IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DUSTIN HIGGS, Petitioner-Appellant, v. T.J. WATSON, Warden, Federal Correctional Complex, Terre Haute, Respondent-Appellee.	Appeal No. 21-1073 **DEATH PENALTY CASE** ***EXECUTION SCHEDULED FOR JANUARY 15, 2021***

APPELLANT'S EMERGENCY MOTION TO STAY EXECUTION PENDING DISPOSITION OF APPEAL

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PRELIMINARY STATEMENT

"ECF" refers to the Appendix filed and docketed in the district court at ECF No. 13, *Higgs v. Watson*, No. 2:20-cv-00665-JPH-DLP (S.D. Ind. Dec. 23, 2020).

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INTRODUCTION

Appellant Dustin Higgs respectfully requests an emergency stay of execution pending this Court's consideration of his appeal of the denial by the United States District Court for the Southern District of Indiana of his Motion to Stay Pending Resolution of Second Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241.[1] *See* Order, *Higgs v. Watson*, No. 2:20-cv-00665-JPH-DLP (S.D. Ind. Jan. 12, 2021) (hereinafter "DCO"), ECF No. 21. Mr. Higgs is scheduled to be executed tomorrow, January 15, 2021, pursuant to convictions and death sentences rendered by the United States District Court for the District of Maryland, for his role in the murders of Tanji Jackson, Tamika Black, and Mishann Chinn.

This case presents a question of first impression concerning a federal prisoner's right to some avenue of relief for Government suppression of exculpatory evidence, not only during trial or direct appeal, but beyond the conclusion of § 2255 proceedings. In his Second Amended Petition (ECF No. 17), Mr. Higgs set forth a *Brady* claim that was impossible to raise properly during § 2255 proceedings because the Government withheld the evidence until two years after the end of those proceedings. Specifically, as explained in greater detail in the Second Amended Petition (S.D. Ind. ECF No. 17), the Government withheld from the defense the facts that (a) Victor Gloria – a cooperating co-defendant and "the critical link in [Mr. Higgs's] conviction" (*see* ECF No. 13-1 at 16 (Gloria Sentencing Tr. at 16:14–20)) – was a suspect in a Baltimore murder, and (b) the Government intervened with Baltimore authorities to persuade them that the evidence implicating Mr. Gloria for that murder was flawed. Those facts constitute exculpatory impeachment evidence within the meaning of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Mr. Gloria's knowledge that the Government was aware of his vulnerability to first-degree murder

[1] A certificate of appealability is not attached per 7th Cir. R. 22(h)(3)(I) because the appeal is from a § 2241 petition, which has no COA requirement. *See* 28 U.S.C. § 2254(c)(1)(A)–(B).

charges in Baltimore gave him a powerful interest in making himself as indispensable as possible to the Government in Mr. Higgs's case in the hope that he might be shielded from accountability in Baltimore. This evidence was material because Mr. Gloria was the central witness against Mr. Higgs at trial, and without his testimony – as one trial prosecutor admitted – the Government "could not have proceeded and obtain[ed] a conviction against Mr. Higgs." Gloria Sentencing Tr. at 4:10–12, ECF No. 13-1 at 4.

While the Indiana district court agreed that Mr. Higgs's *Brady* evidence was "far from trivial," as it brought "to light serious questions about the government's involvement in the Baltimore investigation of Mr. Gloria" and "Mr. Gloria's testimony was crucial to the Government's case," the court concluded that because "Mr. Higgs has not made a strong showing that he may raise his *Brady* claim in a § 2241 petition – under *Webster* or some other way – the Court cannot reach the merits of his claim." DCO at 7–8.

However, this Court has recognized that *Webster* is not the only pathway to § 2255(e)'s savings clause. *See Purkey v. United States*, 964 F.3d 603, 615 (7th Cir. 2020). Here, the Government withheld *Brady* evidence until after Mr. Higgs's § 2255 proceedings were long over, making it impossible for Mr. Higgs to present the evidence during the original § 2255 proceedings and precluding him from attempting to do so again now through § 2255 due to the strict barriers surrounding successive petitions. In this case of first impression, this Court must determine whether § 2255(e)'s savings clause is available to petitioners who are the victims of *Brady* violations that are not disclosed by the Government until after the conclusion of § 2255 proceedings, and who are otherwise deprived of any procedural vehicle to seek relief from the violation of their constitutional rights. To rule against Mr. Higgs would be to deny petitioners who find themselves in this legal quagmire any recourse and to encourage the Government to

continue to exploit statutory loopholes by withholding *Brady* material until the conclusion of § 2255 proceedings.

This Court has set February 22, 2021, as the deadline for Mr. Higgs's opening brief. *See* Order, *Higgs v. Watson*, No. 21-1073 (7th Cir. Jan. 13, 2021), ECF No. 1. Mr. Higgs respectfully seeks a stay of his January15, 2021, execution so that these issues can be fully briefed, the Court can fairly review Mr. Higgs's compelling claims for relief, and the Court can decide this issue of first impression. He explains below why he satisfies all the criteria for the grant of a stay.

PROCEDURAL HISTORY

On December 21, 1998, Mr. Higgs, along with co-defendant Willis Haynes, was indicted in the United States District Court for the District of Maryland on charges connected with the January 27, 1996, shooting deaths of Tanji Jackson, Tamika Black, and Mishann Chinn. Their cases were severed for trial. Mr. Haynes was tried first and sentenced to life in prison without release. *See United States v. Haynes*, 26 F. App'x 123, 126 (4th Cir. 2001). Mr. Higgs was tried next and, on October 11, 2000, was found guilty of three counts each of first-degree premeditated murder, first-degree murder committed during a kidnapping, and kidnapping resulting in death, along with firearms charges. *See United States v. Higgs*, 353 F.3d 281, 289 (4th Cir. 2003) (*Higgs-1*). The jury recommended death sentences on the nine death-eligible counts. *Higgs-1*, 353 F.3d at 289. The Fourth Circuit upheld the convictions and sentences on direct appeal. Certiorari was denied. *Higgs v. United States*, 542 U.S. 999 (2004).

Mr. Higgs then filed a motion for relief under 28 U.S.C. § 2255 in the Maryland district court. On April 7, 2010, the district court denied the § 2255 motion without argument, discovery, or a hearing. *United States v. Higgs*, 711 F. Supp. 2d 479, 557 (D. Md. 2010) (*Higgs-2*). Mr. Higgs then sought a certificate of appealability from the Fourth Circuit on numerous issues. The

circuit denied a COA on all but one issue, and then denied relief on that issue. *United States v. Higgs*, 663 F.3d 726, 730 (4th Cir. 2011) (*Higgs-3*), *cert. denied*, 568 U.S. 1069 (2012).

