IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ORLANDO CORDIA HALL, Petitioner-Appellant, vs. **T.J. WATSON, WARDEN OF USP TERRE HAUTE** Respondent-Appellee.	CIVIL ACTION Case No. 20-3216 DEATH PENALTY CASE **EXECUTION SCHEDULED FOR NOVEMBER 19, 2020**

APPELLANT'S EMERGENCY MOTION TO STAY EXECUTION

On September 30, the government abruptly set Orlando Hall's execution for this Thursday, November 19, 2020, after undue delays by the government and despite pendency of timely-filed and sustainable challenges to Mr. Hall's conviction and sentence. Now, Mr. Hall faces execution even though he has not yet had the opportunity for the merits of his case to be heard.

Mr. Hall filed his petition under 28 U.S.C. § 2241 after the Fifth Circuit denied him permission to file his case under § 2255 and the § 2241 petition was held in abeyance after Mr. Hall, based on new Supreme Court law, again asked for permission to file a § 2255 motion challenging his conviction. Leave to file was again denied. But, despite the Fifth Circuit's ruling, Mr. Hall has a valid claim for resentencing. As relevant here, he was convicted under § 924(c) of using or

possessing a firearm in connection with a crime of violence—namely, federal kidnapping in violation of 18 U.S.C. § 1201(a). However, as this Court found in *United States v. Jenkins*, 849 F.3d 390, 394 (7th Cir. 2017), kidnapping under § 1201(a) is not a crime of violence for the purposes of a § 924(c) conviction. Because his § 924(c) conviction was improperly founded, Mr. Hall is entitled to resentencing.

To execute Mr. Hall pending the resolution of his claims would be to deny him constitutional process. Mr. Hall respectfully asks the Court to enter an emergency stay of his execution pending the resolution of the present appeal.[1]

[1] As required by Seventh Circuit Rule 22(h)(3)(ii) and (iv), the following documents are exhibits to this motion included in the concurrently-filed Supplemental Appendix: Petition for writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Ex. C); Government's motion to dismiss the petition (Ex. D); Mr. Hall's response to the motion to dismiss and motion for a stay of execution (Ex. E); Government's reply in support of its motion to dismiss and response in opposition to the motion to stay (Ex. F); Mr. Hall's reply in support of his motion to dismiss (Ex. G); Fifth Circuit decision on Mr. Hall's direct appeal (Ex. H); Fifth Circuit orders denying Mr. Hall's 28 U.S.C. § 2255 petition and application for certificate of appealability (Ex. I); and Fifth Circuit's opinion denying his request for permission to file a successive 28 U.S.C. § 2255 petition. Additionally, in connection with his appeal of the Southern District of Indiana's judgment, Mr. Hall has filed the district court's final judgment and order dismissing the petition (Ex. A) and the Fifth Circuit's order denying as moot the movant's request for stay of execution (Ex. B). A certificate of appealability (COA) is not attached per Circuit Rule 22(h)(3)(i) because the appeal is from a § 2241 petition, which has is no COA requirement. *See* 28 U.S.C. § 2253(c)(1)(A)-(B) (requiring a COA for habeas proceedings challenging state court convictions and final orders in § 2255 proceedings); 7th Cir. R. 22(h) (requiring attachment of COA to a stay of

Because the execution is scheduled for November 19, 2020, Mr. Hall further requests that the Court order the government to reply to this emergency motion by close of business on Monday, November 16, 2020, or at a time shortly thereafter that the Court deems appropriate.

BACKGROUND

A. Conviction, Sentence, and Direct Appeal

As relevant here, Mr. Hall was convicted of one count of kidnapping, 18 U.S.C. § 1201(a), and one count of carrying or using a firearm in connection with a crime of violence, 18 U.S.C. § 924(c). Dkt. 1 at 3. The kidnapping count served as the sole predicate for Mr. Hall's § 924(c) conviction. Dkt. 1-3 at 17 (instructing the jury that it could only convict Mr. Hall under § 924(c) if it also convicted him "of interstate kidnapping as alleged in Count One of the Indictment").

