Nos. 20-5398 and 20A30

IN THE SUPREME COURT OF THE UNITED STATES

LEZMOND CHARLES MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND TO APPLICATION FOR A STAY OF EXECUTION

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CAPITAL CASE

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion under Federal Rule of Civil Procedure 60(b)(6) to reopen his post-conviction proceedings in light of Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), where petitioner did not present any evidence that the jury deliberations were tainted by racial bias.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Ariz.):

United States v. Mitchell, No. 01-cr-1062 (Jan. 8, 2004) (amended judgment)

Mitchell v. United States, No. 09-cv-1097 (May 22, 2009) (transferring case to No. 09-cv-8089)

Mitchell v. United States, No. 09-cv-8089 (Sept. 30, 2010) (denial of motion under 28 U.S.C. 2255)

Mitchell v. United States, No. 09-cv-8089 (Sept. 18, 2018) (denial of motion under Fed. R. Civ. P. 60(b))

Mitchell v. United States, No. 01-cr-1062 (Aug. 13, 2020) (denial of motion to vacate execution date)

United States Court of Appeals (9th Cir.):

United States v. Mitchell, No. 03-99010 (Sept. 5, 2007) (affirming on direct appeal)

Mitchell v. United States, No. 11-99003 (June 19, 2015) (affirming denial of Section 2255 motion)

Mitchell v. United States, No. 18-17031 (Apr. 30, 2020) (affirming denial of Rule 60(b) motion)

United States v. Mitchell, No. 20-99009 (Aug. 19, 2020) (denying motion to stay and affirming denial of motion to vacate execution date)

United States Supreme Court:

Mitchell v. United States, No. 07-9351 (June 9, 2008)

Mitchell v. United States, No. 15-8725 (Oct. 3, 2016)

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BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND TO APPLICATION FOR A STAY OF EXECUTION

Petitioner is a federal death-row inmate who murdered and dismembered a nine-year-old girl and her grandmother in 2001 during a carjacking. He confessed on multiple occasions and led authorities to the remote area where he and an accomplice had buried the victims' severed heads and hands. Following a jury trial, petitioner was convicted on two counts of first-degree murder, in violation of 18 U.S.C. 1111 and 1153 (2000); one count of carjacking resulting in death, in violation of 18 U.S.C. 2119; and multiple other crimes. He received a capital sentence on the carjacking-resulting-in-death count. The district court and the court of appeals accorded him extensive review on both direct appeal and collateral review under 28 U.S.C. 2255, and this Court

has twice denied petitions for writs of certiorari from the resulting judgments.

The present petition and accompanying application for a stay arise from petitioner's effort to reopen the final judgment in his Section 2255 proceedings. During those earlier proceedings, petitioner had sought permission to interview the jurors in his case to investigate whether their deliberations may have been tainted by any racial bias against Navajos; the district court had denied his request in part because of petitioner's failure to show good cause, as required by a local rule governing post-trial juror interviews. Petitioner now seeks relief from final judgment under Federal Rule of Civil Procedure 60(b)(6), on the theory that this Court's decision in Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), constitutes an extraordinary circumstance that warrants reopening his case so that he may interview the jurors irrespective of local rules.

The court of appeals unanimously and correctly rejected that contention. Pena-Rodriguez does not support what the district court described as a "fishing expedition," Pet. App. 49, into juror deliberations from 17 years ago based solely on unsupported speculation. The decision is not an "extraordinary circumstance" that justifies reopening collateral review under Rule 60(b)(6), and in any event it does not suggest any infirmity in the local rule applied here. In Pena-Rodriguez, this Court recognized a limited racial-bias exception to a rule of evidence that generally

prohibits using testimony from jurors to impeach a jury verdict. 137 S. Ct. at 869. The Court stated that, in order to invoke the exception, a defendant must first make a threshold "showing that one or more jurors made statements exhibiting overt racial bias." Ibid. And the Court recognized that the "mechanics of acquiring and presenting" evidence from jurors to make such a showing would continue to be "shaped and guided by * * * local court rules." Ibid. Here, petitioner "presented no evidence of racial bias" among the jurors, Pet. App. 31, and he identified no sound reason to excuse his failure to comply with the local rule, which protects jurors from undue harassment.

Petitioner has failed to show a reasonable probability that this Court will grant review. That failure, standing alone, warrants denying his application for a stay. The balance of equities also favors denying his application. Seventeen years after petitioner's trial, the government is prepared to carry out his execution on August 26, 2020. Further delay would disserve the interests of the government, the victims' families, and the public. His application for a stay and his petition for a writ of certiorari should both be denied.

STATEMENT

1. In 2001, petitioner and an accomplice killed and dismembered a 63-year-old woman, Alyce Slim, and her nine-year-old granddaughter, identified in court documents as Jane Doe, during a carjacking. Pet. App. 5; 502 F.3d 931, 942-943.

Petitioner and the accomplice, 16-year-old Johnny Orsinger, were traveling from Arizona to New Mexico in search of a vehicle to use as part of a plan to rob a trading post on the Arizona side of the Navajo Indian Reservation. 502 F.3d at 942. While hitchhiking, they encountered Slim, who was driving in her pick-up truck with her granddaughter, Doe. Id. at 942-943; see Presentence Investigation Report (PSR) ¶ 6. Slim and Doe agreed to give petitioner and Orsinger a ride, and drove the two men to a location near Sawmill, Arizona. 502 F.3d at 943.

When Slim stopped her truck to let petitioner and Orsinger out, petitioner and Orsinger stabbed her 33 times. 502 F.3d at 943. After killing Slim, petitioner and Orsinger pulled her body into the backseat, next to her still-alive granddaughter. Ibid. Petitioner and Orsinger drove Slim's truck into the mountains. Pet. App. 5. Petitioner stopped the truck, dragged Slim's body out of it, and ordered Doe to get out as well. Ibid. Petitioner then told Doe "to lay down and die" and cut her throat twice, which did not immediately kill her. Ibid.; 502 F.3d at 943. As Doe lay on the ground bleeding, petitioner and Orsinger used large rocks to bludgeon her head until they had killed her. 502 F.3d at 943; PSR ¶ 6.