After subsequently discovering exculpatory evidence that could have impeached the credibility of the key prosecution witness, but had been suppressed by the Government, Mr. Higgs filed a motion in the Maryland district court, along with a renewed discovery request, seeking to set aside his final judgment under Federal Rule of Civil Procedure 60(d) due to fraud on the court. The 60(d) motion argued that the Government did not disclose all of the benefits received before trial by the Government's key witness, cooperating co-defendant Victor Gloria. In particular, the motion alleged that Mr. Gloria was a suspect in an unrelated state murder prosecution, but that he was not charged after federal prosecutors and agents intervened on his behalf, and that the Government never disclosed these facts. The district court denied the Rule 60(d) motion without granting an evidentiary hearing because it determined that Mr. Higgs was not entitled to relief under the stringent fraud-on-the-court standard; it likewise denied Mr. Higgs's renewed discovery request. *United States v. Higgs*, 193 F. Supp. 3d 495, 513–15 (D. Md. 2016) (*Higgs-4*).[2] A COA was again denied in the Fourth Circuit, *Higgs v. United States*, No. 16-15 (4th Cir. 2017), and the Supreme Court denied certiorari, *Higgs v. United States*, 138 S. Ct. 2572 (2018) (Mem.).

[2] Two months after the denial of the Rule 60(d) motion, one of the trial prosecutors in Mr. Higgs's case was found to have committed extensive *Brady* violations in another case, resulting in the dismissal of the indictment with prejudice. *See* Tr. at 59:19–22 ("The failure to disclosure [sic] is in violation of *Brady*, the history of late disclosures and the promotion of false significant testimony in this case does shock the conscience of this Court."), ECF No. 13-35 at 59; ECF No. 13-34.

Meanwhile, Mr. Higgs sought and was denied permission by the Fourth Circuit to file a successive motion for relief pursuant to 28 U.S.C. § 2255, predicated on the United States Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591, 597 (2015). *See* Order, *In re Higgs*, No. 16-8 (4th Cir. June 27, 2016), ECF No. 13. Following the Fourth Circuit's denial of permission to file a successive § 2255 motion, Mr. Higgs filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the Southern District of Indiana, in a further attempt to litigate his *Johnson* claim.[3] That petition was denied on April 30, 2020. *See* Order, *Higgs v. Daniels*, No. 2:16-cv-321-JMS-MJD (S.D. Ind. Apr. 30, 2020), ECF No. 42. This Court affirmed on January 11, 2021. *See* Order, *Higgs v. Watson*, No. 20-2129 (7th Cir. Jan. 11, 2021), ECF No. 35.

Mr. Higgs also filed a lawsuit in the Southern District of Indiana seeking to obtain documents contained in his police investigative file pursuant to the Freedom of Information Act. Both parties' cross-motions for summary judgment were granted in part and denied in part by the district court. *See* Order, *Higgs v. United States Park Police*, No. 2:16-cv-96-JMS-MJD (S.D. Ind. June 25, 2018), ECF No. 73. This Court granted the Government relief on its cross-appeal and determined that the Government was not obliged to turn over any additional documents to Mr. Higgs. *See Higgs v. U.S. Park Police*, 933 F.3d 897, 900 (7th Cir. 2019).

On August 4, 2020, the Government moved in the Maryland district court to amend Mr. Higgs's final judgment. In so moving, the Government sought to have the district court designate Indiana as the state in which to implement Mr. Higgs's death sentence. *See* Mot. Amend J. &

[3] Mr. Higgs filed a second motion for permission to file a successive § 2255 petition in the Fourth Circuit following the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319, 2323–24, 2333 (2019). That motion was likewise denied. *See* Order, *In re Higgs*, No. 20-2 (4th Cir. Feb. 6, 2020), ECF No. 20.

Order, *United States v. Higgs*, No. 98-cr-520-PJM (D. Md. Aug. 4, 2020), ECF No. 640. On November 20, 2020, prior to the Maryland district court's ruling, the Government informed Mr. Higgs that it had scheduled his execution for January 15, 2021. On December 29, 2020, the Maryland district court denied the Government's motion because it was beyond its authority to modify Mr. Higgs's final judgment and designate another state for the implementation of his death sentence. *See* Order, *United States v. Higgs*, No. 98-cr-520-PJM (D. Md. Dec. 29, 2020), ECF No. 657. The Government appealed the Maryland district court's ruling to the Fourth Circuit, which is currently pending with oral argument scheduled for January 27, 2021. *United States v. Higgs*, No. 20-18 (4th Cir.). Because the Fourth Circuit declined to expedite proceedings by holding oral argument prior to Mr. Higgs's January 15 scheduled execution date (*see* Orders, *United States v. Higgs*, No. 20-18 (4th Cir.), ECF Nos. 390-1, 390-2), the Government sought a writ of certiorari before judgment on January 11, 2021. That petition is currently pending. *United States v. Higgs*, No. 20-927 (U.S.).

RELEVANT FACTUAL HISTORY

1. The Route 197 trial and Victor Gloria's testimony.

For twenty-five years, Mr. Higgs has steadfastly maintained his innocence of capital murder. The Government's case to the contrary rests on the word of one man, his co-defendant Victor Gloria. During the early morning hours of January 27, 1996, Ms. Jackson, Ms. Black, and Ms. Chinn were found murdered along Route 197 in the Patuxent National Wildlife Refuge in Prince George's County, Maryland. It is undisputed that Willis Haynes shot and killed the three young women. There is no direct evidence that Mr. Higgs directed, desired, or intended for the women to be shot. Mr. Higgs did not intend for the victims to die, had no motive to kill the victims, and no control over Mr. Haynes. In fact, Mr. Haynes now admits this is the case. Haynes

Decl. ("Dustin didn't threaten me. I wasn't scared of him. Dustin didn't make me do anything that night or ever."); *see also id*. ("[Higgs] was upset that I shot women. Dustin screamed at me about it), ECF No. 13-33. Nevertheless, Mr. Higgs, along with Mr. Haynes and Mr. Gloria, was charged in the killings. Mr. Haynes's and Mr. Higgs's cases were severed for trial; Mr. Gloria pleaded guilty and was the Government's key witness at both trials.

Mr. Gloria's credibility was critical to the Government's case. *See Higgs-1*, 353 F.3d at 289 n.1 ("Most of the facts surrounding the murders of the three women were obtained from [Mr. Gloria's] eyewitness testimony."). Mr. Gloria testified that during an evening of socializing at Mr. Higgs's apartment, an argument took place between Mr. Higgs and Ms. Jackson. *Id.* at 289. According to Mr. Gloria, this argument led Mr. Higgs to want to have the victims killed. *Id.* at 289–90. Mr. Gloria testified that after the three women left the apartment following the fight, Mr. Higgs got a gun and told Mr. Haynes to get the three women into Mr. Higgs's vehicle. *Id.* at 290. Mr. Gloria testified that he then got into the back seat and observed Mr. Higgs drive the three women to a secluded location along Route 197 while having whispered conversations with Mr. Haynes, pull over, and hand Mr. Haynes the gun with which to carry out the killings. *Id.*

While other evidence supported Mr. Higgs's presence at the scene, the allegation that Mr. Higgs aided, abetted, or caused Mr. Haynes to commit the killings was unsupported by any evidence other than Mr. Gloria's testimony.[4] According to one of the trial prosecutors, the

[4] The Government tried to bolster its case by tying Mr. Higgs to the .38 caliber weapon used by Mr. Haynes. In order to make this critical, yet elusive, connection the Government presented the now debunked forensic evidence that there was a comparative bullet lead analysis "match" (two bullets are from the same melt of lead by a manufacturer) between bullets recovered from an apartment leased in Mr. Higgs's name and the homicide scene. Joint App. at 430, *Higgs v. United States*, No. 10-7 (4th Cir. Dec. 21, 2010), ECF No. 29. In 2005, the FBI announced that it would no longer utilize CBLA evidence because that process lacked scientific reliability. *See Higgs-3*.