Congress defined kidnapping as "unlawfully seiz[ing], confin[ing], inveigl[ing], decoy[ing], kidnap[ping], abuct[ing], or carry[ing] away" the victim and, as relevant here, traveling across state lines. 18 U.S.C. § 1201(a)(1). It made the death penalty available "if the death of *any* person results." *Id.* §

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execution or, in the alternative, an explanation for why the COA is not attached); Fed. R. App. P. 22.

1201(a)(5) (emphasis added); *see also* Dkt. 1-3 at 21 (instructing the jury that it must find that "the death of Lisa Rene resulted").

On direct appeal, the Fifth Circuit affirmed Mr. Hall's convictions and concluded that the government was not required to prove any *mens rea* element with respect to the "resulting in death" sentencing qualifier. *United States v. Hall*, 152 F.3d 381, 416–17 (5th Cir. 1998). On the contrary, the court concluded, Mr. Hall could properly be convicted of a kidnapping "resulting in death" "regardless of [his] mental state . . . with respect to the death." *Id.*[2] Mr. Hall's conviction became final in 1999. *See Hall v. United States*, 526 U.S. 1117 (1999) (cert. denied).[3]

In 2006, in a separate action, the government consented to entry of an injunction preventing the scheduling or carrying out of several federal death sentences during the pendency of legal challenges to the government's then-

[2] *See also United States v. Hayes*, 589 F.2d 811, 821 (5th Cir. 1979) ("No matter how you slice it, 'if death results' does not mean 'if death was intended.'"); *United States v. Schwanke*, 598 F.2d 575, 579 (10th Cir. 1979) (analogizing "if death results" under 18 U.S.C. Section 844(i) to felony murder); *United States v. Barraza*, 576 F.3d 798, 807 (8th Cir. 2009) ("The statute does not require that the deaths result from voluntary and intentional conduct, only that 'the death of any person results' in the course of the kidnapping.").

[3] Mr. Hall's first motion under 28 U.S.C. § 2255 was denied. *Hall v. United States*, No. 4:00-cv- 422-Y, 2004 WL 1908242 (N.D. Tex. Aug. 24, 2004); *Hall v. United States*, 455 F.3d 508 (5th Cir. 2006) (denying certificate of appealability).

existing execution protocol. *See Roane v. Gonzales*, No. 05-2337 (RWR), 2006 WL 6925754, at *1 (D.D.C., Feb. 27, 2006); *see also* Dkt. 45-5 (Ex. E). When Mr. Hall moved to intervene in that case and to be added to the injunction in 2007, the government did not object. Dkt. 45-6 (Ex. F). The government moved on one occasion to lift the injunction. Dkt. 45-7, 45-8 (Exs. G–H). But when the district court denied that motion it chose not to appeal. *See* Dkt. 45-9 (Ex. I) (entering injunction for Mr. Hall notwithstanding motion). Ultimately, for more than a decade, the government took no substantive steps toward revising its execution protocol or lifting the stays to which it had consented. It was apparently content to not carry out Mr. Hall's execution for that entire period, without Mr. Hall taking any action to delay or interfere with the government's development of what it believes is a constitutionally satisfactory execution protocol.

B. Initial § 2255 Motion Based on Johnson

While the government waited, the law relevant to Mr. Hall's conviction and sentence changed. In 2015, the Supreme Court decided *Johnson v. United States*, 576 U.S. 591 (2015), which confirmed that the federal Armed Career Criminal Act ("ACCA") was to be analyzed using the "categorical approach" and, under that approach, the ACCA's residual clause was unconstitutionally

vague. A year later, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Court made *Johnson* retroactively applicable on collateral review.

