

OCTOBER TERM 2020

No. 20-6500

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**ALFRED BOURGEOIS,  
Petitioner,**

**v.**

**T.J. WATSON, Warden, USP-Terre Haute, and UNITED STATES OF AMERICA,  
Respondents.**

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

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**APPLICATION FOR STAY OF EXECUTION**

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**--- CAPITAL CASE ---  
EXECUTION SCHEDULED FOR DECEMBER 11, 2020**

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To the Honorable Amy Coney Barrett, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit:

Petitioner Alfred Bourgeois is an intellectually disabled federal prisoner. On November 20, 2020, the United States scheduled his execution for December 11, 2020. Mr. Bourgeois respectfully requests a stay of execution pending consideration and disposition of his Petition for a Writ of Certiorari, which is being filed together with this Application.

The Petition raises two questions the Court has not previously addressed: does the plain language of the Federal Death Penalty Act (“FDPA”) prohibit the carrying out of an execution against a federal prisoner, like Mr. Bourgeois, who is intellectually disabled under current standards? If so, does 28 U.S.C. § 2241 provide a remedy for such a prisoner even though a court had previously denied his claim using now rejected judge-made criteria instead of clinically accepted diagnostic standards? For the reasons set forth below and in the Petition, the answer to both questions is yes.

This Court should stay Petitioner’s execution to address these novel and important questions of federal law.

### **STANDARDS FOR A STAY OF EXECUTION**

Mr. Bourgeois respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending consideration

of his concurrently filed Petition for a Writ of Certiorari. *See Barefoot v. Estelle*, 463 U.S. 880, 889 (1983) (“Approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.”); *see also Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (recognizing that court may stay execution if needed to resolve issues raised in initial petition).

The standards for granting a stay of execution are well established and require weighing the prisoner’s likelihood of success on the merits, the extent to which the prisoner unnecessarily delayed his claims, the relative harm to the parties, and the public interest. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004); *Barefoot*, 463 U.S. at 895. All these factors weigh strongly in Mr. Bourgeois’s favor here.

## **PETITIONER SHOULD BE GRANTED A STAY OF EXECUTION**

### **1. Petitioner is likely to succeed on the merits.**

As set forth in his Petition and as the district court found, Mr. Bourgeois makes a “strong showing,” PA22–25,<sup>1</sup> that he is intellectually disabled as defined by “current medical standards,” *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017). The plain language of the FDPA bars the government from “carr[ying] out” a death

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<sup>1</sup> Petitioner submitted an Appendix simultaneously with his Petition for Writ of Certiorari. Petitioner’s Appendix shall be cited as “PA” followed by the relevant page number.

sentence “upon a person who is mentally retarded.” 18 U.S.C. § 3596(c). The Seventh Circuit nonetheless deemed Mr. Bourgeois’s intellectual disability under current legal and diagnostic standards to be irrelevant as a matter of law. PA15. Because the plain language, common law history, and legislative history of the FDPA preclude the Seventh Circuit’s blanket ruling, Petitioner is likely to succeed on the merits of the first question presented. *See* Cert. Pet. at 20–32.

Further, the writ of habeas corpus provides a remedy to enforce the FDPA’s absolute prohibition on carrying out executions of intellectually disabled federal prisoners. Habeas corpus has always been available to challenge the legality of the implementation, as opposed to the imposition, of a sentence. Congress did not design 28 U.S.C. § 2255 to accommodate such challenges, and the circumstances of this case demonstrate that a prisoner’s intellectual disability under current standards can never be litigated under § 2255 where his intellectual disability was previously litigated under since-rejected standards—including the judge-made, non-clinical standards under which Petitioner’s claim was rejected during § 2255 proceedings. Section 2255 is therefore inadequate and ineffective to effectuate the rights conferred by the FDPA. *See* Cert. Pet. at 32–40.

Under these circumstances, Petitioner’s request to this Court to grant the petition, vacate the Seventh Circuit’s judgment, and remand to the district court to resolve the merits of his FDPA claim is likely to be granted.

**2. Petitioner has been timely and diligent in this litigation.**

On July 25, 2019, the United States scheduled Mr. Bourgeois's execution for January 13, 2020. Mr. Bourgeois promptly filed, on August 15, 2019, a § 2241 petition in the Southern District of Indiana challenging the implementation of his sentence under the FDPA. Mr. Bourgeois's execution date was subsequently stayed by the United States District Court for the District of Columbia in consolidated lethal injection litigation.