Petitioner and Orsinger left the murder scene and returned after retrieving an axe and shovel. 790 F.3d 881, 883; 502 F.3d at 943. Orsinger used the axe to decapitate the victims and cut off their hands while petitioner dug a hole. Pet. App. 5; 502

F.3d at 943. The two men buried the severed body parts in the hole and pulled the victims' torsos into the woods. 502 F.3d at 943. Later, the men burned Slim's and Doe's belongings. Ibid. Both murders occurred on the Navajo Indian Reservation. Id. at 943, 946. Slim and Doe were Navajo, and petitioner is also Navajo. See id. at 958, 971, 989.

A few days later, petitioner and two other associates armed themselves with guns, donned masks, drove Slim's truck to the trading post, and robbed the store and its employees at gunpoint. Pet. App. 5; 502 F.3d at 943. Petitioner and his associates tied up the employees, struck one of them with a gun, threatened to kill them if they did not cooperate, and stole over $5000. Pet. App. 5; 502 F.3d at 943-944. Afterward, petitioner and his associates split the proceeds, and petitioner set fire to Slim's truck. Pet. App. 5; 502 F.3d at 944.

Law enforcement officers arrested petitioner at an accomplice's house a week after the murders. 502 F.3d at 944. They found a butterfly knife in his pants with trace amounts of Slim's blood on it, as well as another butterfly knife and Slim's cell phone. Ibid. Petitioner waived his Miranda rights and admitted that he had been involved in the trading-post robbery and that he was present when "things happened" to Slim and Doe. Pet. App. 6 (citation omitted). The next day, petitioner helped Navajo police officers locate the bodies of Slim and Doe. Ibid.; 502 F.3d at 944-945. At the scene, petitioner admitted that he had

stabbed the "old lady" and stated that evidence would show or witnesses would say that he had cut Doe's throat twice. Pet. App. 6 (citation omitted). Petitioner also confessed that he and Orsinger had dropped rocks on Doe's head after cutting her throat and that they had severed and buried the victims' heads and hands. Ibid.; 502 F.3d at 945.

Before he was arraigned on federal charges, petitioner again waived his Miranda rights and admitted his role in the robbery and killings, this time providing more detail. 502 F.3d at 945.

2. A federal grand jury in the District of Arizona returned an 11-count indictment charging petitioner with two counts of first-degree murder, in violation of 18 U.S.C. 1111 and 1153 (2000); one count of carjacking resulting in death, in violation of 18 U.S.C. 2119; one count of felony murder (robbery), in violation of 18 U.S.C. 1111 and 1153 (2000) and 18 U.S.C. 2111; one count of felony murder (kidnapping), in violation of 18 U.S.C. 1111 and 1153 (2000) and 18 U.S.C. 1201(a)(2); one count of kidnapping, in violation of 18 U.S.C. 1153 (2000) and 18 U.S.C. 1201(a)(2); three counts of robbery, in violation of 18 U.S.C. 1153 (2000) and 18 U.S.C. 2111; and two counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). 502 F.3d at 945; see Pet. C.A. E.R. 174-178 (second superseding indictment). The government filed a notice of intent to seek the death penalty on the carjacking-resulting-in-death count. Pet. App. 6; see 18 U.S.C. 2119(3).

Petitioner was convicted at trial and received a capital sentence, which was affirmed on direct review.

a. Jury selection began in April 2003. Pet. App. 7. Potential jurors filled out prescreening questionnaires, and the voir dire lasted 12 days, during which jurors were asked questions about their qualifications, including their ability to be impartial toward Native Americans. Ibid. Ultimately, one member of the Navajo Nation was seated on the petit jury. Ibid. At the end of the trial's guilt phase, the jury found petitioner guilty on all counts. Ibid.

The penalty phase began in May 2003. Pet. App. 7. Under the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq., a jury may recommend a capital sentence if it finds beyond a reasonable doubt at least one of the intent factors set forth in 18 U.S.C. 3591(a)(2) and at least one of the aggravating factors set forth in 18 U.S.C. 3592(c). 18 U.S.C. 3593(c), (d), and (e)(2). If the jury makes both findings, it may also consider any non-statutory aggravating factors that it unanimously finds beyond a reasonable doubt, and each individual juror must weigh all aggravating factors found by the jury against any mitigating factors that the juror individually finds to exist by a preponderance of the evidence. See 18 U.S.C. 3593(c) and (d). The jury may then recommend a capital sentence if it unanimously determines that the aggravating factors sufficiently outweigh the

mitigating factors so as to justify a capital sentence. 18 U.S.C. 3593(e).

Consistent with the FDPA, the district court instructed jurors that they "must not consider the race, color, religious beliefs, national origin, or sex of either [petitioner] or the victims," and that they were "not to return a sentence of death unless [they] would return a sentence of death for the crime in question without regard to race, color, religious beliefs, national origin, or sex of either [petitioner] or any victim." Pet. App. 7 (quoting instruction); see 18 U.S.C. 3593(f). In addition, the jury was required to "return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of [petitioner] or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of [petitioner] or any victim may be." Pet. App. 7 (quoting 18 U.S.C. 3593(f)).

The government presented six statutory aggravating factors to the jury in support of a recommendation for a capital sentence: "pecuniary gain; the manner of committing the offense was especially heinous, cruel, or depraved; substantial planning and premeditation; vulnerability of the victim; multiple killings; and the death of Jane Doe occurred during the commission and attempted

commission of another felony, kidnapping." 502 F.3d at 973-974. The government also presented one non-statutory aggravating circumstance with respect to both victims: that petitioner "caused injury, harm, and loss to the victim's family." Id. at 974.

Petitioner's mitigation evidence included a letter from the Attorney General of the Navajo Nation "indicating opposition to capital punishment, both as a general matter and as to" petitioner. 502 F.3d at 989. The letter stated in part: "As part of Navajo cultural and religious values we do not support the concept of capital punishment. Navajo hold life sacred. Our culture and religion teach us to value life and instruct against the taking of human life for vengeance." Id. at 995. During closing arguments, the government challenged the credibility of petitioner's reliance on the Navajo Nation letter by suggesting that petitioner had "turned his back on his religious and cultural heritage." Id. at 994-995.