Government "could not have proceeded and obtain[ed] a conviction against Mr. Higgs" without Mr. Gloria's testimony. *See* Gloria Sentencing Tr. at 4:8–12, ECF No. 13-1 at 4. The district court concurred in that assessment. *See* Gloria Sentencing Tr. at 16:14–20 (describing Mr. Gloria as "the critical link in the conviction of these two men," and finding that "[t]hat is the most important thing about [Gloria] at this point in the sentencing, and it overrides everything else"), ECF No. 13-1 at 16; *see also Higgs-3*, 663 F.3d at 741 ("Gloria's eyewitness testimony provided compelling and convincing details of the events of that evening and of Higgs's involvement in them.").

2. Victor Gloria and the Baltimore murder.

Following the Route 197 murders but prior to Mr. Higgs's trial, Mr. Gloria was present at the scene of, and a suspect in, an unrelated homicide in Baltimore.[5] Although law enforcement suspected Mr. Gloria's involvement in the Route 197 murders early on in their investigation, he was not arrested until almost three years after the killings, on October 5, 1998. Thus, on July 18, 1998, when Martrelle Creighton was murdered in Baltimore's Inner Harbor area, Mr. Gloria was not yet in custody.

On July 18, Mr. Creighton was found by police lying on the sidewalk, suffering from a single stab wound to the neck. ECF No. 13-2 at 1. Baltimore Police soon learned that Mr. Creighton's murder was precipitated by two groups of young men arguing over a group of young

[5] As discussed in greater detail below, most of the information regarding the Baltimore homicide and all of the information regarding federal authorities' involvement in the Baltimore homicide investigation became known to Mr. Higgs only when he obtained a copy of the Baltimore Police file in 2012 (two years after the district court's final judgment denying § 2255 habeas relief) through his continuing investigative efforts.

women. *Id.* at 3. Mr. Creighton and his friends were one group. *Id.* Victor Gloria, Kevin Miller, and twin brothers Keith and Kevin Scott were the other. ECF No. 13-3 at 2.

With minor variations, every witness interviewed by Baltimore Police, which included members of Mr. Creighton's group, members of the group of young women, and Mr. Miller and the Scott twins (but not Mr. Gloria), gave essentially the same account of the lead-up to the stabbing. At that point, however, the accounts began to differ, with some tending to inculpate Mr. Gloria as the killer and others tending to inculpate Mr. Miller. Clarence White, a friend of Mr. Creighton's, was interviewed by Baltimore Police on the night of the stabbing. ECF No. 13-4 at 1. Handwritten police notes from this unrecorded interview indicate that Mr. White described how once the altercation began, a man with "light skin" – a description consistent with Mr. Gloria – swung at Mr. Creighton, at which point Mr. Creighton "grabbed his neck and was bleeding bad." ECF No. 13-5 at 1–2. Mr. White also stated that there were three or four members of the stabber's group, who all ran away together after the stabbing. *Id.* at 1. Mr. White was re-interviewed nearly a year later, on June 11, 1999, at which point he changed his account to indicate that the stabber was "brown skinned," a description more consistent with Mr. Miller.[6] ECF No. 13-6 at 2–3. Mr. White also stated in the second interview that he definitely saw three people involved in the altercation with Mr. Creighton. *Id.* at 2–3. Mr. White identified the three individuals involved as the Scott twins and Mr. Miller. *Id.* at 4–6.

David Bishop, another friend of Mr. Creighton's, was also interviewed on the night of the stabbing and said that he saw both a man matching the description of Mr. Miller and a "light skin

[6] Mr. White's follow-up interview, during which he changed his story, occurred after federal authorities had contacted Baltimore authorities about the Route 197 murders. *See* Relevant Factual History, Section 3 *infra*.

dude" (consistent with Mr. Gloria's appearance) punch Mr. Creighton. ECF No. 13-7 at 2. Mr. Bishop did not initially realize that Mr. Creighton had been stabbed, although Mr. Bishop assumed – once he realized that Mr. Creighton had been stabbed – that it was the man matching Mr. Miller's description who did the stabbing. *Id.* at 3–4.

Sisters Barbara and Charnetta Bailey, who were in the group of young women, were initially interviewed by police on July 29, 1998, and August 12, 1998, respectively. ECF Nos. 13-8, 13-9. Both women said that around the time the confrontation between the two groups of men started, they started to walk away and had their backs turned when it began. *Id.* Both women also stated that at the beginning of the fight, they turned around to see Mr. Gloria run away and Mr. Creighton and Mr. Miller engage in a brief fistfight in which Mr. Miller punched Mr. Creighton. *Id.* Like Mr. White and Mr. Bishop, neither Bailey sister realized that Mr. Creighton had been stabbed. *Id.*

The Scott twins were first interviewed by police on February 2, 1999, when they were arrested in connection with the stabbing. Each of them said that it was Mr. Gloria who stabbed Mr. Creighton, although they, too, did not initially realize that Mr. Creighton had been stabbed. ECF Nos. 13-10, 13-11. Both Scott twins said that Mr. Gloria punched Mr. Creighton and then ran away, and that they did not see Mr. Miller fighting with Mr. Creighton at all. *Id.*

Mr. Miller was arrested and interviewed by police on April 7, 1999. Mr. Miller also said that Mr. Gloria punched Mr. Creighton and then ran away. ECF No. 13-12. Mr. Miller said that he himself then threw a punch at one of Mr. Creighton's friends, but never hit Mr. Creighton. *Id.* Mr. Miller denied stabbing Mr. Creighton and stated that he did not realize when he began fighting that Mr. Creighton had been stabbed. *Id.*

Baltimore Police were thus left with conflicting accounts of who stabbed Mr. Creighton. Some of the accounts tended to suggest that it was Mr. Gloria, and some tended to suggest it was Mr. Miller. All of the accounts described a chaotic atmosphere, with almost no one initially having realized that Mr. Creighton had been stabbed.