Following *Welch*, Mr. Hall asked the Fifth Circuit for permission to file a successive § 2255 motion challenging his § 924(c) conviction based on *Johnson* and *Welch*. *See* Dkt. 1-8. Mr. Hall argued that § 1201(a) could no longer serve as the predicate for his § 924(c) conviction because federal kidnapping was not categorically a crime of violence. The Fifth Circuit denied permission because it viewed *Johnson* and *Welch* as applying only to the ACCA, and not to § 924(c) "or any similarly worded provision." Dkt. 1-8 at 2. Facing a structural barrier to consideration of his claim under § 2255, Mr. Hall initiated this action under § 2241. *See* Dkt. 1.

C. Successive § 2255 Motion Following *Dimaya*

Then the Supreme Court decided *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The Court made clear that *Johnson*'s reasoning was not limited to ACCA convictions. *Id.* at 1223. Shortly thereafter, the Fifth Circuit followed suit and applied *Johnson* to § 924(c). *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), *aff'd* 139 S. Ct. 2319 (2019). As a result, Mr. Hall again requested permission to file a successive § 2255 petition from the Fifth Circuit. The government urged the Fifth Circuit to deny permission, arguing that § 1201(a) is categorically a crime of violence under the elements clause of § 924(c), while

simultaneously asking the District Court to dismiss Mr. Hall's § 2241 petition because the structural barrier to habeas review via § 2255 had been removed. *See* Dkt. 31 at 4-6. The District Court denied the government's motion to dismiss, instead staying the case while the Fifth Circuit considered Mr. Hall's application for permission. Dkt. 36.

In 2019, the government announced a new execution protocol. A year later, it moved to lift the injunction that had prevented it from scheduling Mr. Hall's execution, a motion the district court ultimately granted on September 20, 2020. *See In re Fed. BOP Execution Protocol Cases*, No. 19-MC-145 (TSC), 2020 WL 5604298, at *4 (D.D.C. Sept. 20, 2020). Eight days later, it moved the Fifth Circuit to expedite its decision on Mr. Hall's request for permission. Two days after that, while active proceedings remained pending in the Fifth Circuit and while this case was stayed in the court below, the government scheduled Mr. Hall's execution for November 19.

The Fifth Circuit then denied Mr. Hall's application for permission to pursue a § 2255 motion raising his § 924(c) claim. *In re: Hall*, ---F.3d---, No. 19-10345, 2020 WL 6375718 (5th Cir. Oct. 30, 2020). Over a strong dissent, panel majority concluded that § 1201(a) is categorically a crime of violence because it "necessarily contemplates the reckless disregard of the risk of serious injury to the victim." *Id.* at *3. This is "especially" so, the court asserted, when

the kidnapping results in any death. *Id.* On that basis,[4] the court refused to allow Mr. Hall to pass through the first of two jurisdictional gates to obtaining review of the merits of his § 2255 claim. *See United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018) (describing the two jurisdictional gates that a successive residual-clause § 2255 movant must satisfy in the Fifth Circuit "to have [his motion] heard on the merits"). In so doing, the Fifth Circuit foreclosed Mr. Hall's access to § 2255 procedures to challenge the validity of his § 924(c) conviction and his sentence. Two days after prevailing in the Fifth Circuit, the government moved to dismiss this case. Dkt. 39. Mr. Hall opposed the motion to dismiss and moved to stay his execution so that his claim to vacate his § 924(c) conviction and his related sentence of death could be heard on the merits.

The Southern District of Indiana granted the motion and dismissed the petition on November 14. Dkt. 48, 49. It did so solely on the basis of its view that the Fifth Circuit had already ruled on the merits of his claims. Dkt. 49 at 5-

[4] The Fifth Circuit also opined, in dicta, that the Supreme Court had not yet determined that its decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), was retroactively applicable on collateral review. *Hall*, 2020 WL 6375718 at *5–6. That argument conflicts with the holdings of four Courts of Appeals, all of which agree that the Supreme Court has made *Davis* retroactive within the meaning of § 2255(h)(2). *See In re Matthews*, 934 F.3d 296, 301 (3d Cir. 2019) (prima facie case for authorization); *In re Franklin*, 950 F.3d 909, 910–11 (6th Cir. 2020); *In re Mullins*, 942 F.3d 975, 977–79 (10th Cir. 2019); *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019).