The jury found each of the alleged aggravating factors and all four statutory intent factors. 502 F.3d at 946, 974; Pet. App. 8. The jury also made a number of special mitigation findings. 790 F.3d at 893 & n.6. The jury unanimously found that petitioner did not have a significant prior criminal record; that another person who was equally culpable in the crime (Orsinger) would not receive the death penalty; and that petitioner would be sentenced to life imprisonment without parole if he were not sentenced to death. Id. at 893 n.6. Seven jurors found that the

Navajo Nation's recommendation opposing the death penalty was a mitigating factor; six found that petitioner's childhood and background mitigated against the death penalty; two found that petitioner would adapt to prison life; and one found that petitioner had an impaired capacity to appreciate the wrongfulness of his conduct. Ibid.

After weighing the aggravating and mitigating factors, the jury returned a recommendation for a capital sentence, along with the required certification -- signed by each individual juror -- stating that they had not considered petitioner's or the victims' race in making that recommendation and would have made the same recommendation "no matter what the race" of the defendant or his victims. Pet. App. 7-8 (citation omitted); 502 F.3d at 946. Each juror signed the certificate. Pet. App. 7. As the jurors were discharged, the district court told them, "You are free to talk about the case with anyone or not talk about it as you wish." Id. at 8. The court advised the jurors that the lawyers would "be standing in the hallway" as the jurors exited and that any juror "may approach them and ask them questions" if he or she chose to do so. Ibid. The court further stated, "They've been instructed not to approach you. It's only if you want to talk or discuss the case with lawyers on either side as you wish, you may do. So if you decide to just exit the building, you may." Ibid.

The district court subsequently imposed a capital sentence on the carjacking count, life sentences on each of the four murder

counts and the kidnapping count, and lengthy terms of imprisonment on the remaining counts. Am. Judgment 1-2; see 502 F.3d at 996.

b. The court of appeals affirmed. 502 F.3d at 931-997. The court determined that the evidence of petitioner's guilt was "overwhelming," and that "the mitigating factors proffered by [petitioner] were weak when compared to the gruesome nature of the crimes and the impact they had on the victims' family." Id. at 996. The court rejected petitioner's constitutional challenge to the procedures used to empanel the jurors in his case, finding that petitioner had not "show[n] that the underrepresentation of Native Americans on venires such as his was either substantial or systematic." Id. at 951; see id. at 949-951. The court also "accept[ed] the jurors' assurance" in their certifications "that no impermissible considerations of race or religion factored into the verdict." Id. at 990. And the court rejected petitioner's claim of reversible error in the government's comment during its penalty-phase closing argument that petitioner had "turned his back on his religious and cultural heritage." Id. at 994-995. On plain-error review, the court found that the prosecutor's statement alluded to religion "in the same sense that the Navajo Nation's letter did," and that "it was not plainly erroneous for the government to challenge the credibility of [petitioner's] reliance" on the Navajo Nation letter as purportedly mitigating evidence. Id. at 995.

Judge Reinhardt dissented. 502 F.3d at 997-1014. He would have vacated and remanded for a new trial or, alternatively, a new sentencing proceeding. Id. at 1014.

c. This Court denied a petition for a writ of certiorari. 553 U.S. 1094.

3. Petitioner subsequently brought a collateral attack on his conviction and sentence in a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. The district court denied relief, and the judgment was affirmed on appeal.

a. In 2009, six years after his trial, petitioner filed a motion in the district court for authorization to interview jurors in support of an anticipated collateral attack under Section 2255. Pet. App. 9; see id. at 89-106. In the motion, petitioner stated that he sought to ascertain "whether any member of the jury panel engaged in ex parte contacts, considered extrajudicial evidence, allowed bias or prejudice to cloud their judgment, or intentionally concealed or failed to disclose material information relating to their qualifications to serve as jurors in [his] case." Id. at 90. Pointing again to the prosecutor's comment at closing argument about petitioner's "turn[ing] his back on his religious and cultural heritage," 502 F.3d at 994-995, petitioner requested "to interview the jurors about racial and religious prejudice on this point to see whether [petitioner's] Navajo beliefs, or the allegation that the crime violated his Navajo beliefs, played any part in his death sentence," Pet. App. 98; see id. at 97-98.

Petitioner also argued that publicity surrounding his trial and potential acts of juror misconduct warranted granting his request for juror interviews. Id. at 98-100.

Petitioner's request to interview jurors was governed by Rule 39.2 of the District of Arizona's Local Rules of Civil Procedure, which is incorporated into the Local Rules of Criminal Procedure. See Pet. App. 10 n.2. Local Rule 39.2(b) requires a defendant seeking permission to interview jurors after trial to file, "within the time granted for a motion for a new trial," a set of "written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories." D. Ariz. L. R. Civ. P. 39.2(b). The Rule provides that permission to interview jurors "will be granted only upon the showing of good cause." Ibid. Here, petitioner argued that good cause existed "because an investigation into potential juror misconduct was a necessary part of any federal capital post-conviction investigation." Pet. App. 10; see id. at 92-96. Petitioner did not submit any written interrogatories or an affidavit, nor did he identify any "evidence of juror impropriety." Id. at 10; see id. at 95 n.4 (petitioner's motion, arguing that it would be "premature to ask whether the investigation will uncover facts revealing meritorious, cognizable claims").

The district court denied petitioner's witness-interview request. Pet. App. 45-54. The court first determined that petitioner had failed to comply with the procedural requirements

of Local Rule 39.2 because his motion was untimely and because he had failed to file proposed interrogatories and had failed to submit an affidavit setting forth reasons for interrogatories. Id. at 46. The court also determined that, even "overlook[ing] the motion's procedural deficiencies," petitioner had failed to establish "good cause." Id. at 46-47. The court explained that "[p]etitioner must, at a minimum, make a preliminary showing of juror misconduct to establish good cause to conduct juror interviews," and that he had not done so. Id. at 47.