3. Federal authorities' involvement in the Baltimore murder investigation.

Although this fact was unknown to Mr. Higgs until he received a copy of the Creighton homicide file in 2012, two years after the district court decided his § 2255 habeas petition, federal authorities learned of Mr. Gloria's involvement in the Creighton murder on February 2, 1999 – the same day the Scott twins identified Mr. Gloria as the killer. ECF No. 13-14. The account in this section comes from the materials withheld for thirteen years and turned over to Mr. Higgs's counsel only in 2012, after continued discovery efforts.

A handwritten note with the February 2, 1999, date in the Baltimore Police file lists the names of Detectives Rydi Abt and Joseph Green of the United States Park Police, along with Detective Green's office and pager numbers. *Id.* It also lists the number for the Park Police Criminal Investigations Bureau. *Id.* Immediately under the names and telephone numbers is the following notation: "JAN '96 – 3/B/F victims shot to death on BW Pkwy." *Id.* Under that notation is the notation "Dec '98 – 3 arrest made," followed by the names of Mr. Haynes, Mr. Higgs, and Mr. Gloria, along with certain other identifying information. *Id.* In other words, the very day that Mr. Gloria was first named as Mr. Creighton's killer, Baltimore authorities were in contact with the federal authorities responsible for Mr. Higgs's capital prosecution.

Detective Green had further contact with Baltimore Police the following day, February 3, 1999. On that date, Detective Green retrieved a photographic lineup previously created by the Park Police, which included Mr. Gloria, and provided it to the Baltimore Police. ECF No. 13-15.

The Baltimore Police file also contains a handwritten note dated one week later, February 10, 1999, which includes the notation: "Case Agent for Victor Gloria S/A Brad Sheafe FBI Calverton Office." ECF No. 13-16. Under this notation are two different telephone numbers. *Id.* Several additional, undated, handwritten notes also contain the names of Detective Green and Detective Abt, along with telephone numbers and information relating to the murders on Route 197. ECF Nos. 13-17, 13-18, 13-19.

At some point, a member of the Baltimore Police Department traveled, or at least made plans to travel, to the office of the United States Park Police, presumably in order to meet with a Park Police officer regarding Mr. Gloria. *See* ECF No. 13-20 (undated handwritten note with the words "Directions to U.S. Park Police" written across the top, underneath which are directions from Baltimore to the Park Police office).

The Creighton file further reveals that not only were members of the Baltimore Police Department in contact with federal law enforcement agents, but the chief homicide prosecutor in the Baltimore City State's Attorney's Office, Mark Cohen, was in direct communication with Assistant United States Attorney Deborah Johnston, who prosecuted Mr. Higgs at his federal capital trial and represented the Government during Mr. Higgs's § 2255 proceedings. ECF No. 13-21. The note recounting the Johnston-Cohen conversation, authored by Mr. Cohen on April 12, 1999, indicates that Ms. Johnston suggested to Mr. Cohen that Mr. Miller and the Scott twins might be falsely implicating Mr. Gloria. *Id.* The note also shows that Mr. Cohen, the person with the authority to bring charges against Mr. Gloria for the Baltimore homicide, was inclined to charge Mr. Gloria, but deferred his decision until after he received "background" information from federal agents regarding the unrelated investigation into the Route 197 homicides. *Id.*

While Mr. Cohen reported that the United States Attorney's Office could not disclose whether Mr. Gloria was going to testify against Mr. Higgs and Mr. Haynes because Mr. Gloria's plea agreement was sealed, the federal prosecutors' reluctance to share this information was short-lived. In a report dated April 21, 1999, Baltimore Police Detective Robert Patton noted that "[p]er the U.S. Attorney's office Victor Gloria had plead guilty and is slatted to testify against his co-defendants, Willis Haymes and Dustin Higgs who are reportedly are close friends with the Scott brothers and Kevin Miller." ECF No. 13-22 at 1 (text reproduced as it appears in original). Detective Patton's report continues by noting that the United States Attorney's Office conveyed to Baltimore authorities its belief, ostensibly based on the unrelated federal investigation, that all three eyewitnesses who identified Mr. Gloria as the murderer were falsely implicating him as a form of retaliation due to their friendship with Mr. Haynes and Mr. Higgs. ECF No. 13-22 at 2.

4. The resolution of the Baltimore murder case.

The Baltimore authorities charged Mr. Miller and each of the Scott twins with first degree murder. ECF Nos. 13-23, 13-24. Mr. Gloria was the only member of the group not charged with first degree murder; he received no charges at all arising from this incident and was never interviewed by Baltimore authorities.[7]

Both Scott twins entered pleas to second degree assault and were sentenced to time served. ECF Nos. 13-25, 13-26. They were released from custody on August 30, 1999, having served approximately seven months in jail. *Id.* Mr. Miller pleaded guilty to second degree murder, but pursuant to a negotiated plea agreement he received an extraordinarily low sentence,

[7] The fact that Mr. Gloria was never interviewed is even more remarkable in light of the fact that he had previously pleaded guilty to threatening another individual with a knife during a fight. Application for Statement of Charges, 9/28/96, ECF No. 13-13.

in light of the fact that he supposedly killed a man in the middle of downtown by stabbing him in the neck: twenty years, with all but five years suspended. ECF No. 13-27. This five-year sentence was made concurrent to any other sentence, with credit for time already served. ECF No. 13-29. Mr. Miller also received three years of probation upon release. *Id.* The sentencing judge justified his extreme downward departure from the guidelines range as follows: "[M]uddled factual statement leaves few things clear: someone died and the Def. was involved." ECF No. 13-28.

Mr. Miller did not serve his full five-year term; he was released from prison in July 2002, three years and three months after he was first arrested. ECF No. 13-30.

5. The first § 2255 proceedings.

During the course of their investigation for the § 2255 proceedings, Mr. Higgs's counsel learned that Mr. Gloria had been a suspect in a Baltimore murder, and that he may not have been prosecuted in that case because he was to be the star witness in federal capital cases against Mr. Higgs and Mr. Haynes. Because Mr. Gloria's role in the Baltimore homicide and federal authorities' intervention into the state authorities' investigation was not disclosed to trial counsel, Mr. Higgs alleged that the Government had not turned over all of the material relating to Mr. Gloria that it was required to under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), *Giglio v. United States*, 405 U.S. 150, 154 (1972), and their progeny. Specifically, Mr. Higgs alleged that Mr. Gloria was a suspect, but was never charged, in an unrelated homicide in Baltimore. Mot. Vacate 33, *United States v. Higgs*, No. 98-cr-520-PJM, (D. Md. Nov. 28, 2005), ECF No. 492. Mr. Higgs further alleged that Mr. Gloria was not charged with this homicide at the behest of the Government, "in an effort to preserve his status as a testifying witness in this federal capital

triple homicide case," and that the Government's failure to disclose this consideration violated Mr. Higgs's due process rights. *Id.*[8]

In the § 2255 proceedings, Mr. Higgs moved for discovery, including *Brady* material. Mot. Discovery 1, *United States v. Higgs*, No. 98-cr-520-PJM, (D. Md. July 1, 2006), ECF No. 509. In that motion, Mr. Higgs specifically referenced Mr. Gloria's involvement in the Baltimore homicide. *Id.* at 12–13. Mr. Higgs requested any information in the possession of the Baltimore City State's Attorney's Office "regarding Mr. Gloria's participation in and/or non-prosecution for the above described homicide." *Id.* at 13. Mr. Higgs also made a more general request for "all relevant and exculpatory witness and law enforcement statements" not previously provided. *Id.* at 15.

