**Capital Case**
**Execution Scheduled Sept. 24, 2020**

**Case Nos. 20-5766, 20A49**

# In the Supreme Court of the United States

Christopher André Vialva,
*Petitioner,*

v.

United States of America,
*Respondent.*

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

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND TO APPLICATION FOR A STAY OF EXECUTION

[Execution Scheduled for Sept. 24, 2020 at 6:00 p.m.]


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## REPLY

Petitioner respectfully submits this Reply to the Government's Brief in Opposition to Petition for a Writ of Certiorari and to Application for a Stay of Execution.

## ARGUMENT

The Government's Brief in Opposition (Opp. Br.) highlights rather than diminishes the need for this Court to grant certiorari and settle the law controlling the implementation of federal executions. First, the Government makes sweeping, unjustified assertions about the power of the Executive Branch to execute individuals. Second, the Government provides little guidance as to how the Federal Death Penalty Act's (FDPA) implementation provision, 18 U.S.C. § 3596(a), should be interpreted regarding date-setting and execution warrants. Finally, the Government expresses unfounded fears about the inability of federal courts to discern relevant provisions of state law and apply them when implementing death sentences. The Government's arguments demonstrate the necessity of this Court's involvement to resolve core issues regarding the implementation of the Federal Death Penalty Act.

*First*, the Government misunderstands what this case is about. The question presented is not about how the FDPA constrains the Bureau of Prisons (BOP) or the U.S. Marshal in the implementation of a death sentence that has been ordered by a district court. Rather, it is about how the Act constrains the district court that issued the judgment imposing death in the implementation of that sentence. The Government is confused because it believes the BOP has some independent power to

set execution dates and proceed without any warrant. The Government's position is that on July 31, 2020, the BOP set Mr. Vialva's execution date. Opp. Br. at 24. The Government's position is patently incorrect. The BOP has no power to set an execution date. The Government cites no Congressional act or regulation conferring such power on the BOP. No such authority exists. Mr. Vialva's execution date was set for the first time September 11, 2020, when the district court entered an order lifting the stay of his judgment and directing the Marshal to supervise his execution thirteen days later on September 24, 2020.[1]

The Government believes "the default constitutional rule for setting execution dates is one of shared authority between the Executive and Judiciary," Opp. Br. at 22, and "[c]urrent federal law . . . shifts principal responsibility for setting execution dates back to the Executive Branch, while also recognizing the concurrent authority of the courts." *Id*. On the contrary, no law of Congress confers on any executive officer any authority to set execution dates. The Government cites *Holden v. Minnesota*, 137 U.S. 483, 495–96 (1890), for its proposition. *Holden* stands for no such thing. *Holden* involved a Minnesota court judgment, and "under the law of Minnesota . . . the day on which the punishment of death should be inflicted depended upon the warrant of

[1] The district court erroneously concluded no stay was in place. The court misconstrued the portion of the judgment stating Mr. Vialva "will" be executed after exhaustion of appeals as a general order of authorization. The next paragraph in the judgment provided in the event of an appeal, the judgment "shall" be stayed "pending further order." A judgment imposing death is always stayed pending appeals if it directs execution to occur. Necessarily, that stay must be lifted before an execution may occur. The BOP has no power to unilaterally lift a stay of a judgment imposed by a district court.

the governor." *Id.* at 495. The Court held it did not violate due process for Minnesota to pass such a law. *Id. Holden* does not suggest the "Executive Branch" of the federal government has "shared authority" with the federal judiciary to set execution dates. *Holden* recognized it is constitutionally permissible for a state legislature to pass a law delegating the power to set an execution date to the executive branch. *Holden* did not conclude Congress has done so. The Government cites no such law and none exists.[2]

The Government also misinterprets Attorney General Wirt's opinion. Attorney General Wirt did not opine the President had any "inherent" power to issue warrants setting execution dates in the absence of Congressional action. Opp. Br. at 20. The word "inherent" never appears in the opinion. Attorney General Wirt concluded the President had the power to set the execution date based on federal law created by the judicial branch. The controlling authority derived from the judiciary in the absence of countervailing Congressional directive.[3] 1 U.S. Op. Att'y. Gen. 228 (1818). The

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[2] Even if the "Executive Branch" had such "shared authority," that does not mean any *officer* within that branch could set an execution date. It is wholly unclear what the Government means by "shared authority." The Government appears to claim the authority includes the power to disregard court orders, as it did in this case when the BOP announced its intention to execute Mr. Vialva in violation of a court order staying his judgment.