The district court expressly addressed and rejected all of petitioner's asserted bases for good cause. First, it found petitioner's reliance on the prosecutor's closing-argument statement that petitioner had "turned his back on his religious and cultural heritage" to be misplaced. Pet. App. 47 (citation omitted). The court observed that Federal Rule of Evidence 606(b) -- which generally prohibits jurors from testifying about their deliberations -- "plainly prohibited" an inquiry into "the subjective effect of the prosecutor's statements on the jury's sentencing deliberation." Ibid. It also observed that, in any event, the court of appeals had already considered the prosecutor's comment on direct appeal and had not found it to be improper. Ibid. Second, the district court found that petitioner's stated concerns about publicity appeared to be "nothing more than a fishing expedition" and that petitioner "ha[d] not demonstrated any factual basis to support his claim that jurors may have been

exposed to prejudicial newspaper articles in the jury room." Id. at 48-49. Finally, the court found that petitioner's arguments about possible juror misconduct were "based on wholesale speculation." Id. at 49.

b. In his collateral attack under Section 2255, petitioner alleged -- in the course of asserting 28 "Issues for Relief" -- that the district court's denial of his request to interview jurors violated the Fifth, Sixth, and Eighth Amendments. D. Ct. Doc. 30, at ii (Nov. 12, 2009) (capitalization altered; emphasis omitted); see id. at 183-187. Petitioner argued, in particular, that the denial of his interview request deprived him of the opportunity to ensure that his jury was impartial and that the verdict was reliable. See id. at 187-189.

The district court denied petitioner's Section 2255 motion. D. Ct. Doc. 56, at 61 (Sept. 30, 2010). Among other things, the court rejected petitioner's challenge to the denial of his motion to interview jurors because the court found that the claim alleged an "error in a postconviction proceeding, not at trial or sentencing," and thus "fail[ed] to state a cognizable claim for relief under § 2255." Id. at 60. The court did not grant a COA on that claim. Pet. App. 13.

c. The court of appeals likewise did not grant a COA on that claim (or any other claim on which the district court had not itself granted a COA), and affirmed the denial of relief on the claims that the district court had certified, with Judge Reinhardt

dissenting in part. 790 F.3d at 894 & n.7. This Court denied a petition for a writ of certiorari. 137 S. Ct. 38.

4. On March 5, 2018, petitioner filed a motion (Pet. App. 77-88) under Federal Rule of Civil Procedure 60(b)(6), which provides that a court "may" reopen a final judgment, order, or proceeding if the movant shows "any * * * reason that justifies relief" other than those listed in Rules 60(b)(1)-(5). Fed. R. Civ. P. 60(b)(6). A Rule 60(b)(6) motion must be brought "within a reasonable time," Fed. R. Civ. P. 60(c)(1), and a movant must "show 'extraordinary circumstances'" to justify relief. Gonzalez v. Crosby, 545 U.S. 524, 529, 535 (2005) (citation omitted). The district court denied the motion and the court of appeals affirmed.

a. In his Rule 60(b)(6) motion, petitioner asked the district court to "re-open this case" in order to allow him "to move for access to the jurors" again. Pet. App. 87. Petitioner asserted that this Court's decision in Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), had "cast[] doubt" on the district court's denial of his 2009 request for permission to interview jurors, Pet. App. 79; see id. at 82-85. In Pena-Rodriguez, a state jury had found a Hispanic defendant guilty, and two jurors had voluntarily disclosed to defense counsel that "during deliberations, another juror had expressed anti-Hispanic bias toward [the defendant] and [his] alibi," but the state courts had concluded that Colorado's analogue to Federal Rule of Evidence 606(b) precluded reliance on such evidence of apparent racial or

ethnic bias during the deliberations as a basis for impeaching the verdict. 137 S. Ct. at 861-862. This Court granted certiorari and reversed, "hold[ing] that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that" Rule 606(b)'s "no-impeachment rule give way." Id. at 869.

The district court rejected petitioner's contention that Pena-Rodriguez entitled him to reopen the collateral proceedings in his case. Pet. App. 37-44. The court observed that petitioner has "not alleged any reason to believe that any of the jurors in his case were biased against him due to his race"; that without some "preliminary showing of bias," Local Rule 39.2 "prohibits the fishing expedition [p]etitioner requests"; and that "Peña-Rodriguez does not alter that result." Id. at 43. The court accordingly determined that petitioner was "no more entitled to interview jurors now than he was when he made his initial request." Ibid. In addition to denying the Rule 60(b)(6) motion, the court also declined to issue a COA. Ibid.

b. The court of appeals granted a COA to review the district court's denial of the Rule 60(b)(6) motion. See C.A. Doc. 10-1, at 1 (Apr. 25, 2019). The court of appeals also stayed petitioner's execution -- then scheduled for December 2019 -- pending the resolution of the appeal. C.A. Doc. 26, at 1 (Oct. 4, 2019). After briefing and argument, it unanimously affirmed the

district court's decision not to reopen petitioner's collateral proceedings. Pet. App. 1-35.

The court of appeals observed that it had "long imposed restrictions on lawyers seeking access to jurors," and that the rules restricting such access "'(1) encourage freedom of discussion in the jury room; (2) reduce the number of meritless post-trial motions; (3) increase the finality of verdicts; and (4) further Federal Rule of Evidence 606(b) by protecting jurors from harassment and the jury system from post-verdict scrutiny.'" Pet. App. 20 (citation omitted). And the court explained that Federal Rule of Evidence 606(b) "generally provides that a juror may not testify about statements and incidents that occurred during the jury's deliberations" and that "a court 'may not receive a juror's affidavit or evidence of a juror's statement on these matters.'" Id. at 21-22 (quoting Fed. R. Evid. 606(b)(1)).

The court of appeals recognized that, in Pena-Rodriguez, this Court had held that "'where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant,' then 'the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement.'" Pet. App. 24 (quoting Pena-Rodriguez, 137 S. Ct. at 869). But the court observed that Pena-Rodriguez had also "acknowledged and confirmed the longstanding rules giving trial courts discretion over lawyer efforts to investigate and interview jurors." Id. at 25; see Pena-

Rodriguez, 137 S. Ct. at 869. The court of appeals explained that although Pena-Rodriguez "established a new exception to Rule 606(b)," it "left untouched the law governing investigating and interviewing jurors," thereby allowing district courts to "continue to exercise their discretion in granting motions to interview jurors and to implement and adhere to rules such as Local Rule 39.2 requiring a showing of good cause." Pet. App. 26-27 (citation omitted). And the court of appeals emphasized that "[a]ll other circuits that have considered" the question had likewise determined that Pena-Rodriguez does not call into question local rules regulating lawyers' post-trial contact with jurors. Id. at 27; see id. at 27-28 (discussing cases).