The Government did not disclose the facts that Mr. Gloria had been identified by multiple eyewitnesses as the killer of Mr. Creighton; that federal authorities had been in contact with state authorities responsible for the Baltimore murder investigation; or that Mr. Gloria was not charged in the Baltimore homicide, following the federal authorities' intervention.

In its response to Mr. Higgs's § 2255 motion, the Government argued that Mr. Higgs's "vague descriptions of the supposed benefits conferred on Gloria largely fail to demonstrate any connection to this trial or federal officials." Mot. Strike 88, *United States v. Higgs*, No. 98-cr-520-PJM, (D. Md. Nov. 8, 2006), ECF No. 519. The Government described Mr. Higgs's allegations regarding the undisclosed leniency afforded to Mr. Gloria as mere "speculation about the Government's knowledge or actions." *Id.* The Government further argued that "[c]ertainly,

[8] Pretrial, the defense and the Government had entered into a discovery agreement, under which the Government agreed to provide *Jencks* and *Giglio* material no later than one week prior to trial, and other *Brady* material "if and when discovered." ECF No. 13-31.

the Constitution required the prosecutors to disclose any consideration promised to Gloria in exchange for his testimony; the prosecutors, however, had no duty or ability to predict, much less inform Higgs of benefits, or acts of grace, that coincidentally flowed to the witness after this trial." *Id.* at 86. The Government also resisted Mr. Higgs's discovery and *Brady*/*Giglio* requests pertaining to Mr. Gloria, arguing that "there is no evidence that [Gloria] was promised anything other than that which he admitted at trial." *Id.* at 72.

Relying in part on the Government's representations, the Maryland district court denied the *Brady* claim relating to Mr. Gloria, as well as Mr. Higgs's request for discovery. *Higgs-2*, 711 F. Supp. 2d at 507–09, 557.

6. Mr. Higgs's attempts to obtain the Baltimore Police and Park Police files.

During the original § 2255 proceedings, Mr. Higgs sought, through investigative efforts and discovery requests, to obtain documentary evidence about Mr. Gloria's involvement in the Creighton homicide and the Federal Government's intervention in that case. Mr. Higgs sent a written request for the complete investigation file to the Baltimore Police and filed a discovery motion in the § 2255 litigation. Mr. Higgs was unsuccessful, however, as the Baltimore Police turned over only a one-page summary report and the Government successfully opposed Mr. Higgs's § 2255 discovery requests.

In the spring of 2012, Mr. Higgs attempted, a second time, to obtain the Baltimore Police file via written request. Whereas the Baltimore Police responded to Mr. Higgs's first written request by turning over a one-page summary report, the police responded to his second written request by turning over its 640-page investigative file, with some information redacted.[9] Mr.

[9] There is no apparent reason why the two requests were handled so differently by the Baltimore Police.

Higgs came into possession of the file in September 2012. As set forth *supra* in the Procedural History, Mr. Higgs has continually pursued multiple litigation avenues to secure relief based on the Government's suppression of this *Brady* evidence beyond the conclusion of § 2255 proceedings, including Rule 60 litigation (*Higgs-4*, 193 F. Supp. 3d at 513–15), FOIA litigation (*Higgs v. U.S. Park Police*, 933 F.3d at 900), and this § 2241 litigation.

MR. HIGGS IS ENTITLED TO A STAY OF EXECUTION

The standard for issuance of a stay is like that for issuance of a preliminary injunction. The moving party must show: (i) there is a significant possibility of success on the merits; (ii) irreparable harm will result in the absence of the stay; (iii) the balance of harms is in favor of the moving party; and (iv) the public interest supports a stay. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Mr. Higgs meets these requirements.

I. Mr. Higgs Can Demonstrate a Significant Possibility of Success on the Merits of His Claim.

A. Mr. Higgs Can Establish That He Was Denied Due Process Under *Brady v. Maryland.*

Victor Gloria's credibility was a critical issue at trial as his testimony was indispensable to obtaining Mr. Higgs's convictions and death sentences. Prior to Mr. Higgs's trial, Mr. Gloria became a suspect in the unrelated homicide of Martrelle Creighton in Baltimore. The federal prosecutors charged with trying Mr. Higgs were in contact with state authorities in Baltimore charged with investigating the Creighton homicide, and later informed those state authorities that they believed the witnesses identifying Mr. Gloria as the perpetrator of the Creighton murder were conspiring to frame him. The Baltimore authorities declined to charge Mr. Gloria with any crime and did not even interview him despite his undisputed presence during the commission of the murder. As the district court below correctly concluded, Mr. Higgs's *Brady* evidence is "far

from trivial" and it "brings to light serious questions about the government's involvement in the Baltimore investigation of Mr. Gloria." DCO at 7.

A *Brady* violation has three elements: (1) suppression by the prosecution of evidence that is both (2) favorable to the accused and (3) material to guilt or punishment. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). The duty to disclose material exculpatory evidence extends to evidence in the possession of the police, regardless whether prosecutors are aware of it. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The Supreme Court has made clear that "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.") (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

1. The Government Withheld Exculpatory Evidence of Mr. Gloria's Lenient Treatment in Exchange for His Testimony.

Evidence that the Government actively intervened to protect Mr. Gloria from being prosecuted for murder to preserve his credibility in this case constitutes impeachment evidence that must be disclosed pursuant to *Brady*. The Government has never disputed that it did not inform counsel for Mr. Higgs prior to trial that it was aware Mr. Gloria was a suspect in Mr. Creighton's murder and had multiple contacts on Mr. Gloria's behalf with the state authorities who were deciding whether to prosecute him.

The essence of the Government's argument when this claim was raised during the § 2255 proceedings and again during the 60(d) proceedings in the District of Maryland was instead that Baltimore authorities declined to prosecute Mr. Gloria entirely of their own accord, and thus Mr. Gloria received no benefit from federal authorities that they were required to disclose. It was a

mere happy coincidence for the Government that the critical witness in a case it had been investigating for over three years did not become irredeemably tainted when Baltimore authorities exercised their purportedly independent judgment to decline to charge Mr. Gloria. The Government further argued that the prosecutors "had no duty or ability to predict, much less inform Higgs of benefits, or acts of grace, that coincidentally flowed to [Mr. Gloria] after this trial." Mot. Strike 86, *United States v. Higgs*, No. 98-cr-520-PJM (D. Md. Nov. 8, 2006), ECF No. 519.

