CAPITAL CASE

EXECUTION SCHEDULED FOR 6:00 P.M. (EDT) SEPTEMBER 22, 2020

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM EMMETT LECROY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TABLE OF APPENDICES

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13353

D.C. Docket No. 2:02-cr-00038-RWS-JCF-1

WILLIAM EMMETT LECROY, JR.,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(September 16, 2020)

Before WILLIAM PRYOR, Chief Judge, NEWSOM, and LUCK, Circuit Judges.

NEWSOM, Circuit Judge:

William Emmett LeCroy, Jr. is a federal death-row inmate. The Director of the Bureau of Prisons has scheduled LeCroy's execution for September 22, 2020. LeCroy moved the district court to postpone his execution date by several months on the ground that two of his three appointed lawyers are currently unable to meet with him due to circumstances caused by COVID-19. The district court denied the motion, and LeCroy now appeals.

We hold that neither the district court nor this Court has the authority to postpone LeCroy's execution—at least absent a demonstration that a stay is warranted, a showing that LeCroy has not attempted to make. Moreover, and in any event, we hold that LeCroy is not entitled to relief on the merits. We therefore affirm the district court's ruling.

I

The following facts are undisputed. Less than two months after being released from prior terms of state and federal imprisonment, LeCroy bound, raped, and killed Joann Tiesler in Cherry Log, Georgia. *United States v. LeCroy*, 441 F.3d 914, 918–20 (11th Cir. 2006). After absconding in Tiesler's car, LeCroy was captured in Minnesota, just shy of the Canadian border. *Id*. at 920. In the car, police found a knife stained with Tiesler's blood and other evidence related to the killing. *Id.* LeCroy was indicted in the United States District Court for the Northern District of Georgia for taking a motor vehicle by force, violence, and

intimidation resulting in Tiesler's death, in violation of 18 U.S.C. § 2119(3). *Id.* A superseding indictment added special death-eligibility allegations. *Id.* At the conclusion of the sentencing phase, the jury returned a death sentence. *Id.* LeCroy was remanded to federal custody at the United States Penitentiary in Terre Haute, Indiana. *Id.*

This Court unanimously affirmed LeCroy's conviction and sentence on direct appeal, *see id.* at 918, and the Supreme Court denied his petition for writ of certiorari, *see LeCroy v. United States*, 550 U.S. 905 (2007). LeCroy thereafter moved the district court for the appointment of counsel; the court granted the motion and appointed John R. Martin and Sandra L. Michaels. LeCroy later filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The district court denied the motion, this Court again unanimously affirmed, *see LeCroy v. United States*, 739 F.3d 1297 (11th Cir. 2014), and the Supreme Court again denied LeCroy's petition for writ of certiorari, *see LeCroy v. United States*, 575 U.S. 904 (2015). In 2019, the district court appointed LeCroy a third lawyer, Stephen Ferrell of Federal Defender Services of Eastern Tennessee, Inc.

On July 31, 2020, LeCroy and his attorneys received notice that the Bureau had set LeCroy's execution date for September 22, 2020. More than three weeks later, on August 24, 2020, LeCroy moved to postpone the execution date by several months—*i.e.*, until sometime in Spring 2021—on the ground that two of

his three appointed lawyers, Martin and Michaels, were uniquely affected by COVID-19, could not travel to visit him, and accordingly could not (1) properly assist in the preparation and filing of a clemency petition and (2) attend his execution in person.

The district court denied LeCroy's motion. In short, it concluded that if it were "amenable to LeCroy's request and inclined to 'reset' or 'modify' the date of execution, granting the requested relief (i.e., continue or postpone execution) would amount to a stay." The court further explained that LeCroy could not invoke the All Writs Act, 28 U.S.C. § 1651, as a means of circumventing the traditional stay requirements.

LeCroy now appeals.

II

We must first consider the source and scope of the courts' authority to postpone LeCroy's execution date. The Code of Federal Regulations vests the Bureau Director with broad authority and discretion to set execution dates as an initial matter:

> (a) Except to the extent a court orders otherwise, a sentence of death shall be executed:
>
> (1) On a date and at a time designated by the Director of the Federal Bureau of Prisons, which date shall be no sooner that 60 days from the entry of the judgment of death. If the date designated for execution passes by reason of a stay of execution, then a new

> date shall be designated promptly by the Director of the Federal Bureau of Prisons when the stay is lifted[.]

28 C.F.R. § 26.3(a)(1). Section 26.4 further provides:

> Except to the extent a court orders otherwise:
>
> (a) The Warden of the designated institution shall notify the prisoner under sentence of death of the date designated for execution at least 20 days in advance, except when the date follows a postponement of fewer than 20 days of a previously scheduled and noticed date of execution, in which case the Warden shall notify the prisoner as soon as possible.