6. At the same time, the district court denied the motion to stay Mr. Hall's execution. *Id.* at 8. Mr. Hall promptly appealed.

ARGUMENT

This Court should stay Mr. Hall's execution. The stay factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). In capital cases, stays should be used to "give non-frivolous claims of constitutional error the careful attention that they deserve." *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c). In other words, a "death sentence cannot begin to be carried out . . . while substantial legal issues remain outstanding." *Id.* As described below, all of these factors cut in Mr. Hall's favor.

A. There Is a Significant Possibility Mr. Hall's Appeal of the District Court's Judgment Dismissing His § 2241 Petition Will Succeed.

Mr. Hall's petition invokes 28 U.S.C. § 2255(e)'s "savings clause," "which permits an application for a writ of habeas corpus under section 2241 by someone who otherwise would be required to use the motion under 2255 and has failed in that effort, if 'it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.'" *Webster v. Daniels*, 784 F.3d

1123, 1135 (7th Cir. 2015) (quoting 28 U.S.C. § 2255(e)). "[W]hether section 2255 is inadequate or ineffective depends on whether it allows the petitioner 'a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence'" and "arguments addressing 'the fundamental legality of a sentence' could be entertained, not just those attacking conviction." *Id.* at 1136.

First, there is a significant possibility that Mr. Hall can show "some kind of structural problem with section 2255." *Id.* As the full merits brief contemporaneously filed with this motion explains, Mr. Hall has twice sought permission to seek a reliable judicial determination of the fundamental legality of his § 924(c) conviction and death sentence under § 2255. Both times, the Fifth Circuit has turned him away because it determined that § 2255 was not available.

Mr. Hall's first application was refused in 2016 because the Fifth Circuit held that *Johnson*'s logic did not apply to § 924(c). Even though the Fifth Circuit later disavowed that decision and the Supreme Court confirmed it was wrong, the 2016 denial had the effect of running out Mr. Hall's one-year AEDPA clock even though he had taken all necessary steps to vindicate his rights. *See* 28 U.S.C. 2255(f); *Davis*, 903 F.3d at 483; *see also Davis*, 139 S. Ct. at 2319; *Dimaya*, 138 S. Ct. at 1204. Thus, when Mr. Hall returned to the Fifth Circuit, he had to rely upon *Dimaya*, and was later ordered by the court to brief

Davis. The Fifth Circuit denied permission again, this time on the theory that kidnapping is always a crime of violence because even kidnapping through "inveigling" or "decoying" involves a reckless disregard of the risk of serious physical injury to the victim. *Hall*, 2020 WL 6375718 at *3. Putting aside the dictionary definitions of "inveigle" and "decoy"—which mean to deceive *without* the use or threat of physical force—Judge Dennis's forceful dissenting opinion makes clear that the Fifth Circuit "concoct[ed] a far more onerous requirement for authorization than the statutorily-mandated prima facie standard and thus *erect*[*ed*] *an unprecedented barrier to authorization*." *Id.* at *7 (Dennis, J., dissenting) (emphasis added). What's more, the Fifth Circuit's whole theory of denial—that "decoying" and "inveigling" necessarily involve a reckless disregard for the *risk* of serious injury—is currently pending before the Supreme Court.[5] *See Borden v. United States* 140 S. Ct. 1262 (2020) (granting certiorari on the question of whether the "use of force" encompasses crimes with a *mens rea* of mere recklessness). If the Fifth Circuit is yet again proved wrong in *Borden*, § 2255 may well still be unavailable because, as happened with his

[5] The *reasons* the Fifth Circuit gave for denying permission are not binding on this Court. *See infra* at 10–11. A denial of permission amounts to an admission of non-jurisdiction. And without jurisdiction, there is no law of the case save the determination that review via § 2255 is unavailable. *See Webster v. Daniels*, 784 F.3d at 1135.