These arguments lack merit. The police had strong reason to suspect Mr. Gloria, as he was either directly or indirectly implicated by multiple witnesses as the person who stabbed Mr. Creighton. And it is highly likely that Mr. Gloria knew that the federal authorities responsible for making a downward departure motion and a sentencing recommendation in the federal case were aware of his involvement in the Baltimore case, as the Maryland district court found during the 60(d) litigation. *Higgs-4*, 193 F. Supp. 3d at 511 n.12 ("[I]t seems plausible that the AUSA's knowledge of the friendship and theory of the conspiracy came from her questioning Gloria himself about the Creighton murder.").

In other words, Mr. Gloria knew that the federal prosecutors knew that he was a suspect in Mr. Creighton's killing, because the federal prosecutors questioned him about it. The federal prosecutors knew that they were shielding him from the state prosecutors, and that they were turning around and feeding information he gave them to the state authorities. Moreover, the federal prosecutors likely told Mr. Gloria during these conversations that they would be speaking to state authorities further. Regardless, mere knowledge that federal prosecutors were aware of the Baltimore investigation created a powerful incentive on Mr. Gloria's part to ingratiate

himself to the maximum possible extent with the Government.[10] This information was thus exculpatory within the meaning of *Brady*, as it constitutes "evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest." *Bagley*, 473 U.S. at 676; *see also Giglio*, 405 U.S. at 154 (*Brady* rule encompasses "evidence affecting credibility").

2. The Withheld Information Was Material.

It is impossible to overstate the importance of Mr. Gloria to the Government's case. As the Fourth Circuit noted on direct appeal, "[m]ost of the facts surrounding the murders of the three women were obtained from [Mr. Gloria's] eyewitness testimony." *Higgs-1*, 353 F.3d at 289 n.1; *see also id.* at 313–14 (evidence of kidnapping, felony, and premeditated murder is all derived from Mr. Gloria's testimony).

Furthermore, because Mr. Gloria's testimony served as the central pillar for the Government's case against Mr. Higgs, it is evident that the jury credited that testimony, regardless of trial counsel's attempts to impeach his credibility.

Lastly, the assertion that additional impeachment of Mr. Gloria would not have made any difference is erroneous. The impeachment value of the suppressed evidence was particularly strong. Mr. Gloria was a suspect in a murder, and if so charged, would have faced the possibility of imprisonment for life. Moreover, evidence of the intervention by federal authorities on his behalf would have allowed the jury to consider the lengths to which the Government was willing

[10] Baltimore authorities neither charged Mr. Gloria with Mr. Creighton's murder nor interviewed him, even though they charged Keith and Kevin Scott with first-degree murder – in spite of the fact that there was little evidence to substantiate such charges. In the absence of knowledge that Mr. Gloria was a key witness in a high-profile federal murder prosecution, it is highly unlikely that Baltimore authorities would have declined to charge Mr. Gloria – who was present at the time of the murder and implicated far more directly by several witnesses, including disinterested witnesses – without, at the very least, interviewing him.

to go to assist Mr. Gloria and, in turn, the length to which Mr. Gloria was willing to go to secure that assistance. This evidence was different in force and in kind from the impeachment developed at trial, and it gave Mr. Gloria additional motivation – of which the jury was not aware – to curry favor with the Government. Nor does it matter whether a formal agreement was in place not to prosecute Mr. Gloria in Baltimore in exchange for his testimony. As the Seventh Circuit explained in *United States v. Salem*, 578 F.3d 682 (7th Cir. 2009),

> to say that there is no reasonable probability that the jury could reach a different result, even if the evidence showed that the government's star witness was never charged for his direct involvement in a violent gang murder, ignores the differences between the drug and gun crimes about which [the star witness] was questioned [at trial] and [his undisclosed involvement in a] first-degree homicide.

578 F.3d at 689.

The mere fact that Mr. Gloria knew he was under investigation, and that the federal authorities with whom he was cooperating were in contact with state authorities, constituted powerful impeachment evidence. The suppression of the Baltimore homicide evidence was material.

B. Mr. Higgs Can Establish that the District Court Improperly Employed Rigid Categories, Instead of Applying the Standard-Based Language of the Savings Clause.

While Mr. Higgs asserted a *Brady* claim in his initial § 2255 motion, he lost that challenge, in large measure, because he had no hard evidence to support it given that the Government had refused to turn over the police and prosecution's files. It was not until two years after the denial of Mr. Higgs's § 2255 motion that he was able to obtain the Baltimore Police Department's 640-page file through a subsequent request. The materials in the file substantiated his initial § 2255 allegations.

Mr. Higgs's *Brady* claim is properly brought under § 2241 because the Government withheld evidence supporting the claim until after Mr. Higgs's § 2255 proceedings had ended. It was thus impossible for Mr. Higgs to present this evidence during the original § 2255 proceedings, and he is precluded from attempting to use § 2255 to do so again now, due to the strict barriers to raising successive § 2255 petitions. As a result, Mr. Higgs is entitled to review under § 2241 because § 2255 is "inadequate or ineffective to test the legality of [Mr. Higgs's] detention" or sentence. 28 U.S.C. § 2255(e). This provision is commonly called the "savings clause," and allows a federal prisoner who otherwise would have to proceed under § 2255 to litigate a habeas claim under 28 U.S.C. § 2241. Seventh Circuit precedent requires "some kind of structural problem with section 2255 before section 2241 becomes available." *Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (en banc).

In this case, denying § 2241 review of this *Brady* claim would reward the Government for its misconduct. Because the Government successfully hid the evidence until after the § 2255 proceedings were over, the Government's misconduct and the exculpatory evidence it failed to disclose will never receive proper review by any court unless this Court allows Mr. Higgs to proceed under § 2241.

The Indiana district court ruled that Mr. Higgs was unlikely to prevail on his claim that he may proceed under § 2241, in part, because it concluded that he could not satisfy what it characterized as an "established avenue" for bringing a § 2241 claim based on newly discovered evidence. DCO at 6. The court cited Seventh Circuit precedents identifying "three specific paths" to satisfying the savings clause. *Id.* at 5 (citing *In re Davenport*, 147 F.3d 605, 611-12 (7th Cir. 1998) (claim relying on Supreme Court decision of statutory interpretation made retroactive to cases on collateral review); *Garza v. Lappin*, 253 F.3d 918, 921-23 (7th Cir. 2001) (claim

relying on decision issued by international tribunal after § 2255 proceedings were completed); and *Webster*, 784 F.3d at 1135-44 (claim relying on evidence that existed but was unavailable at the time of trial and showed that defendant was categorically ineligible for the death penalty)). While the court recognized that the "fact patterns" of these three cases were not the only ones that could satisfy the savings clause, *id*. at 5, it effectively did exactly what it disclaimed doing: it rejected Mr. Higgs's savings clause argument because it was not a perfect match with the facts of any of these three cases.