Here, the Director has set LeCroy's execution for September 22, 2020. In his motion, LeCroy sought to postpone that date—in particular, he "ask[ed] that the Court schedule [his] execution for a date certain in Spring 2021 . . . ." Even so, LeCroy insisted in the district court—and continues to maintain—that his was "not a Motion for a Stay of Execution or an Injunction."

We disagree. Although LeCroy's motion carefully avoided using the word "stay"—instead repeatedly asking the district court to "reset" or "modify" his execution date—LeCroy has failed to explain how his pleading can sensibly be understood as anything other than a request to *stay* his execution. As the Supreme Court has explained, a stay operates by "halting or postponing some portion of the proceeding, or . . . temporarily divesting an order of enforceability." *Nken v. Holder*, 556 U.S. 418, 428 (2009); *see also Stay*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "stay" as the "postponement or halting of a proceeding,

judgment, or the like" and an "order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding"). That is *precisely* the relief that LeCroy seeks. A stay by any other means is still a stay.

A stay of execution is an equitable remedy that "is not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Rather, under our precedent, a court may issue a stay of execution "only if [the movant] establishes that (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; *and* (4) if issued, the injunction would not be adverse to the public interest." *Price v. Comm'r, Ala. Dep't of Corr.*, 920 F.3d 1317, 1323 (11th Cir. 2019) (citations and quotation marks omitted). LeCroy has not even attempted to satisfy—and indeed, has sworn off—these requirements.

Nor does LeCroy identify any other source of authority—statutory, regulatory, or otherwise—that would empower a federal court to "reset" or "modify" his execution date. It is true, as LeCroy says, that 28 C.F.R. §§ 26.3 and 26.4 prescribe a role for the judiciary in setting execution dates. *See* 28 C.F.R. § 26.3(a) ("Except to the extent a court orders otherwise, a sentence of death shall be executed . . . ."); *id.* § 26.4 ("Except to the extent a court orders otherwise . . . ."). As does the Bureau of Prisons Execution Protocol. *See* Department of Justice, Bureau of Prisons Execution Protocol 5 (2004) ("If the execution date is set by a

judge, the Warden will notify the condemned individual, in writing, as soon as possible."). It may well be, as LeCroy asserts, that both these regulations and the Protocol reflect an understanding that courts historically played some concurrent role in—had some shared responsibility for—setting execution dates in the first instance. *Cf. United States v. Lee*, No. 4:97-cr-00243, 2020 WL 3921174, at *3 (E.D. Ark. July 10, 2020). And at the very least, the regulations and the Protocol sensibly recognize—as they must—a court's authority to stay or enjoin a scheduled execution. But we are confident that they do *not* vest courts with a free-floating, standardless reservoir of authority to postpone an already-scheduled execution, free and clear of the traditional stay standard. If they did, no death-sentenced inmate would ever again go to the trouble of trying to satisfy the stay factors. That cannot be the law.

Nor does the All Writs Act, which LeCroy invokes alongside §§ 26.3 and 26.4 and the Protocol, independently authorize a federal court to modify his execution date—independently, we mean, of a showing that the traditional stay factors have been satisfied. The Act establishes that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This Court, though, has carefully confined the Act's office to "extraordinary circumstances." *United States v. Machado*, 465 F.3d

1301, 1308 (11th Cir. 2006), *overruled on other grounds by United States v. Lopez*, 562 F.3d 1309, 1311 (11th Cir. 2009). Moreover, the Act does not absolve LeCroy of his responsibility to make the showing necessary to obtain a stay. *See Dunn v. McNabb*, 138 S. Ct. 369, 369 (2017) (observing that the All Writs Act "does not excuse a court from making" injunction- or stay-related related findings); *see also Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1229 (11th Cir. 2005) ("Under our circuit law, the All Writs Act cannot be used to evade the requirements for preliminary injunctions.").[1]

LeCroy has not even attempted to satisfy the requirements necessary to stay his execution—even temporarily—and he has identified no authority that would otherwise permit a federal court to "reset" or "modify" his execution date. Accordingly, we hold that the district court correctly concluded that it lacked the authority to postpone LeCroy's execution.[2]

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[1] LeCroy separately argues that the All Writs Act protects the court's jurisdiction under 18 U.S.C. § 3599 to appoint counsel. We disagree. Section 3599 does not imbue the court with *continuing* authority or jurisdiction that the Act may then be invoked to protect. *See Baze v. Parker*, 632 F.3d 338, 346 (6th Cir. 2011) ("Because the only jurisdictional power granted to the district court by section 3599 is the power to appoint attorneys and oversee the release of federal funds to those attorneys, the relief that Baze seeks here is not 'in aid of' the district court's preexisting jurisdiction under section 3599 and is thus outside the scope of the All Writs Act.").