The court of appeals accordingly determined that "[b]ecause Peña-Rodriguez [did] not override local court rules or compel access to jurors," the decision did not "constitute 'extraordinary circumstances' for purposes of Rule 60(b)." Pet. App. 27; see id. at 29. In reaching that determination, the court emphasized that, at petitioner's trial, "the district court took significant steps to prevent racial bias," including during voir dire and in the jury instructions. Id. at 29. The court of appeals also observed that the jurors in petitioner's case had had "ample opportunities * * * to report any racial bias," but -- unlike the two jurors in Pena-Rodriguez -- had made no such reports. Id. at 30. And because petitioner had "presented no evidence of racial bias," the court declined to decide "the extent to which procedural rules

must give way" in a case where a criminal defendant makes a preliminary showing of juror bias. Id. at 30-31.

Judge Christen joined the court of appeals' opinion in full while writing separately to express her view that "this case warrants careful consideration" in light of the Navajo Nation's opposition to the death penalty. Pet. App. 34; see id. at 31-34. Judge Christen acknowledged that the evidence of petitioner's guilt was "overwhelming" and that the court had already determined in petitioner's first appeal that "the United States was legally permitted to seek death pursuant to the carjacking statute." Id. at 32-33; see 502 F.3d at 946-949.

Judge Hurwitz similarly joined the court of appeals' opinion in full while writing separately to "suggest that the current Executive * * * take a fresh look at the wisdom of imposing the death penalty" in this case given the Navajo Nation's position. Pet. App. 34. Like Judge Christen, Judge Hurwitz "d[id] not question the government's legal right to seek the death penalty," and he recognized that the court had "already held that [the government] had the statutory right to do so." Ibid.

c. The court of appeals entered judgment on April 30, 2020, and denied petitioner's rehearing petition on July 8, 2020. Pet. App. 1, 36. On July 15, 2020, the court denied petitioner's motion to stay the issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari. C.A. Doc. 45,

at 1; see ibid. (noting that Judge Hurwitz would have granted the motion).

Five days later -- and two days before the mandate was scheduled to issue -- petitioner filed a second rehearing petition, seeking further review of the denial of his motion to stay the issuance of the mandate. C.A. Doc. 46, at 1-2 (July 20, 2020); see Fed. R. App. P. 41(b). The filing of that second rehearing motion apparently itself delayed the issuance of the mandate, which did not in fact issue on the previously understood schedule. On July 29, 2020, the government notified the court of appeals that petitioner's execution had been rescheduled for August 26, 2020, but that the Federal Bureau of Prisons would not execute petitioner as long as the court's stay remained in place. C.A. Doc. 47, at 2. On August 11, 2020, the court denied petitioner's second rehearing petition. C.A. Doc. 52, at 1; see ibid. (noting that Judge Hurwitz would have granted the petition). On August 13, 2020 -- approximately three-and-a-half months after the panel decision and more than a month after the court of appeals declined to rehear that decision en banc -- petitioner filed the petition for a writ of certiorari.

The court of appeals' mandate issued on August 18, 2020. The following day, petitioner filed an application to this Court for

a stay of his execution pending the disposition of his petition for a writ of certiorari.*

ARGUMENT

Petitioner's application for a stay, and his petition for a writ of certiorari, should be denied. In order to obtain a stay of execution pending consideration of a petition for a writ of certiorari, a movant must first establish a likelihood of success on the merits -- specifically, "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" as well as "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citations omitted). A movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citations omitted). If the movant satisfies those prerequisites, the Court considers whether a stay is appropriate

* Earlier this month, petitioner also filed a challenge in the court of conviction to the manner in which his execution will be carried out, premised principally on the theory that the Federal Death Penalty Act requires the federal government to adhere to certain lethal-injection protocols used by the State of Arizona. Cf. Barr v. Roane, 140 S. Ct. 353, 353 (2019) (statement of Alito, J., respecting the denial of stay or vacatur). The district court declined to stay his execution or grant any other relief on the basis of that challenge. See 01-cr-1062 D. Ct. Doc. 618, at 16 (Aug. 13, 2020). On August 19, 2020, the Ninth Circuit denied his motion for a stay of execution pending appeal in those proceedings and affirmed the district court's order. 20-99009 C.A. Doc. 18-1, at 13 (per curiam); see p. 38, infra.

in light of the "harm to the opposing party" and "the public interest." Nken v. Holder, 556 U.S. 418, 435 (2009).

Petitioner cannot satisfy those standards. First and foremost, he has failed to establish a reasonable probability that this Court will grant certiorari, let alone a significant possibility of reversal. Petitioner contends (Pet. 10-19; Stay Appl. 2-4) that this Court's decision in Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), entitles him to an opportunity to interview the jurors from his trial, without regard to local court rules, in order to investigate the possibility that racial bias may have affected the jury's deliberation. Petitioner also contends (Pet. 19-21; Stay Appl. 4-5) that this case implicates a division of authority within the courts of appeals regarding Federal Rule of Civil Procedure Rule 60(b)(6). Both contentions lack merit. The court of appeals correctly determined that Pena-Rodriguez does not provide a basis for invoking Rule 60(b)(6) to reopen his long-final collateral proceedings attacking his original criminal judgment. The Court recently denied a petition for a writ of certiorari presenting a similar question in another capital case, see Robinson v. United States, 140 S. Ct. 1128 (2020) (No. 19-5535), and nothing supports a different result here. Petitioner has also failed to demonstrate that the balance of equities favors a stay, which would undermine the government's and the public's interest in the timely enforcement of petitioner's lawful sentence. Neither further review nor a stay is warranted.

I. PETITIONER HAS FAILED TO SHOW THAT THIS COURT IS LIKELY TO REVIEW AND REVERSE THE COURT OF APPEALS' DECISION

As a threshold matter, the court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Petitioner accordingly presents no sound basis for either certiorari review or a stay pending such review.