[3] The Government speculates that "deference" to state warrant requirements may have been "prudent" in 1818 "given the dependence of the federal law enforcement on state facilities at the time." Opp. Br. at 21. The United States Marshal Service's own website refutes this: "The first known federal execution under this authority was conducted by U.S. Marshal Henry Dearborn of Maine on June 25, 1790. He was ordered to execute one Thomas Bird for murder on the high seas. In coordinating this, Dearborn spent money on building a gallows and coffin. Later, as U.S. Marshals saw more death sentences imposed, a few districts resorted to more permanent equipment. U.S. Marshal E.D. Nix of Oklahoma had a portable scaffold

salient point of Attorney General Wirt's opinion remains unchanged: Execution warrants to implement death sentences in federal cases issue as provided by state law. It was necessary for the President to act in the case "to give effect to our laws." *Id*. Attorney General Wirt recognized the President's authority to set an execution date flowed from a *judicial* rule of general law.[4]

*Second*, with respect to the FDPA, the Government relies solely on cases interpreting the act in a very narrow context: which aspects of "state law" apply *specifically* to the act of execution. Opp. Br. at 17–18 (citing *United States v. Mitchell*, No. 20- 99009, 2020 WL 4815961, *2–*3 & n.6 (9th Cir. Aug. 19, 2020); *Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020); *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 129–31, 151 (D.C. Cir. 2020); *LeCroy v. United States*, No. 20-13353, 2020 WL 5542483, *4 (11th Cir. Sept. 16, 2020)) [collectively, "execution-chamber cases"]. These decisions were not so "uniform" in reasoning as the Government suggests.[5] Opp. Br. at 2. Mr. Vialva need not dispute their holdings to prevail.

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that could be easily packed for travel in 1894." *See* History—Historical Federal Executions, available at https://www.usmarshals.gov/history/executions.htm (last visited Sept. 17, 2020).

[4] As both parties recognize, *see* Opp. Br. at 22 & Ptn. at 10 n.5, the practice of the President issuing execution warrants waned in the middle of the 19th century. The judiciary assumed the duty of issuing execution warrants.

[5] The Government's alleged circuit court uniformity addressing the scope of the FDPA is undermined by *In re Fed. Bureau of Prisons' Execution Protocol Cases*. The three circuit court judges reached three different interpretations of the FDPA. Two judges rejected the Government's argument that FDPA language required adherence only to the top-line method of execution. Ptn. at 3 (discussing Judge Katsas's, Judge Rao's, and Judge Tatel's interpretations).

In the execution-chamber cases, no party doubted § 3596(a) constrained the manner by which a Marshal supervises an execution. The courts were asked to determine *which* aspects of state law applied. The cases addressed the level of specificity with which a Marshal supervising an execution is required to ensure compliance with state law. This case asks whether courts implementing death sentences are constrained by § 3596(a). Specifically, this case presents the question whether § 3596(a)'s implementation provision requires a court to adhere to state law notice requirements applicable to the setting of execution dates.

The Government focuses mostly on a Marshal's role in implementing a death sentence, and how it was historically constrained by older Congressional provisions. Opp. Br. at 14–17. Neither the Marshal's nor the BOP's role in implementing death sentences is at issue here. The existence of the Government's "longstanding 'practice'" of failing to follow "subsidiary details" of "state execution protocols," Opp. Br. at 16, does not inform whether § 3596(a) requires courts to look to state law when implementing death sentences. "Longstanding practice" with respect to in-chamber execution procedures may well be on the Government's side. Precedent with respect to warrant requirements is firmly on Mr. Vialva's side. The FDPA must be read in conjunction with that historical judicial law.

*Finally*, the Government is befuddled about how a federal court could ever look to Texas law to implement a death sentence as regards fixing an execution date and issuing an execution warrant. It suggests Mr. Vialva's "approach" "would threaten to undermine the basic purpose of the FDPA by making it 'impossible to carry out

executions of prisoners sentenced in some States.'" Opp. Br. at 18 (quoting *Barr v. Roane*, 140 S. Ct. 353 (2019) (Alito, J., statement respecting the denial of stay or vacatur)). The Government fears, for example, a federal court would read Texas's requirement that a date not be set until after exhaustion of state habeas corpus remedies to prevent the federal court from ever setting an execution date because a person sentenced to death by a federal court has no state habeas corpus remedies. *Id*. This is a straw man. Mr. Vialva never requested "strict compliance" with Texas law in such an absurd way. Moreover, Mr. Vialva believes federal courts are competent to look at state law and determine which of its elements related to implementation of death sentences—for example, notice provisions relating to the setting of an execution date—are material and should bind its own implementation of a death sentence. *See, e.g., United States v. Hammer*, 121 F. Supp. 2d 794, 798 (M.D. Pa. 2000) (determining which state law was material to implementation of a death sentence). The federal courts have always done so.

## CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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