[2] Even if LeCroy's request were more properly viewed as a request for an injunction, rather than a stay, the same result would obtain. LeCroy must still satisfy the traditional requirements for obtaining an injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right."); *Swain v. Junior*, 961 F.3d 1276, 1284 (11th Cir. 2020) (same). The All Writs Act does not excuse LeCroy from satisfying these requirements. *Schiavo*, 403 F.3d at 1229.

III

LeCroy is not entitled to the relief he seeks, in any event. Before the district court and in this Court, LeCroy has asserted two grounds for postponing his execution: (1) two of his three appointed lawyers are currently unable to meet with him face-to-face to assist in the preparation and filing of a clemency petition; and (2) two of his three appointed lawyers are currently unable to be on hand in person to witness his scheduled execution.

As an initial matter, we reiterate our "consistent[holding] that there is no federal constitutional right to counsel in postconviction proceedings." *Barbour v. Haley*, 471 F.3d 1222, 1227 (11th Cir. 2006). Nor (for better or worse) does the Constitution guarantee a condemned inmate the right to have his lawyer present at his execution. If LeCroy is entitled to relief, therefore, it must be on the basis of some statute or regulation.

Before the district court, LeCroy first asserted that he had a statutory right to assistance with his clemency petition under 18 U.S.C. § 3599(e). That statute provides that appointed counsel

> shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and *shall also represent the defendant in such competency proceedings and*

> *proceedings for executive or other clemency* as may be available to the defendant.

18 U.S.C. § 3599(e) (emphasis added). The problems for LeCroy are (1) that nothing in § 3599(e) specifies in-person representation and (2) that, despite the heightened risks that COVID-19 poses for two of his three appointed lawyers, he still has ready access to the "represent[ation]" that § 3599(e) contemplates. Not only can LeCroy avail himself of unmonitored telephone calls and face-to-face videoconferences with all three of his lawyers, but he can also meet with one of them, Ferrell, in person at the prison.[3]

Both before the district court and in this Court, LeCroy has separately pointed to 18 U.S.C. § 3596(a) in support of his argument that his attorney must be on hand to personally witness his execution. Section 3596(a) states that an execution shall be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." This provision, LeCroy contends, incorporates Ga. Code Ann. § 17-10-41, which states that "the convicted person may request the presence of his or her counsel." In support of this argument, LeCroy cites *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020).

[3] Nothing in the record indicates that COVID-19 poses any unique (or even heightened) risk to Ferrell.

Although the separate opinions in *Execution Protocol Cases* posit varying interpretations of § 3596(a), even the dissenting opinion there—which embraced the most capacious reading—acknowledged that § 3596(a) requires the Bureau to follow only those state execution procedures that "effectuat[e] the death, . . . including choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements." *Id*. at 151 (Tatel, J., dissenting) (alterations and citations omitted). Other circuits have interpreted § 3596(a) in a similarly (if not more) restrictive manner. *See*, *e.g.*, *United States v. Mitchell*, No. 20-99009, 2020 WL 4815961, at *2–3 (9th Cir. Aug. 19, 2020); *Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020) ("We do not understand the word 'manner' as used in § 3596(a) to refer to details such as witnesses. The word concerns how the sentence is carried out, not who watches."). We needn't decide today precisely what the phrase "in the manner prescribed by the law of the State in which the sentence is imposed" entails—whether it refers only to top-line methods, execution procedures more generally, etc. Whatever that phrase means, we are confident that it does not extend to ensuring a lawyer's presence at execution.

Accordingly, we hold that even if this Court had the authority to postpone LeCroy's execution date absent a showing that a stay is warranted, LeCroy is not entitled to relief on the merits.

IV

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA v. WILLIAM EMMETT LECROY, JR., Defendant/Petitioner.	Criminal Action No. 2:02-CR-38-RWS 2:08-CV-83-RWS [Capital Case]

ORDER

This case comes before the Court on Defendant-Petitioner William Emmett LeCroy, Jr.'s "Motion To Reset Or Modify Execution Date In Order To Implement Court's Order Appointing Counsel" ("Motion") [Doc. 593], filed August 24, 2020, the United States' Response in Opposition [Doc. 598], filed August 28, 2020, and "Notice of Defendant's Submission of Clemency Petition" [Doc. 599], filed August 31, 2020.