A. This Court's Decision In Pena-Rodriguez Does Not Call Into Question The District Court's Application Of The Local Rule On Juror Contact To Petitioner's Case

Rules that protect jury verdicts from impeachment based on juror testimony, like their common-law antecedents, are designed to "both promot[e] the finality of verdicts and insulat[e] the jury from outside influences." Warger v. Shauers, 574 U.S. 40, 45 (2014). Without such rules, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." McDonald v. Pless, 238 U.S. 264, 267 (1915). To ensure that such circumstances do not arise, Federal Rule of Evidence 606(b) generally precludes using juror testimony to impeach a verdict, and lower courts have recognized that "district courts have the power to make rules and issue orders prohibiting attorneys and parties from contacting jurors, whether directly or indirectly, absent prior court approval." United States v. Venske, 296 F.3d 1284, 1291 (11th Cir. 2002), cert. denied, 540 U.S. 1011 (2003). Such rules "are quite common" and "encourage freedom of discussion in the jury room." Cuevas v. United States, 317 F.3d

751, 753 (7th Cir.), cert. denied, 540 U.S. 909 (2003). The district court here is thus one of many courts to have a rule prohibiting post-trial juror contact. See D. Ariz. L. R. Civ. P. 39.2(b); see also 27 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure § 6076 (2d ed. 2007).

Nothing in this Court's decision in Pena-Rodriguez suggests that the local rule's application was unconstitutional in the circumstances of petitioner's case. Pena-Rodriguez involved the state trial of a Hispanic defendant with a Hispanic alibi witness, after which two jurors voluntarily informed defense counsel that a third juror had "expressed anti-Hispanic bias" during deliberations. 137 S. Ct. at 861. The trial court, while acknowledging "apparent bias" based on the two jurors' affidavits, nonetheless denied the defendant's motion for a new trial on the ground that Colorado's equivalent to Federal Rule of Evidence 606(b) precluded it from considering those affidavits. Id. at 862. This Court ultimately held "that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment" requires such a rule to "give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." Id. at 869.

Petitioner here, however, cannot identify any such "clear statement" by a juror indicating racial animus, or any other non-speculative basis for concluding that -- notwithstanding their

express written certification to the contrary, Pet. App. 7 -- any juror harbored such bias. In setting forth its holding, the Court in Pena-Rodriguez made clear that a "threshold showing" of "racial animus" is required before a no-impeachment rule must give way. 137 S. Ct. at 869. Specifically, the Court required that, in order to pierce a rule forbidding impeachment of the jury verdict based on the basis of jury testimony about deliberations, the defendant must first make "a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." Ibid. And the Court emphasized that "[n]ot every offhand comment" by a juror "indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." Ibid.

The Court in Pena-Rodriguez also expressly recognized that local juror-contact rules could apply to cases, like this one, in which a defendant raises speculative claims of possible juror bias. "The practical mechanics of acquiring and presenting [the necessary] evidence," the Court explained, "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." 137 S. Ct. at 869. The Court found no inherent inconsistency between the "limits" prescribed by such rules -- which "provide jurors some protection when they return to their daily affairs after the verdict has been entered" -- and the Sixth

Amendment-required "racial-bias exception" to the principle that jury verdicts should not be impeached by juror testimony. Id. at 869-870. The Court observed that limits "on juror contact" were in place in several States that had already recognized such a racial-bias exception under state law. Id. at 870; see ibid. (citing examples and discussing a "pattern" of cases in which jurors had voluntarily provided evidence of bias). And the Court emphasized that other safeguards exist "to prevent racial bias in jury deliberations," including "careful voir dire" and instructions informing jurors of their "duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind." Id. at 871.

B. Petitioner's First Question Does Not Warrant Review And Therefore Does Not Justify A Stay

Petitioner principally seeks review to address what he describes as "the 'open question' of Peña-Rodriguez" and to "establish that barring criminal defendants from interviewing their trial jurors about racial bias is untenable." Pet. 10 (emphasis omitted); see Pet. 10-19; Stay Appl. 2-4, 5-8. But petitioner appears to acknowledge (Pet. 11) that Pena-Rodriguez did not itself override rules limiting lawyers' ability to interview jurors after a trial, like the local rule that the district court applied here, see pp. 13-14, supra. And Petitioner identifies no conflict in the lower federal or state courts concerning the application of Pena-Rodriguez. Cf. United States

v. Birchette, 908 F.3d 50, 58-60 (4th Cir. 2018) (affirming district court's application of a local rule requiring "good cause" to justify juror interview), cert. denied, 140 S. Ct. 162 (2019); United States v. Robinson, 872 F.3d 760, 764, 770 (6th Cir. 2017) (similar), cert. denied, 139 S. Ct. 55 (2018), 139 S. Ct. 56 (2018), and 139 S. Ct. 786 (2019). To the extent that some jurisdictions have more permissive local juror-inquiry rules or practices (see Pet. 17-18), any variance in such procedures was already anticipated by the Court in Pena-Rodriguez, see 137 S. Ct. at 869. No sound basis exists for further review, particularly in the circumstances of this case.

1. As an initial matter, the posture of this case does not allow for resolution of any "open question" from Pena-Rodriguez. Petitioner is not seeking resolution of such a question in the context of direct review of a criminal judgment, or even direct review of the denial of collateral relief. He is instead seeking it on review of the denial of a motion to reopen collateral proceedings under Federal Rule of Civil Procedure 60(b)(6) -- a context in which such an extension of Pena-Rodriguez would be foreclosed.

In Gonzalez v. Crosby, 545 U.S. 524 (2005), this Court explained that its "cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances'" to justify reopening a final judgment, which will only "rarely occur in the habeas context." Id. at 535 (citation omitted). And

Gonzalez further explained that one of the Court's decisions construing the federal habeas statutes did not constitute an extraordinary circumstance, even if that decision showed that the district court had erred in dismissing the prisoner's habeas petition on statute-of-limitations grounds. Id. at 536-537. It follows a fortiori that a procedural question purportedly left "open" in Pena-Rodriguez cannot provide the basis for reopening proceedings under Rule 60(b)(6).