Johnson application, Mr. Hall's one-year deadline to invoke *Davis* has already expired.

For Mr. Hall, the Fifth Circuit's repeated denials of permission have rendered § 2255 inadequate and ineffective. As in *Webster*, intervening events—namely the confirmation by the Supreme Court that § 924(c)'s force clause is analyzed using the categorical approach—call into grave doubt the integrity of Mr. Hall's conviction for using or carrying a firearm in connection with a violent felony. *See Webster*, 784 F.3d at 1135. And the door through which Mr. Hall would need to pass in order to obtain review of those arguments has been twice closed by the Fifth Circuit on grounds that are highly doubtful. *See id.*[6] Section 2255 is unavailable and the savings clause must provide an escape valve. *See Webster*, 784 F.3d at 1136. There is a significant possibility

[6] The government would set the bar much higher, suggesting that the mere opportunity to *apply for permission* to file a successive § 2255 means § 2241 becomes unavailable. No authority supports that extreme construction. In *Webster*, the en banc Seventh Circuit agreed that access to § 2241 was available after the Fifth Circuit had denied permission to file a successive § 2255. 784 F.3d at 1135. The question is whether a petitioner has access to a procedure that could lead to the *relief* they seek. *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001). No such procedure is available when permission is denied.

that Mr. Hall can show the kind of structural barrier to relief via § 2255 that opens the door to relief via § 2241.

Second, there is a significant possibility that Mr. Hall will succeed once the merits of his petition are considered. "[K]idnapping under 18 U.S.C. § 1201(a) is not a crime of violence as defined in § 924(c)." *Jenkins*, 849 F.3d at 394. As § 1201(a) kidnapping is the only predicate supporting Mr. Hall's § 924(c) conviction, that conviction must be vacated. This Court has made clear that the first element of kidnapping—unlawfully seizing, confining, inveigling, decoying, kidnapping, abducting, or carrying away—may be satisfied without the use or threatened use of physical force. *Id.* at 393. And any argument that kidnapping involves "an ever-present risk that the situation will devolve to the point that the perpetrator will need to use force" impermissibly "conflates the Force Clause and the Residual Clause." *Id.* "The Force Clause only defines crimes of violence by the elements of those crimes, not by any inherent risk associated with that crime"; such arguments are "properly analyze[d] . . . only under the Residual Clause." *Id.* The Fifth Circuit's reasoning cannot be squared with the categorical approach that the Supreme Court has explained § 924(c)'s language commands. *Davis*, 139 S. Ct. at 2328, 2330. Under a straightforward application of the categorical approach, Mr. Hall's § 924(c) conviction cannot stand.

Nor can his sentence. "[A] district court's sentencing determination is necessarily holistic . . . so when part of a sentence is vacated, the court is entitled to resentence on all counts." *Jackson*, 932 F.3d 556, 558 (7th Cir. 2019).[7] That is what is required here. The invalidity of Mr. Hall's § 924(c) conviction infects his whole sentence and his death sentence in particular. Mr. Hall's jury was instructed at the guilt phase that it had to find beyond a reasonable doubt that his kidnapping conviction was a crime of violence. Dkt. 1-3 at 17 (conditioning § 924(c) conviction on kidnapping conviction); *id.* at 18 (defining "crime of violence" to include a crime "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"). That instruction was

[7] Both *Jenkins* and *Jackson* were GVR'ed in light of *Dimaya*. *United States v. Jenkins*, 138 S. Ct. 1980 (2018). The Seventh Circuit reconsidered *Jenkins* and *Jackson* because, following *Dimaya*, "[s]ome members of the [Supreme] Court were signaling increased discomfort with the use of the categorical approach." *United States v. Jackson*, 932 F.3d 556, 558 (7th Cir. 2019). But once the Supreme Court decided *Davis* and "vindicate[d]" the Seventh Circuit's earlier opinions, there was "[n]othing remaining to be decided with respect to Jenkins and Jackson." *Id.* The Seventh Circuit reinstated its judgment, "vacat[ed] and remand[ed] for full resentencing." *Id.*

wrong.[8] It was indisputably part of the sentencing package and must now be vacated. Mr. Hall is likely to succeed on the merits of his claims.