On March 10, 2020, the § 2241 court stayed Mr. Bourgeois's execution, finding that Mr. Bourgeois made a "strong showing" that he is intellectually disabled under current diagnostic standards and that a hearing should be held to consider the evidence. PA22–25.

On October 6, 2020, the Seventh Circuit vacated the stay and ordered the petition dismissed. PA15. Mr. Bourgeois filed a timely petition for en banc reargument, and the court ordered a response from the Government. On November 20, 2020, while the rehearing petition was still pending, and although the Seventh Circuit had yet to issue its mandate, the Government set Mr. Bourgeois's execution for December 11, 2020.

On December 1, 2020, the Seventh Circuit denied rehearing. The instant Application for Stay of Execution and Petition for Writ of Certiorari follow one day later.

In short, Mr. Bourgeois has been timely and diligent in pursuing this challenge to the implementation of his sentence under § 3596, because such challenges are appropriately brought “[w]hen the sentence is to be implemented.” 18 U.S.C. § 3596(a). Moreover, even before the Government first scheduled his execution, Mr. Bourgeois diligently sought relief in § 2255 proceedings under then-extant standards. And after this Court in *Moore*, 137 S. Ct. at 1044, rejected Texas courts’ approach to deciding intellectual disability claims, Mr. Bourgeois sought leave from the Fifth Circuit to again have his intellectual disability considered in light of that precedent. The Fifth Circuit denied his request. *See Bourgeois v. United States*, No. 18-40270 (5th Cir.); PA262–64.

Mr. Bourgeois’s imminent execution date is not on account of any delay or lack of diligence on his part. Rather, the Government has caused the severe time constraints here by scheduling the execution while the district court’s stay of execution was still in effect and before Mr. Bourgeois could seek relief from this Court, and by setting the execution date only three weeks out, on December 11, 2020.

The Government is likely to invoke the public’s interest in the finality of criminal judgments, including death sentences. But the Government’s own actions disserve that interest. The Bureau of Prisons went without an established execution method from 2011 until 2019—the last six of years of which the Government spent

in the “final phases of finalizing the protocol.” *See* Defendants’ Status Report of July 3, 2013, at 1, *Roane v. Gonzalez*, No. 1:05-cv-02337-TSC (D.D.C. July 3, 2013), ECF No. 323. That delay is not attributable to Mr. Bourgeois in particular or to the actions of anti-death penalty activists more generally. *See Glossip v. Gross*, 576 U.S. 863, 870 (2015). Indeed, during the eight years in which the Government lacked a viable protocol, a total of seventeen states carried out 255 executions by lethal injection.<sup>2</sup> If the Government were sincere in its view that the need for prompt executions overrides other stay factors, it would have acted with at least some semblance of alacrity over the years. *See Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018) (“[T]he fact that the Government has not—until now—sought to remove SIJ [Special Immigration Juvenile] applicants, much less designees, undermines any urgency surrounding Petitioners’ removal.”). Nothing justifies any sudden need to execute Mr. Bourgeois *now*.

**3. Petitioner will be irreparably harmed if a stay is not granted.**

Because Mr. Bourgeois has a substantial likelihood of success in showing that he is intellectually disabled, the harm of denying a stay is manifest and absolute. *See*

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<sup>2</sup> *See* Death Penalty Information Center, Execution Database, <https://deathpenaltyinfo.org/executions/execution-database>. The database reveals a total of 258 executions between March 4, 2011 (the date on which the Attorney General publicly announced a lack of execution drugs), and July 25, 2019 (the date on which the Attorney General announced the new protocol). Of those 258 executions, 255 were carried by lethal injection and three by electrocution.

*Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (recognizing that irreparable injury “is necessarily present in capital cases”). By contrast, the Government has no interest whatsoever in conducting an unlawful execution or an execution where, as here, the prisoner has made a “strong showing” that he is intellectually disabled under current standards. PA22–25. The balance of harms weighs strongly in favor of a stay.

**4. The public interest weighs in favor of granting a stay.**

The public interest is reflected by Congress’s decision to erect an absolute bar on the execution of intellectually disabled persons. This interest would best be served by enforcing the plain language of the FDPA and by recognizing that habeas corpus is the appropriate vehicle for Mr. Bourgeois’s claim.

FOR THE FOREGOING REASONS, and those set forth in his Petition for a Writ of Certiorari, Petitioner respectfully requests that this Application for a Stay of Execution be granted.

Respectfully submitted,

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Dated: December 2, 2020