In the district court's view, a petitioner seeking to satisfy the savings clause with a claim based on newly discovered evidence must show all three factors that led the Seventh Circuit to allow § 2241 review in *Webster*. Specifically, a petitioner would have to show that the newly discovered evidence: (1) existed at the time of trial, (2) was not available to the petitioner through the exercise of diligence, and (3) demonstrated that the petitioner was categorically ineligible for the sentence imposed. *Id*. at 6 (citing *Webster*, 784 F.3d at 1139). The court recognized that "Mr. Higgs has made a strong showing that his *Brady* claim satisfies the first two requirements." *Id*. Nevertheless, he could not obtain § 2241 review because, unlike Webster, he could not show his categorical ineligibility for the death penalty. *Id*. at 7.

The district court's insistence that only newly-discovered evidence claims that can satisfy *Webster*'s third prong are eligible for § 2241 review was unduly restrictive. The court's analysis contravened its own recognition of the rule that *Davenport*, *Webster*, and *Garza* do not provide the only routes to § 2241 review. *Id*. at 5-6 (citing *Purkey*, 964 F.3d at 615). Indeed, just this week, this Court has acknowledged as much in other unrelated litigation in Mr. Higgs's own case:

> As we explained in *Purkey* and reiterate today, our decisions in *Davenport*, *Garza*, and *Webster* do not "create rigid categories delineating when the [savings clause]

> is available." 964 F.3d at 614. Such a conclusion "would be inconsistent with the standard-based language of section 2255(e)." *Id.* at 614–15. To be sure, we took care in *Purkey* to emphasize that the terms "inadequate" and "ineffective" (as used in § 2255(e)'s savings clause) must mean something more than the mere lack of success. *Id.* at 615. Instead, "there must be some kind of *structural* problem with section 2255 before section 2241 becomes available." *Webster*, 784 F.3d at 1136 (emphasis added).

Higgs v. Watson, No. 20-2129, 2021 WL 81380, at *3 (7th Cir. Jan. 11, 2021).

Contrary to this directive, the district court applied "rigid categories" that limit *Webster*'s analysis only to claims such as intellectual disability and age that can make a defendant categorically ineligible for the death penalty. Granted, *Webster* was a case about intellectual disability that required this Court to decide whether the savings clause could be applied to issues of categorical ineligibility for the death penalty. The Court answered this issue in Webster's favor. Then, in applying that decision to the facts presented, this Court focused on the structural problems that arise when critical evidence that existed at the time of trial was not available to the reasonably diligent defendant during a previous attempt to litigate the claim. *Webster*, 784 F.3d at 1140. The circumstances here present a far more compelling need for § 2241 review than those in *Webster* because here it was the Government itself that hid the critical evidence until well after initial § 2255 proceedings were completed.

The district court concluded that a § 2255 petitioner victimized by this category of government misconduct is out of luck. It should have ruled, on the contrary, that the savings clause applied, or at least that Mr. Higgs had a likelihood of establishing that it did.

C. Mr. Higgs Can Establish that the District Court Gave Undue Significance to the Lack of a Specific "*Brady* Exception" to the Provisions Governing Successive Petitions.

The district court's second reason for rejecting the savings clause argument was the absence of a specific provision for cases like this one in the section governing successive § 2255

petitions. According to the district court, Mr. Higgs maintained that the court should recognize a "special rule" for *Brady* claims "to discourage the government from suppressing evidence after trial." *Id*. at 7. The court viewed it as conclusive that Congress decided to limit second or successive petitions based on newly discovered evidence to those supported by a clear and convincing showing of innocence, and did not include a *Brady* exception when it enacted § 2255. *Id*. at 8.

The district court recognized that the newly discovered suppressed evidence identified by Mr. Higgs was not available at the time of his initial § 2255 motion and that its impact was "far from trivial." DCO at 6-7. Thus, the Government's misconduct prevented Mr. Higgs from using this evidence to support the claim raised in his initial § 2255, where he would not have faced any procedural barriers to review. Nevertheless, the district court concluded that the only avenue for a petitioner like Mr. Higgs to seek relief for newly discovered evidence was through § 2255(h), even though his claim could not satisfy the exception's very narrow requirements. DCO at 8. The district court erred for several reasons.

First, the district court rewarded the Government for successfully hiding the *Brady* evidence not only at trial, but also throughout the post-conviction process. The Government's successful suppression precluded Mr. Higgs from having any opportunity to raise his claims at that time. Section 2255 should not be construed to reward government misconduct. While the statute largely limits a prisoner to one post-conviction proceeding, it does not suggest that the Government should be allowed to limit a prisoner's ability to identify and litigate claims in an initial proceeding. The Government should not be allowed to take advantage of § 2255's limitations on successive petitions when it actively precluded the discovery and litigation of claims in the first petition. Prosecutors play a special role in the criminal justice system. Their

obligation to refrain from improper conduct must be faithfully observed. *Banks*, 540 U.S. at 696*; Berger v. United States*, 298 U.S. 78, 88 (1935). Nowhere is this more important than in a capital case; the duty to enforce *Brady* "with painstaking care is never more exacting than it is in a capital case." *Kyles*, 514 U.S. at 422.

"Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Banks*, 540 U.S. at 696. Yet that is exactly what the district court's opinion gives to the Maryland police and prosecutors, who hid valuable evidence in hopes that the defense would not find it. And while *Banks* purports to prevent prosecutors from engaging in hide-and-seek games when it comes to exculpatory evidence, *id.*, the Government and Maryland prosecutors played those games and won, both at the time of trial and throughout appellate and collateral review.

Second, § 2255(h)(1) places a substantial limit on claims based on newly discovered evidence. Section 2255(h)(1) allows a prisoner to file a second or successive § 2255 petition only on the basis of "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." This is a high standard to meet, similar to the innocence standard of *Schlup v. Delo*, 513 U.S. 298 (1995), and imposes a substantial barrier to raising claims based on new evidence.

The *Brady* evidence uncovered by Mr. Higgs cannot meet this demanding standard. Granted, the suppressed evidence that Mr. Gloria was a suspect in a Baltimore homicide and that federal authorities intervened on his behalf, had great impeachment value that would have undermined Mr. Gloria's credibility and dealt a substantial blow to the Government's case. However, it does not, by itself, constitute affirmative evidence of innocence, let alone by the

clear and convincing standard required by the statute. This Court has recognized that impeachment evidence will seldom if ever make a clear and convincing showing that no reasonable juror would vote to convict. *McDowell v. Lenke*, 737 F.3d 476, 484 (7th Cir. 2013). Indeed, evidence that is merely impeaching will generally not result in a new trial. *United States v. Young*, 20 F.3d 758, 764 (7th Cir. 1994). The structure of § 2255, and the requirements it imposes before claims based on newly discovered evidence can be litigated in a second petition, made it unavailable to Mr. Higgs at the time he finally uncovered the evidence the Government suppressed.