2. Even assuming that a change in decisional law regarding post-conviction procedures could in some instances amount to an extraordinary circumstance, petitioner still could not demonstrate that the district court abused its discretion in denying his Rule 60(b)(6) motion. See Pet. App. 13. Pena-Rodriguez neither supports petitioner's argument here, nor even leaves the issue "open." It instead makes clear that the application of juror-interview restrictions like the local rule here remains valid. The decision in Pena-Rodriguez is thus neither an "extraordinary circumstance" under Rule 60(b)(6) nor even a basis for relief if the argument were before the Court on de novo review.

As explained above, Pena-Rodriguez directly recognized that "[t]he practical mechanics of acquiring and presenting" evidence of racial animus "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." 137 S. Ct. at 869. The Court expressed no concerns about the lawfulness of such

rules, or the practical implications of applying them. It instead observed that "limits on juror contact can be found in other jurisdictions that" had previously "recognize[d] a racial-bias exception" to the no-impeachment rule, id. at 869-870; explained that counsel may still develop the required evidence when jurors "come forward of their own accord," id. at 869; and noted instances in which jurors had done so -- as they had in Pena-Rodriguez itself, id. at 870. Petitioner's repeated reliance (Pet. i, 13-14) on Justice Alito's concern in dissent that the majority's holding in Pena-Rodriguez might in the future be applied to juror-contact rules provides no basis for concluding that the majority was in fact invalidating the very procedures that it approved. See Pena-Rodriguez, 137 S. Ct. at 884 (Alito, J., dissenting).

Moreover, in the context of this particular case, petitioner focuses (Pet. 14-15) exclusively on the Arizona local rule's "good cause requirement" and does not explain why Pena-Rodriguez would constitute an extraordinary circumstance that would warrant excusing his failure to comply with the local rule's other requirements. In his 2009 request, petitioner not only failed to show good cause but also failed to file "within the time granted for a motion for a new trial" or to provide "written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories." Pet. App. 10 n.2 (quoting D. Ariz. L. R. Civ. P. 39.2(b)). The local rule requires those prerequisites for any

request to interview jurors after trial, regardless of the particular justification given for the request. See ibid. And in denying petitioner's 2009 request for leave to interview jurors, the district court observed that those "procedural deficiencies" alone were "grounds for denial." Id. at 46. Even if Pena-Rodriguez could plausibly be read to foreclose a "good cause" standard for juror interviews in cases involving otherwise unsupported claims of racial bias, it does not suggest that courts are disabled from placing reasonable limits on the time and form of a request for such interviews.

3. Petitioner's case-specific arguments for further review are likewise unsound. As both courts below observed, petitioner "has presented no evidence of racial bias here." Pet. App. 31 (court of appeals); see id. at 43 (district court's determination that "[p]etitioner has not alleged any reason to believe that any of the jurors in his case were biased against him due to his race"). Petitioner suggests in passing that the record contains "evidence of racial animus in the * * * media coverage of his case" (Pet. 3); that Native Americans were excluded from the petit jury (Pet. 4-5, 23); and that the prosecutor made improper comments at closing argument (Pet. 5, 23). But those contentions do not suggest that the jurors themselves were biased; instead, they largely repeat earlier arguments that the lower courts have found to be unsubstantiated.

For example, the court of appeals determined in petitioner's direct appeal "that the racial composition of the jury pool and petit jury * * * and comments made by the prosecutor in closing argument did not constitute errors at trial." Pet. App. 29; see 502 F.3d at 951-959, 970-971. And with respect to petitioner's allegations of biased media coverage, the district court found that petitioner did not "demonstrate[] any factual basis to support his claim that jurors may have been exposed to prejudicial newspaper articles in the jury room," and that he did not identify any specific article that would purportedly have had a prejudicial effect on deliberations. Pet. App. 48; see id. at 48-49. Nothing about those rejected claims suggests that individual jurors harbored racial animus, or that petitioner should be entitled to question all of them, 17 years after the trial, about whether or not they might have had any such animus. At the trial itself, "the district court took significant steps to prevent racial bias," including in the certifications jurors were required to complete at the penalty phase, Pet. App. 29; see pp. 7-10, supra, and nothing since has called the good faith of the jurors into question.

Petitioner asserts (Pet. 12-13) that his failure to adduce any evidence of racial bias during the deliberations was the result of a "Catch-22" in which he was not allowed to interview jurors to develop the necessary evidence. But petitioner was afforded the same opportunity that the defendant received in Pena-Rodriguez.

At the conclusion of petitioner's trial, the district court instructed the jurors that they were permitted but not required to speak with counsel about the case, and that the lawyers would "be standing in the hallway" as the jurors exited should the jurors wish to speak with them. Pet. App. 8 (quoting instruction). The jurors in Pena-Rodriguez received a similar instruction, and two of them chose to speak with defense counsel. See 137 S. Ct. at 861-862. The jurors here, by contrast, did not report any racial bias during deliberations, despite "ample opportunities" to do so if any had surfaced. Pet. App. 30.

C. Petitioner's Second Question Likewise Does Not Warrant Review

Petitioner separately contends that review is warranted to address "whether a change in decisional law is an 'extraordinary circumstance' under Rule 60(b)." Pet. 19 (emphasis omitted); see Pet. 3-4, 19-21; Stay Appl. 4-5. Even as framed by petitioner, however, that issue has no bearing on the disposition of his case. As petitioner acknowledges (Pet. 20 n.6), the court of appeals already applied the rule that he advocates and still found that Rule 60(b)(6) relief was unwarranted.

Moreover, notwithstanding his assertion (Pet. 20) of a circuit conflict, petitioner does not identify any court that would deem Pena-Rodriguez an extraordinary circumstance warranting Rule 60(b) relief in a case like this one. See Moses v. Joyner, 815 F.3d 163, 169 (4th Cir. 2016) (noting the "admirable consistency"

of the law on Rule 60(b)(6) since Gonzalez and explaining that even decisions such as those cited by petitioner here "are peppered with cautionary language underscoring that" a change in decisional law "'without more, does not entitle a habeas petitioner to Rule 60(b)(6) relief'") (quoting Cox v. Horn, 757 F.3d 113, 124 (3d Cir. 2014), cert. denied, 575 U.S. 929 (2015)), cert. denied, 137 S. Ct. 1202 (2017); see also, e.g., Biggins v. Hazen Paper Co., 111 F.3d 205, 212 (1st Cir. 1997) (stating, in a decision predating Gonzalez, that it would be a "dubious practice to reopen a final judgment under Rule 60(b)(6) solely because of later precedent pointing in a different direction," at least "absent extraordinary circumstances" other than the later precedent itself). Accordingly, petitioner's second question presented does not warrant further review in this case.