LeCroy is a federal death row inmate imprisoned at the United States Penitentiary ("USP"), in Terre Haute, Indiana, which lies within the Southern District of Indiana (and the Seventh Circuit Court of Appeals). LeCroy was prosecuted in the Northern District of Georgia, with the undersigned presiding over the jury trial, including the penalty phase, as well as post-trial litigation and post-

conviction habeas proceedings. On August 1, 2020, the United States filed a "Notice Regarding Execution Date" advising that the Director of the Federal Bureau of Prisons ("BOP"), upon the direction of the Attorney General, has scheduled the execution of William Emmett LeCroy, Jr., in accordance with 28 C.F.R. Part 26, to take place on September 22, 2020, prompting the instant Motion. [Doc. 591].

In the Motion, counsel for LeCroy assert that the Court should "reset" or "modify" the execution date to allow counsel to fulfill the duties they were appointed to perform pursuant to 18 U.S.C. § 3599. [Motion at 1].[1] Lead counsel for LeCroy makes this request based on chronic health conditions and the global COVID-19 pandemic, which, taken together, preclude him from attending the execution as requested by LeCroy.[2] [Motion at 3-5]. Counsel request that the

[1] Defense counsel cite this Court's May 25, 2007 Order ("Appointment Order") [Doc. 479], appointing and assigning counsel the duties of "providing effective legal and investigative assistance to their client in preparation for clemency proceedings and other possible legal challenges, including being present for the client and giving him counsel at the time of his execution." [Motion at 1-2].

[2] LeCroy has three attorneys of record, John R. Martin ("Lead Counsel" or "Martin"), Sandra Michaels ("Michaels"), who is Martin's spouse, and Stephen Ferrell ("Ferrell") of the Federal Defender Services of Eastern Tennessee, Inc. ("FDSET") (collectively "Counsel"). Ferrell was appointed in January 2019 [Doc. 584] and, thus, has less history with LeCroy than either Martin or Michaels.

execution be postponed until the Spring of 2021 or "until sometime after a vaccine is available" for COVID-19. [Motion at 6].

The United States opposes the Motion on multiple grounds, including that the Motion, as presently styled, is not properly before this Court. [Doc. 598]. Alternatively, the United States argues that to grant this relief absent identification of a violation of any constitutional or statutory right or court order would constitute an abuse of discretion.

A hearing was held on September 2, 2020 to provide the parties with an opportunity for oral argument.[3]

Having reviewed the record and considered the arguments of counsel, the Court enters the following Order.

BACKGROUND

The underlying facts, which are not disputed, are summarized by the Eleventh Circuit's decision of March 2, 2006, affirming the conviction and sentence, and need not be repeated here. [Doc. 472 – United States v. LeCroy, 441 F.3d 914 (11th Cir. 2006)]. In sum, on October 7, 2001, LeCroy broke into the home of Joann Tiesler, raped and murdered her, and fled in her car to the Canadian

[3] The hearing was conducted via Zoom.gov video conferencing consistent with the parties' stated preference.

border, where he was arrested two days later. He was indicted on a single count of violating 18 U.S.C. § 2119(3) (carjacking), namely, taking a motor vehicle that had been transported, shipped, and received in interstate commerce, with the intent to cause death and serious bodily harm, from the person and presence of Joann Lee Tiesler by force and violence resulting in her death. [Docs. 1, 32].

The case was tried before a jury in 2004 (February 17, 2004 thru March 10, 2004). The jury returned a verdict of guilty on March 1, 2004. [Doc. 398]. Following the penalty phase, on March 10, 2004, the jury issued a special verdict in favor of a death sentence. [Doc. 414]. The Judgment and Commitment Order ("J&C") was entered pursuant to the jury's special verdict on March 11, 2004. [Doc. 417]. The J&C expressly provided that the Attorney General and United States Marshal "shall make the arrangements for the execution and supervise implementation of the sentence." [Doc. 417]. LeCroy moved for a new trial and the motion was denied. [Docs. 420, 445].

On direct appeal, LeCroy's conviction and sentence were affirmed by the Eleventh Circuit Court of Appeals. [Docs. 448, 472]. His petition for rehearing *en banc* was likewise denied. [Doc. 473].

LeCroy's post-conviction collateral attack asserting various constitutional challenges to his conviction and sentence was unsuccessful. On April 22, 2008,

LeCroy filed a Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C. § 2255. [Doc. 493]. This Court denied relief following an evidentiary hearing lasting three days. [Doc. 551]. LeCroy appealed and the appellate court issued a certificate of appealability. [Docs. 555, 564]. On January 15, 2004, the Eleventh Circuit affirmed this Court's denial of LeCroy's Section 2255 Motion. [Doc. 573]. The Eleventh Circuit's mandate issued March 17, 2014. [Doc. 574].

