it is likely that the federal government will execute Lezmond without him having the opportunity to exercise his constitutional right to a trial free from racism.

This Court has granted stay applications to prevent far less severe consequences. In *Hollingsworth v. Perry*, for example, it granted a stay to stop "the District Court [from] broadcast[ing] [a] trial," which "may [have] chill[ed]" witness testimony, a harm that "would be difficult—if not impossible—to reverse." 558 U.S. at 195. And in *California v. American Stores Company*, the potentially "irreparable injury" was a "merger" of two supermarkets, which the applicant claimed "would substantially lessen competition." 492 U.S. 1301, 1304, 1302 (1989). These harms pale in comparison to the irreparable harm that would result if the Government executed Mitchell before this important Constitutional issue is resolved.

A stay is also in the interest of the public because all citizens have an interest in ensuring that the Constitution is upheld. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). Moreover, the Government will suffer little appreciable harm if a stay is granted. The only "harm" that would result is that the Government would have to wait for review of this case before it could carry out Mitchell's execution—if indeed it would still be permitted to execute him following this Court's resolution of Mitchell's claim. That delay is an insignificant and temporary harm compared to the irreparable harm of permitting an unconstitutional execution to take place.

Second, failure to issue a stay risks "foreclos[ing] . . . certiorari review by this Court," which itself constitutes "irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302; *accord, e.g.*, *John Doe Agency*, 488 U.S. at 1309. Allowing the Government to proceed towards executing Mitchell while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison*, 468 U.S. at 1302.

On balance, a stay is therefore warranted. Failure to grant one "may have the practical consequence of rendering the proceeding moot" or otherwise cause irreparable harm to Mitchell. *Mikutaitis v. United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers). The Government would not "be significantly prejudiced by an additional short delay," and a stay would serve both the public interest and judicial economy. *Id.* "In light of these considerations," this Court should "grant the application." *Id.*

IV. The balance of equities and relative harms weighs strongly in favor of granting a stay.

In addition to the stay factors identified above, "in a close case it may be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large." *Indiana State Police Pension Trust*, 556 U.S. at 960 (internal quotations omitted). Approximately one month ago, the Government executed three men at the federal prison at Terre Haute: Daniel Lee, Wesley Purkey, and Dustin Honken. The executions of Lee and Purkey were utterly chaotic. Although Lee's execution was scheduled for July 13, 2020 at 4:00 p.m., he was not pronounced dead until 8:07 a.m. the next morning after being strapped to

the execution gurney for four hours. Purkey was scheduled to be executed on July 15, 2020 at 4:00 p.m., but was not pronounced dead until 8:19 a.m. the next morning. These executions were the result of the Government's attempt to cut corners and meet their own schedule instead of following court orders. Indeed, the Government apparently did not realize that the Eighth Circuit had not yet issued its mandate when they strapped Lee to the execution gurney. As a result, the Government had to request the extraordinary remedy that the Eighth Circuit issue its mandate in the middle of the night so it could proceed with Lee's execution without violating the Eighth Circuit's previously issued stay of execution. *United States v. Lee*, Eighth Circuit Case No. 19-3618. The Government proposes to pursue Mitchell's execution under similar chaotic circumstances. The parties will continue to barrel towards the August 26 execution date without knowing whether that execution will proceed. Should the Court grant this motion, the Court would be preventing such disorder in this case.

A stay of execution is also warranted here in order to allow Mitchell to pursue relief in other forums. Mitchell still has litigation pending before the Ninth Circuit alleging a violation of the Federal Death Penalty Act ("FDPA"), as well as an application for executive clemency. Both of these efforts could not commence until after the Government set his execution date. With regard to his FDPA claim, the district court properly found that the challenge was not ripe until Mitchell was served with notice of his August 26, 2020 execution date on July 29, 2020. *United States v. Mitchell*, Case No. 3:01-cr-01062-DGC (D. Ct. Ariz. Aug. 13, 2020), dkt. 618

at 4. Similarly, according to the Office of the Pardon Attorney's rules for seeking executive clemency, a request for a commutation should not be filed until a person's challenges to his convictions and sentences are resolved.[1] By scheduling Mitchell's execution date with 28 days' notice while his case was still pending in the Ninth Circuit (and with a stay of execution from that court in place), the Government has hampered Mitchell's ability to seek clemency. This is particularly important here because, as both Judge Christen and Judge Hurwitz acknowledged in their concurring opinions, "this case warrants careful consideration." *Mitchell*, 958 F.3d at 793 (Christen, J. concurring) and at 794 ("I respectfully suggest that the current Executive should take a fresh look at the wisdom of imposing the death penalty. . . . Although the judiciary today has done its job, I hope that the Executive will carefully consider whether the death penalty is appropriate in this unusual case.). A stay would allow Mitchell's litigation and clemency application to run its course in a timely, but not needlessly truncated or wasteful, fashion. Accordingly, the equities tip in Mitchell's favor and the Court should grant a stay of execution.

To be sure, this Court has recognized that the public also has an "interest in the timely enforcement of a [death] sentence." *Bucklew*, 139 S. Ct. at 1133 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). But this is not a situation where Mitchell has filed a late-breaking challenge grounded in "settled precedent." *Cf. id.* The Rule 60(b) motion that is the subject of the pending certiorari petition was filed in district court in March 2018, long before any execution date was set. The petition

[1] Available at: https://www.justice.gov/pardon/file/960571/download

for certiorari addresses exceptionally important questions that remain unanswered by this Court. Especially when the "most extreme sanction available" is at issue, *Atkins v. Virginia*, 536 U.S. 304, 319 (2002), there is no public interest in moving forward with an unconstitutional execution.

CONCLUSION

For the foregoing reasons, the Court should grant a stay of execution pending consideration and disposition of Mitchell's petition for writ of certiorari.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: August 18, 2020

By: */s/ Celeste Bacchi*
CELESTE BACCHI*
Deputy Federal Public Defender

Attorneys for Petitioner
LEZMOND CHARLES MITCHELL
**Counsel of Record*