II. EQUITABLE CONSIDERATIONS WEIGH AGAINST A STAY

Petitioner's application for a stay should also be denied because the balance of equities weighs in favor of permitting the government to carry out his lawful sentence, rather than countenancing further delay. This Court has explained 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 v. McDonough, 547 U.S. 573, 584 (2006) (quoting Nelson v. Campbell, 541 U.S. 637, 650 (2004)); see Gomez v. United States Dist. Court, 503 U.S. 653, 654

(1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").

Here, the court of appeals issued its judgment on April 30, 2020; denied a petition for rehearing on July 8, 2020; and denied petitioner's motion to stay the mandate on July 15, 2020. On July 9, 2020, in its response to petitioner's motion to stay the mandate, the government observed that petitioner could seek review in this Court at any time and represented that his execution would not be carried out before August 24, 2020 -- giving him, at the time, more than a month and a half to seek relief from this Court. C.A. Doc. 41, at 11-12 (July 9, 2020). On August 3, 2020, in response to petitioner's motion to stay his execution date, the government further represented that it would endeavor to respond promptly to any filing in this Court, to ensure adequate time for this Court to consider any request for relief. C.A. Doc. 49, at 15.

In the ordinary course the court of appeals' mandate would have issued a week after the denial of petitioner's rehearing petition, Fed. R. App. P. 41(b), thus dissolving the stay that the court of appeals had granted at the outset of petitioner's Rule 60(b)(6) appeal. But petitioner filed a second rehearing petition, seeking en banc review of the denial of his motion to stay the mandate. C.A. Doc. 46, at 1-2 (July 20, 2020). As an apparent result of petitioner's second rehearing petition, the mandate did

not ultimately issue until August 18, 2020, approximately a month after it otherwise would have. On July 29, 2020, the government gave notice that the Federal Bureau of Prisons had re-scheduled petitioner's execution for August 26, 2020. See C.A. Doc. 47, at 2 (July 29, 2020). Notwithstanding the ample time to seek this Court's review of the panel decision, which was issued three-and-a-half months ago, petitioner did not file his petition for a writ of certiorari until August 13, 2020, and did not file a stay motion until after the mandate issued. The temporal proximity of that motion to petitioner's execution date -- which he has known of for weeks, and which was itself a rescheduling of his original date in December 2019 -- is a result of petitioner's own litigation decisions. Under these circumstances, petitioner has no equitable right to demand that his execution be further delayed. See Hill, 547 U.S. at 584; see also Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019)("Last-minute stays should be the extreme exception, not the norm[.]").

This Court has repeatedly emphasized in the context of state executions that "[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew, 139 S. Ct. at 1133 (quoting Hill, 547 U.S. at 584); see, e.g., Nelson, 541 U.S. at 650 (describing "the State's significant interest in enforcing its criminal judgments"); Gomez, 503 U.S. at 654 (noting that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment").

Once post-conviction proceedings "have run their course," as they have here, "an assurance of real finality" is necessary for the government to "execute its moral judgment." Calderon v. Thompson, 523 U.S. 538, 556 (1998).

The government's interest in carrying out petitioner's sentence is magnified by the heinous nature of his crimes. Petitioner and his accomplice killed a 63-year-old grandmother, "stabbing her 33 times and moving her mutilated body to the back seat next to her granddaughter," who was nine years old. Pet. App. 5. After driving the grandmother's truck "some 30-40 miles into the mountains" with the nine-year-old girl "beside her grandmother's body," 502 F.3d at 943, petitioner "ordered the granddaughter to get out of the truck and 'lay down and die,'" at which point he "slit her throat twice, and then dropped rocks on her head to finish her off," Pet. App. 5. "[T]o conceal evidence," petitioner and his accomplice then "severed the heads and hands of both victims and pulled their torsos into the woods." Ibid. Petitioner has already pursued direct review and collateral review in the district court and the court of appeals. No further delay of his sentence is warranted.

Petitioner errs in suggesting (Stay Appl. 11-12) that the Court should grant his stay motion here in order to allow additional time for the lower courts to consider the challenge to the lethal-injection protocol that he has raised in the court of conviction, or to allow the Executive Branch more time to consider

his clemency petition. After petitioner filed his stay application in this Court, the court of appeals unanimously rejected his request for a stay based on the protocol challenge, finding that he had failed to show "either that he is likely to succeed on the merits or that it is probable that he would suffer an irreparable injury in the absence of a stay." 20-99009 C.A. Doc. 18-1, at 1-2 (Aug. 19, 2020) (per curiam); see id. at 12-13. Petitioner has not sought this Court's review of the protocol challenge; he does not argue in his stay motion that the protocol challenge would provide an independent basis for a stay, even if this Court would deny the petition for a writ of certiorari on his Rule 60(b)(6) claim; and the present stay motion is not the appropriate place for such an argument, which relates to a separate claim that he has only recently asserted. As for clemency, it is a function committed to the sole discretion of the President of the United States. U.S. Const. Art. II, § 2, Cl. 1; see Harbison v. Bell, 556 U.S. 180, 187 (2009). If the Executive Branch requires additional time to process petitioner's clemency request, the Executive Branch could delay his execution for that purpose.

Granting a stay at this stage would cause "severe prejudice" to the government, In re Blodgett, 502 U.S. 236, 239 (1992) (per curiam), which is fully prepared to implement a lawful sentence imposed many years ago. As the government has recently explained to this Court, a scheduled federal execution date cannot readily be moved in light of complex logistical considerations. See Gov't

Appl. at 37-38, Barr v. Lee, No. 20A8 (filed July 13, 2020). At this late stage, petitioner should not be permitted to frustrate the government's effort to carry out his execution.

CONCLUSION

The application for a stay of execution and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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