Nothing about the law-of-the-case doctrine changes this. It is well established that "observations or commentary touching upon issues not formally before the reviewing court do not constitute binding determinations." *Creek v. Vill. of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998). It is equally well established in the Fifth Circuit that a denial of permission to file a successive § 2255 motion is a jurisdictional determination. *See United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018) (describing the two jurisdictional gates that a successive residual-clause § 2255 movant must satisfy in the Fifth Circuit). Indeed, AEDPA confers on the circuit courts only the jurisdiction to determine "whether an application for authorization . . . makes a prima facie showing" with merits questions reserved exclusively to the district court. *In re Smith*, 285 F.3d 6, 7 (D.C. Cir. 2002). Thus, all the Fifth Circuit decided was "that a successive motion under section 2255 was not available." *Webster*, 784 F.3d at 1135. That's the sole "law of the case" established by the Fifth Circuit's refusal to authorize further proceedings on Mr. Hall's claim against his conviction for

[8] The government conceded that the Supreme Court's decision confirming that § 924(c)'s residual clause is invalid is also retroactively applicable on collateral review. *See* Dkt. 39 at 12.

violating § 924(c). And it has no bearing on Mr. Hall's argument here, except to the extent that it demonstrates a structural defect in § 2255 that entitles Mr. Hall to proceed under § 2241.

B. Mr. Hall Will be Irreparably Harmed Absent a Stay of His Execution

The threatened irreparable harm to Mr. Hall is plain. Absent a stay, Mr. Hall will be put to death in just days without having obtained a reliable judicial determination of the fundamental legality of his conviction and sentence.

C. The Government Will Not Be Substantially Injured By a Stay of Execution.

A stay will not substantially injure the government. To be sure, the government's new urgency to carry out Mr. Hall's sentence may be temporarily forestalled, but only as long as is necessary to ensure that the government may carry out the sentence lawfully. The government suffers no injury when a stay merely allows a case presenting a substantial issue to proceed to resolution "in the normal course." *Cf. Buck v. Davis*, 137 S. Ct. 759, 774 (2017). And Mr. Hall's petition is not last-minute. *See Gomez v. U.S. Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) (noting that the "balance of hardships" factor should take into account whether a stay application is last-minute or otherwise manipulative of the habeas process). Mr. Hall filed this § 2241 petition years before the government, in a flurry of activity, sought to lift the longstanding

injunction and schedule his imminent execution date with less notice than any other federal death row prisoner has received in the modern era. Indeed, any exigency in these proceedings is entirely of the government's making. Just as an unjustified delay must cut against a petitioner, a sudden and unexplained fit of purported urgency must cut against the government. "[T]he fact that the government has not—until now—sought to" schedule Mr. Hall's execution "undermines any urgency surrounding" its claimed need to do so. *Oscorio-Martinez v. Att'y Gen. U.S. of Am.*, 893 F.3d 153, 179 (3d Cir. 2018).

Any delay in bringing this motion is not of Mr. Hall's making. As described above, the government consented to the injunction that for years prevented it from scheduling his execution. *Roane*, 2006 WL 6925754, at *1; *id.* at Dkt. 36, 38. The government then waited for more than a decade to do anything to promote the resolution of the lawsuit that made the injunction necessary in the first place. Likewise, the extended proceedings in the Fifth Circuit were not at Mr. Hall's urging. Mr. Hall never asked for any extension of any deadline for any filing. That court held Mr. Hall's petition in abeyance while the Supreme Court decided *Davis*. Once *Davis* came down, the court directed supplemental briefing. Following that briefing, it appointed an amicus, received yet more briefing, and held oral argument on whether *Davis* is retroactively applicable on collateral review. Mr. Hall, by contrast, has diligently

pressed his claim since 2016, including filing this motion pursuant to the Court's order only one week after the Fifth Circuit denied him permission. Any delay belongs to the government.