The Court was notified on March 11, 2015, that the Supreme Court denied certiorari, at which time LeCroy's conviction became final. [Doc. 576]. And see Washington v. United States, 243 F.3d 1299, 1300-01 (11th Cir. 2001).

LeCroy has submitted one prior clemency petition. [Doc. 598 at 8-9]. In December 2016, LeCroy filed an application for executive clemency. [Doc. 598, Exhibit 1- Declaration of Kira Gillespie ("Gillespie Declaration") ¶ 5]. On January 20, 2017, LeCroy requested to withdraw his petition, and the Office of the Pardon Attorney administratively closed LeCroy's clemency petition without prejudice on January 24, 2017. [Gillespie Declaration ¶ 5].

On August 28, 2020, counsel for LeCroy filed a renewed petition for clemency seeking commutation of his death sentence with the Department of Justice's Office of Pardon Attorney. [Doc. 599].

As discussed *supra*, LeCroy has fully exhausted all avenues of relief for asserting substantive challenges to his conviction and sentence. Procedurally, this case has been in a posture for execution since 2015. As stated by counsel for the Government during the hearing, for reasons unrelated to LeCroy's case, the Department of Justice resumed capital executions at some point in 2019, and September 22, 2020 is LeCroy's first scheduled date of execution. He filed this Motion shortly after the execution was announced.

DISCUSSION

LeCroy argues that, under the All Writs Act, 28 U.S.C. § 1651(a) ("AWA"), this Court may (and should) intervene to enforce its Order Appointing Counsel ("Appointment Order"). [Doc. 578, 580]. LeCroy bases his request on the exigent circumstances presented by the coronavirus pandemic, which restricts the ability of his Lead Counsel to attend the execution on September 22, 2020. LeCroy asks the Court to provide for a delay such that his Lead Counsel may attend the execution.

The Court begins with its authority to reset an execution date.

I. Authority to Entertain Defendant's Motion

According to LeCroy, this Court has the authority to reset his execution date in accordance with the Federal Death Penalty Act, 18 U.S.C. §§ 3591, *et seq*. ("FDPA"), and 28 C.F.R. § 26.3(a) to allow for counsel's appointment to be

meaningful.[4] The Court concludes, as a general matter, that it has the authority to fix the date of execution if it chooses to do so. However, given the posture of the case, the All Writs Act cannot provide redressability for LeCroy.

A. The Federal Death Penalty Act

LeCroy was sentenced to death pursuant to FDPA, 18 U.S.C. §§ 3591, *et seq*. Section 3596 governs implementation of the sentence and provides in part:

> A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. . . .

18 U.S.C. § 3596(a) (1994). For purposes of Section 3596(a), "the State in which the sentence is imposed" for purposes of § 3596(a) of the FDPA is that of the sentencing court. United States v. Battle, 173 F.3d 1343, 1350 (11th Cir. 1999); see also United States v. Bourgeois, 423 F.3d 501, 509 (5th Cir. 2005); United States v. Hammer, 121 F. Supp. 2d 794, 798 (M.D. Pa. 2000) (citing 18 U.S.C. § 3595(a) and (c)) ("The term 'imposed' throughout the federal death penalty

[4] LeCroy also points to the BOP Execution Protocol. [Doc. 593 at 7 (citing Roane *et. al*. v. Barr, 1:19-mc-00145-TSC, at 0874, 0883, 0915 (D.D.C. Aug. 30, 2019))].

statute relates to the adjudication by the court and not the actual infliction of the punishment"). Here, imposition of sentence occurred in the State of Georgia, in the Northern District of Georgia. See O.C.G.A. § 17-10-38(a).

As noted, LeCroy has exhausted the procedures for appeal of the judgment of conviction and for review of his sentence and steps have been taken to implement the sentence.

B. Regulations Governing Implementation of Sentence

Subsection (a) of the applicable federal regulation, entitled, "Date, Time, Place, and Method of Execution," reads in pertinent part:

> *Except to the extent a court orders otherwise*, a sentence of death shall be executed: (1) On a date and at a time designated by the Director of the Federal Bureau of Prisons . . . . If the date designated for execution passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisons when the stay is lifted[.] . . .

28 C.F.R. § 26.3(a)(1) (2008) (emphasis added). Similarly, Subsection 26.4(c) speaks to who may be present at the execution and begins with the caveat, "*Except to the extent a court orders otherwise* . . . ." 28 C.F.R. § 26.4(c) (emphasis added).