Third, Mr. Higgs, suspecting that the Government had provided undisclosed benefits to Mr. Gloria, tried to raise a similar claim in his initial § 2255 petition. *See* Relevant Factual Background, Section 5 *supra*. But he lacked the proof needed to support those suspicions. Rather than disclose the proof it had been hiding, the prosecutors successfully argued that Mr. Higgs's claim failed for want of proof. *Id*. Despite the egregious nature of this misconduct, it is likely that Mr. Higgs's prior effort to litigate a *Brady* claim would have precluded any effort to relitigate that claim in a second § 2255, if he had tried to file a successive § 2255 petition instead of a § 2241 petition once he had discovered the evidence prosecutors had hidden. 28 U.S.C. § 2244, which is incorporated into § 2255(h), likely erects a complete bar to relitigation of a claim that has previously been raised. *Taylor v. Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002) (§ 2255(h) incorporates § 2244(b), including bar on relitigation of claims).

The district court addressed the problem at the wrong level of generality, and should have asked instead whether Mr. Higgs's case laid bare a "structural problem" with § 2255 that made review impossible. If the court had done so, it would have found the answer in its own discussion: § 2255 makes no provision for a *Brady* claim that is impossible to advance during

initial § 2255 proceedings because the prosecution or police manage to hide the suppressed evidence until later. This is a structural problem with § 2255 no less than the one identified in *Webster*. It should not matter that the type of claim at issue there involved categorical ineligibility for death. *Brady*, too, protects fundamental values.

So, we come to the crux of the issue in this case. Is there a working vehicle that will allow Mr. Higgs to raise his substantial claims of prosecutorial suppression of evidence in violation of due process? Or will the Government be rewarded for the length of time it successfully hid exculpatory evidence by escaping any review of its own misconduct in violation of Mr. Higgs's constitutional rights?

Here, the Government cheated at trial. That cheating helped it obtain Mr. Higgs's convictions and death sentences. In § 2255 proceedings, the Government cheated again. That cheating allowed it to argue successfully that Mr. Higgs lacked the evidence necessary to sustain his *Brady* claims, even as it continued to hide the evidence that would have proved those claims valid.

Rewarding such misconduct will encourage some prosecutors to bend and break the rules to obtain a conviction and death sentence, hoping they can keep the evidence hidden long enough to prevent the courts from reviewing their actions. Indeed, as Justice Sotomayor pointed out in her dissent in *Bernard v. United States*, 2020 U.S. LEXIS 5991, at *5 (Dec. 10, 2020), such a result "rewards prosecutors who successfully conceal their *Brady* and *Napue* violations until after an inmate has sought relief from his convictions on other grounds." It is untenable to think that Congress intended this result, and yet, that is exactly what has occurred here.

Constitutional violations arising from the suppression of material exculpatory evidence are simply too important to avoid review. Such violations strike at the heart of the criminal

justice system and undermine the public's faith in its legitimacy. The need for transparent judicial review is especially great in these times where many portions of the public have expressed a great distrust of the criminal justice system; have questioned the actions of police and prosecutors; and have seen the exonerations of hundreds of people whose wrongful convictions were based, in whole or in part, on the unconstitutional suppression of evidence. *See, e.g.*, Univ. of Cal. Irvine Newkirk Ctr. for Sci. & Soc'y, Univ. of Mich. Law Sch., & Mich. State Univ. Coll. of Law, *Exoneration Detail List*, *Official Misconduct (OM) Tab: Exculpatory evidence withheld*, National Registry of Exonerations, https://tinyurl.com/y4jh7a56 (last visited Jan. 14, 2021).

Prosecutors should not be able to avoid review of their misconduct through a narrow construction of the habeas statute. But, in this scenario, the structure of § 2255, and the limitations it imposes when new evidence of prosecutorial misconduct is discovered, preclude review. Congress created the savings clause to ensure that issues like this one would not escape judicial review. Section 2241 is the legitimate and appropriate vehicle for Mr. Higgs to litigate these claims.

II. Mr. Higgs Will Suffer Irreparable Injury Without a Stay.

Mr. Higgs's execution is scheduled for January 15, 2021. The harm to Mr. Higgs of being put to death – where Mr. Higgs was not the shooter and the shooter is serving a life sentence, where Mr. Higgs is innocent of capital murder, and where no evidentiary hearing has ever been held to resolve the outstanding issues stemming from Mr. Gloria's involvement in the Baltimore murder and determine whether the Government violated its *Brady* obligations – cannot be overstated. *See Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (holding that "irreparable

harm is taken as established in a capital case" because "[t]here can be no doubt that a defendant facing the death penalty at the hands of the [Government] faces irreparable injury").

III. A Stay Will Not Substantially Harm the Government; the Potential Injury to Mr. Higgs Outweighs Any Harm to Respondents.

The Government's only interest in securing Mr. Higgs's execution before full and fair judicial review of his *Brady* claim is its desire for adherence to an arbitrary schedule. Mr. Higgs's request for a stay is not based on any delay on his part. Until recently, the Government had not carried out an execution since 2003 and had no execution protocol in place since 2011. In the meantime, Mr. Higgs has diligently pursued the claims raised in the Second Amended Petition, seeking relief under § 2255 in 2005 (through the denial of certiorari in 2012), seeking relief under Rule 60(d) (through the denial of certiorari in 2018), and seeking additional discovery to support the claim through FOIA litigation (denial of discovery affirmed by Seventh Circuit in 2019). When the Government announced Mr. Higgs's execution date on November 20, 2020, less than two months ago, Mr. Higgs continued his ongoing litigation efforts and filed the Second Amended Petition on December 23, 2020. *See* ECF No. 14-1.

In any event, under no scenario can the Government's interest in adhering to an arbitrarily accelerated execution schedule, packed into a lame-duck President's last full week in office, outweigh the interest of the Petitioner and the public in ensuring that Petitioner's constitutional rights were not violated.

IV. The Public Interest Weighs in Favor of a Stay.

The public interest is "in having a just judgment," *Arizona v. Washington*, 434 U.S. 497, 512 (1978), not simply in having an execution. The public has no interest in executing a man where the Government withheld critical information affecting the credibility of its star witness, information that would have undermined the Government's whole case if disclosed at trial.

Indeed, the opposite is true. The public interest lies in ensuring that the Government obeyed its ethical and constitutional duties, not that it successfully hid exculpatory evidence until after appellate and collateral proceedings were completed.

This Court has an opportunity to remind the public that our justice system does not execute prisoners without providing some avenue of review for concededly substantial claims that the Government withheld material information at trial. To the extent there is a public interest in timely enforcement of a death sentence, that interest does not outweigh the public interest in knowing that the federal government met its constitutional responsibilities. It has not done so here. The balance of harms weighs in Mr. Higgs's favor.

REQUEST FOR RELIEF

For the foregoing reasons and those that will be enumerated in greater detail in his opening brief on February 22, 2021, Mr. Higgs respectfully requests that the Court stay his execution pending its consideration of his *Brady* claim.

Respectfully submitted,

/s/ Matthew C. Lawry
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January 14, 2021

CERTIFICATE OF SERVICE

I, Matthew C. Lawry, hereby certify that on this 14th day of January, 2021, the foregoing was filed electronically through ECF/CM. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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