D. **The Public Interest Favors a Stay.**

The public interest favors a stay because any societal reliance on the finality of Mr. Hall's sentence is supplanted by the unlawfulness of his conviction and sentence. Finality is not an end unto itself. On the contrary, the public interest strongly disfavors rushing to carry out a death sentence that is interwoven with an invalid underlying conviction. Moreover, fundamental equities are at stake here, namely the government's decision to schedule Mr. Hall's execution while both this case and the Fifth Circuit case remained pending, as if to put the courts under acute time pressure to dispose of the case. Courts disfavor parties that fail to diligently press their cause only to demand urgent action as an execution looms. *See generally Hill v. McDonough*, 547 U.S. 573, 584 (2006). That applies to the government as well as to petitioners. The government waited over a decade to take the steps necessary to lift the injunction against executing Mr. Hall. Now, the government wishes unjustifiably to rush these proceedings to meet an aritficial deadline that it set. The death penalty should not be meted out in so harried a fashion. The public interest favors a stay.

E. **Substantial Legal Issues Remain Outstanding.**

A stay is also warranted to allow the substantial legal issues remaining in Mr. Hall's petition to be resolved with appropriate deliberation and care. *See Barefoot*, 463 U.S. at 888. Apart from the strong likelihood that his § 924(c) conviction, and thus his sentence, are unlawful, the Court's resolution of Mr. Hall's petition would also benefit from guidance on whether "recklessness" is a sufficient *mens rea* to transform an offense into a crime of violence. Indeed, the answer to that question might well influence this Court's analysis on the likelihood of Mr. Hall's success in obtaining ultimate relief.

The Supreme Court last week heard argument on this very question. *See Borden*, 140 S. Ct. 1262. And there is good cause to believe the Court will side with the First,[9] Fourth,[10] and Ninth[11] Circuits and agree that a *mens rea* of recklessness is insufficient to satisfy the "use of force" clause under the ACCA or, as here, § 924(c). That is because, as a textual matter, defendants cannot *categorically* use or threaten use of physical force "against the person or property of another" by merely being aware of (and proceeding in the face) a risk of harm.

[9] *United States v. Rose*, 896 F.3d 104, 109-10 (1st. Cir. 2018).

[10] *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018); *United States v. Middleton*, 883 F.3d 485, 497-500 (4th Cir. 2018) (Floyd, J., concurring).

[11] *United States v. Orona*, 923 F.3d 1197, 1202-03 (9th Cir. 2019) (rehearing en banc pending).

See 18 U.S.C. § 924(e). If the Supreme Court adopts this view in *Borden*, it would fatally undermine the Fifth Circuit's ruling denying Mr. Hall permission to file a successive § 2255 application. *See Hall*, 2020 WL 6375718 at *3 ("[T]he act of kidnapping, and especially kidnapping *resulting in death*, necessarily contemplates the reckless disregard of the risk of serious injury to the victim."). Mr. Hall should, at minimum, not be executed before this substantial issue can be resolved and the Court can consider how its resolution bears on Mr. Hall's case.

CONCLUSION

For these reasons, the Court should stay Mr. Hall's execution pending final resolution of his appeal. Mr. Hall also respectfully requests that the Court order the government to reply to this motion by close of business on November 16, 2020, or at a time shortly thereafter that the Court deems appropriate.

Respectfully submitted,

By: /s/ Robert N. Hochman

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November 15, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

1. Exclusive of the exempted portions of the motion, as provided in Fed. R. App. P. 32(f), the motion contains 5097 words.

2. The motion has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied on the word count feature of this word processing system in preparing this certificate.

November 15, 2020 /s/ Robert N. Hochman

☑

CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on November 15, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Robert N. Hochman

☐

CERTIFICATE OF SERVICE

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

counsel / party:	address:
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

s/_____