C. Analysis

As an initial matter, the parties agree that the Executive and Judicial Branches share jurisdiction over implementation of the FDCPA sentence, and that Congress does not prescribe the rules for fixing the date of execution. See

Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019); see also Holden v. State of Minnesota, 11 S. Ct. 143, 147–48 (1890); and see Bourgeois, 423 F.3d at 509.

Based upon the regulation language expressly contemplating Court action ("[e]xcept to the extent a court orders otherwise"), LeCroy argues that an Order from this Court would supersede any action taken by the Executive Branch; that the sentencing court's authority is *superior* to the power of the Executive Branch. On the other hand, the Government contends that "the 'except' clause [within the 1993 regulations] is merely a recognition that both the Judiciary and the Executive Branch have authority to set a date during the implementation of a capital sentence" but does not afford the Court unbridled discretion once a date of execution has been set. [Doc. 598 at 15].

As stated previously, the Court delegated the authority to implement or carry out the sentence to the Attorney General in its J&C, which expressly provided that the Attorney General and United States Marshal "shall make the arrangements for the execution and supervise implementation of the sentence." [Doc. 417]. That the Court did not elect to take on the initial responsibility for setting the date of execution when imposing judgment is significant. More importantly, the execution has already been assigned a date certain and set for September 22, 2020 by the Attorney General.

The Government contends that, once the execution date is set, the only mechanism for delaying execution is by pursuing equitable relief such as seeking a stay of execution or an injunction, which places a higher burden on LeCroy. See, e.g., Hill v. McDonough, 126 S. Ct. 2096, 2104 (2016). As discussed in greater detail below, the Government's statement of the law is correct. If the Court were amenable to LeCroy's request and inclined to "reset" or "modify" the date of execution, granting the requested relief (i.e., continue or postpone execution) would amount to a stay.

Yet, the Motion explicitly denies that LeCroy is seeking a stay or injunction. [Motion at 2, 8]. As noted, LeCroy suggests:

> [A]n order from this Court setting or modifying Mr. LeCroy's execution would not be a stay or an injunction. Because the Government's regulations are conditioned upon this Court's action, issuance of an order setting a different execution date does not enjoin a government action; it instead renders the BOP date-setting regulations, by their own terms, non-operational.

[Motion at 8 (citing 28 C.F.R. § 26.3; 28 C.F.R. § 26.4)]. In the current posture of the case, with an imminent execution date set, the Court disagrees that setting a different execution date merely "renders BOP date-setting regulations non-operational."

And, as discussed below, LeCroy cannot achieve what he seeks by attempting to invoke the Court's authority under the All Writs Act.

II. Defendant LeCroy's Motion to Reset the Execution Date

As stated above, LeCroy's Motion does not seek a stay; instead he seeks for the Court to enforce its Appointment Order through the All Writs Act.

A. All Writs Act

Pursuant to the All Writs Act, 28 U.S.C. § 1651, the Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "The purpose of the power codified in [Section 1651] is to allow courts 'to protect the jurisdiction they already have, derived from some other source.'" Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1229 (11th Cir. 2005) (citation omitted); see generally Baze v. Parker, 711 F. Supp. 2d 774, 779 (E.D. Ky. 2010) (in context of state clemency proceeding, finding lack of jurisdiction where habeas proceedings had concluded, and noting "[w]ithout the underlying habeas jurisdiction under 28 U.S.C. § 2254, the Court lacks any independent jurisdiction over this litigation, and thus cannot invoke the All Writs Act to grant relief "in aid of [its] respective jurisdiction. . . ."), aff'd, 632 F.3d 338 (6th Cir. 2011). The AWA "is an extraordinary remedy that . . . is essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." Schiavo, 403 F.3d 1223 at 1229. (citation and internal quotation marks omitted).

B. Appointment Order

LeCroy invokes the AWA and asks the Court to enforce its Order Appointing Counsel as his basis for relief. The Court's Appointment Order issued pursuant to Title 18, United States Code, Section 3599, which requires that LeCroy be provided with assistance of counsel "throughout every subsequent stage of available judicial proceedings, . . . [including] applications for stays of execution and other appropriate motions and procedures, . . . competency proceedings and proceedings for executive or other clemency as may be available to the defendant." 18 U.S.C. §3599(e); see also Harbison v. Bell, 129 S. Ct. 1481, 1486 (2009). LeCroy contends that the statute—and the attendant regulations[5]—require the presence of his choice of counsel—here, Lead Counsel—at the execution itself.

At the hearing, Lead Counsel for LeCroy explained the importance of his presence at the execution. It is, he contends, the "near-sacred duty of appointed

[5] Pursuant to 28 C.F.R § 26.4(c), "[i]n addition to the Marshal and the Warden, the following persons shall be present at the execution:

> (3) Not more than the following numbers of persons selected by the prisoner[, including]:
>
> (ii) Two defense attorneys[.] . . ."

28 U.S.C. § 26.4(c)(3)(ii) (2008).

counsel, particularly appointed counsel who has a long-standing relationship of confidence and trust with the client." [Declaration of Carol A. Wright, Chief of the Capital Habeas Unit for the Middle District of Florida, Doc. 593, Exhibit 2 at ¶¶ 26–27].

Lead Counsel asserts that the exigent circumstances created by the pandemic interfere with his ability to fulfill his professional duties.

C. Exigent Circumstances Due to COVID-19

The coronavirus pandemic has significantly altered the judicial operations of the Northern District of Georgia and has created an unusual environment in which the Court seeks to continue its work in new and novel ways, as illustrated by the video hearing held in this case. Although the Court is learning to adapt, not unlike other agencies, entities, and individuals tasked with essential work, the pandemic presents hardships on all who work within the judicial system. But to the extent reasonably possible, the work of the judicial system continues.[6]

Evidence has been presented that the BOP is considering accommodations to their modified COVID-19 restricted operations on a case-by-case basis, and that

[6] See generally, United States v. Lee, 2020 WL 3921174, at *5 (E.D. Ark. July 10, 2020) (refusing the postpone execution date due to pandemic on distinguishable and less compelling facts; recognizing that Congress has not seen fit to suspend federal executions and declining to substitute its own judgment for that of Executive Branch).

there are alternatives for counsel short of being physically present for in-person meetings at the prison leading up to the date of execution. [Doc. 598, Exhibit 2 – Declaration of Tom Watson ("Watson Declaration")].

However, the record does not include documentation of any specific requests made by counsel to assist in carrying out professional obligations during BOP's modified operations and/or in light of Lead Counsel's health concerns.[7] Significantly, Counsel do not assert that they are unable to pursue relief on LeCroy's behalf and have, in fact, filed a renewed clemency petition and requested oral argument via videoconference. [Doc. 599].

Nevertheless, Lead Counsel requests the Court reset the execution date so that he can fulfill his obligations under the Appointment Order.

D. The AWA Does Not Excuse LeCroy From Seeking a Stay

Invoking the All Writs Act does not excuse a movant from making a showing that a stay or injunction, if sought, is warranted. Dunn v. McNabb, 138 S. Ct. 369 (2017) (quoting Hill, 126 S. Ct. at 2104) (vacating injunction enjoining execution issued by trial court, and stating, "The All Writs Act does not excuse a

[7] According to the BOP, the only in-person visit to be scheduled by one of the defense team (Ferrell) was to be accommodated but was cancelled. [Watson Declaration ¶ 5]. Unmonitored video conferencing is also available (since mid-July) and no requests have been made by counsel. [Watson Declaration ¶ 8]. BOP reports that Lecroy has had ten unmonitored telephone calls with counsel since March 2020. [Watson Declaration ¶ 7].

court from . . . finding that [prisoner] has a significant possibility of success on the merits. . . ."); accord Schiavo, 403 F.3d at 1229 ("[T]he All Writs Act cannot be used to evade the requirements for . . . injunctions") (citations omitted).[8]

The Supreme Court teaches that, regardless of the legal vehicle, "inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." Hill, 126 S. Ct. at 2104 (state death row inmate seeking to bring constitutional challenge to method of execution as civil rights action pursuant to 42 U.S.C. § 1983 was not entitled to stay of execution as matter of course); accord Grayson v. Allen, 491 F.3d 1318, 1322 (11th Cir. 2007); and see Lee v. Warden USP Terre Haute, 2019 WL 6608724, at *3, 9-11 (S.D. Ind. December 5, 2019) ("standards governing preliminary injunctions apply to motions to stay executions in habeas proceedings") (citations omitted).

[8] The Eleventh Circuit's ruling in Schiavo makes clear that, notwithstanding "legal decisions affecting life or death[,] . . . where the relief sought is in essence a preliminary injunction [a stay], the All Writs Act is not available because other, adequate remedies at law exist[.] Schiavo, 403 F.3d at 1226, 1228-29 (refusing to authorize emergency injunctive relief under All Writs Act pending appeal where trial court's denial of injunctive relief – and not overturn medical decision to withdraw life sustaining measures of patient – was not an abuse of discretion and given that likelihood of success on merits was also required under AWA).

"Injunctive relief is an equitable remedy that is not available as a matter of right." Grayson, 491 F.3d at 1322. A stay of execution may be granted only "if the movant establishes that (1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction issues, (3) the injunction would not substantially harm the other litigant, and (4) if issued, the injunction would not be adverse to the public interest." Long v. Secretary, Dep't of Corr., 924 F.3d 1171, 1176 (11th Cir.) (citing, *inter alia*, Powell v. Thomas, 641 F.3d 1255, 1257 (11th Cir. 2011)), cert. denied sub nom. Long v. Inch, 139 S. Ct. 2635 (2019); see generally Schiavo, 403 F.3d at 1226 (reiterating that "injunctive relief may not be granted unless the plaintiff establishes the substantial likelihood of success criterion").

In this case, as is evident from these proceedings, LeCroy has three highly capable attorneys appointed to represent him. The interests being asserted by Lead Counsel for LeCroy and his wish to fulfill his professional and ethical obligation to his client, to honor LeCroy's request that he be present for the execution, are not only sincere but undoubtedly weighty. Counsel's impassioned plea that the Court should reset the execution date in order to accommodate this wish is compelling. To be sure, LeCroy's defense team has earned the respect of the Court.

But no matter how Counsel seeks to package it, the factual basis for the Motion and the nature (and effect) of the relief being sought reveal that LeCroy actually seeks a stay of execution. "[A] stay operates upon the judicial proceeding itself. It does so either by halting or *postponing* some portion of the proceeding, or by temporarily divesting an order of enforceability." Nken v. Holder, 129 S. Ct. 1749, 1758 (2009) (recognizing functional overlap and distinctions between an injunction and a stay within context of deciding standard for stay pending judicial review of removal order under alien removal statute) (citation omitted; emphasis provided). A stay is exactly what LeCroy's Motion requests – he asks the Court to *postpone* his execution in light of the pandemic and limitations of Lead Counsel. Although presented within a different statutory scheme, in Nken, the Supreme Court rejected the argument that relief was available under the AWA and held that "traditional stay factors" had to be established before relief could be granted. Nken, 129 S. Ct. at 1756-58.

The undersigned, like the Schiavo majority, acknowledges the emotional appeal of Counsel's AWA argument, but is constrained to decide the issue based on the controlling law. The Court concludes that what LeCroy actually seeks in his Motion is a stay of execution. He seeks this relief because of the pandemic and the fact that his longest-serving Lead Counsel and attorney of choice cannot be

physically present for the execution in this environment. The Court believes LeCroy's Motion and Counsel's request to be genuine and compelling.

However, LeCroy has no pending habeas action, and his clemency petition is before the Department of Justice's Office of Pardon Attorney, also part of the Executive Branch. In addition, LeCroy has not moved for a stay of execution and has not attempted to satisfy the traditional criteria for imposing a stay.

As discussed *supra*, the All Writs Act does not confer jurisdiction not otherwise established. Because the Court cannot reconcile LeCroy's claim (that the requested relief would not amount to stay of execution) with the controlling law, and because LeCroy has not moved for a stay, LeCroy's request is not redressable by The All Writs Act.[9]

If relief is ultimately sought by LeCroy via the appropriate vehicle and presented in a proper forum, the arguments advanced here may yield a different result.[10]

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[9] Given its ruling, the Court need not reach or discuss LeCroy's arguments under 28 U.S.C. § 26.4(c) and O.C.G.A. § 17-10-41.

[10] The Court is not convinced that Defendant's request does not solely implicate execution of the sentence and require a habeas action in the Southern District of Indiana. "[C]hallenges to the execution of a sentence, rather than the validity of the sentence itself, are properly brought under [28 U.S.C.] § 2241. Antonelli v. Warden, U.S.P. Atlanta, 542 F.3d 1348, 1352 (11th Cir. 2008) (citing Bishop v. Reno, 210 F.3d 1295, 1304 (11th Cir. 2000)).

CONCLUSION

For all of these reasons, it is hereby **ORDERED** that the Defendant LeCroy's "Motion To Reset Or Modify Execution Date In Order To Implement Court's Order Appointing Counsel" [Doc. 593] is **DENIED**.

SO ORDERED this 4th day of September, 2020.

RICHARD W. STORY
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13353-P

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

WILLIAM EMMETT LECROY, JR.,

Defendant - Appellant.

On Appeal from the United States District Court for the
Northern District of Georgia

BEFORE: WILLIAM PRYOR, Chief Judge, NEWSOM, and LUCK, Circuit Judges.

BY THE COURT:

Appellant's motion to stay execution pending the Court's review of his petition for rehearing en banc is DENIED because he has not made the requisite showing. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13353-P

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

WILLIAM EMMETT LECROY, JR.,

Defendant - Appellant.

Appeal from the United States District Court
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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, Chief Judge, NEWSOM, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

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