Nos. 20-5767 and 20A52

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM EMMETT LECROY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND TO APPLICATION FOR A STAY OF EXECUTION

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CAPITAL CASE

QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion to enjoin his scheduled execution where petitioner did not attempt to satisfy the traditional requirements for such an injunction, including a likelihood of success on the merits.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ga.):

United States v. LeCroy, No. 2:08-cv-83-RWS (Mar. 11, 2004)

United States v. LeCroy, No. 2:08-cv-2277-RWS (Mar. 30, 2012) (denying motion to vacate, set aside, or correct sentence under 28 U.S.C. 2255)

United States v. LeCroy, No. 2:08-cv-2277-RWS (Sept. 4, 2020) (denying motion to reset or modify execution date)

United States Court of Appeals (11th Cir.):

United States v. LeCroy, No. 04-15597 (Mar. 2, 2006) (affirming conviction and sentence on direct appeal)

United States v. LeCroy, No. 12-15132 (Jan. 15, 2014) (affirming denial of motion to vacate, set aside, or correct sentence under 28 U.S.C. 2255)

United States v. LeCroy, No. 20-13353 (Sept. 16, 2020) (affirming denial of motion to reset or modify execution date)

Supreme Court of the United States:

LeCroy v. United States, No. 06-7877 (Apr. 23, 2007) (denying certiorari in direct appeal of conviction and sentence)

LeCroy v. United States, No. 14-5536 (Mar. 9, 2015) (denying certiorari in appeal of denial of motion to vacate, set aside, or correct sentence under 28 U.S.C. 2255)

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Petitioner is a federal death-row inmate scheduled to be executed at 6 p.m. today. He was convicted and sentenced to death more than 16 years ago for the carjacking, rape, and murder of Joann Tiesler. His conviction was upheld both on direct appeal and on collateral review under 28 U.S.C. § 2255, and this Court twice denied petitions for writs of certiorari. On July 31, 2020, the Bureau of Prisons (BOP) notified petitioner and his counsel that his execution had been scheduled for September 22, 2020.

At approximately 3 p.m. today, three hours before his execution is scheduled to occur, petitioner filed a petition for a writ of certiorari and an application for a stay of execution.

Petitioner's last-minute request to enjoin his imminent execution should be rejected. His application for a stay of execution and his petition for a writ of certiorari should be denied promptly so that the execution may proceed as planned.

Both filings arise from petitioner's effort to override BOP's determination setting that execution date, and to delay his execution until sometime next year. On August 24, 2020, more than three weeks after BOP set petitioner's execution date, petitioner filed a motion in the Northern District of Georgia requesting that the court postpone his execution because two of his appointed counsel would not be in attendance in person on the scheduled date due to concerns about COVID-19. Petitioner requested that the "execution date be reset until sometime after a vaccine is available," which he posited would occur by "April or May, 2021." D. Ct. Doc. 593, at 6, 14 (Aug. 24, 2020) (8/24 Mot.).

Both courts below correctly rejected petitioner's request. C.A. Op. 4-11 (Sept. 16, 2020); D. Ct. Doc. 601, at 6-19 (Sept. 4, 2020) (D. Ct. Op.). As both courts recognized, in substance the relief petitioner sought was a stay of or injunction against his impending execution. To the extent that the courts below were the proper fora for requesting such relief, settled precedent allows that extraordinary remedy only if petitioner established at least that he is likely to succeed on the merits; that he will suffer irreparable injury without the requested relief; and that the requested relief would not substantially harm the government or

the public interest. See, e.g., Dunn v. McNabb, 138 S. Ct. 369, 369 (2017) (per curiam); C.A. Op. 6, 8 & n.2. Far from satisfying those traditional requirements for extraordinary relief, petitioner "has sworn [them] off," C.A. Op. 6, acknowledging below that he "cannot meet the standards for a stay of execution because he cannot show any likelihood of success on the merits," Pet. C.A. Br. 8-9.

The courts below also correctly rejected petitioner's contention, which he renews (Pet. 7-16) in this Court, that either the All Writs Act, 28 U.S.C. 1651(a), or Department of Justice regulations governing its internal procedures to implement a death sentence excused him from satisfying the traditional prerequisites for an injunction or stay of execution. C.A. Op. 6-8; D. Ct. Op. 8-18. This Court's decisions make clear that a death-row inmate may not circumvent those requirements by invoking the All Writs Act. See, e.g., McNabb, 138 S. Ct. at 369. And the regulations confer no freestanding authority on a court to suspend an already-scheduled execution; the court may postpone the execution only if the movant has met the requirements for an injunction or a stay.

Moreover, as the court of appeals additionally found, petitioner "is not entitled to the relief he seeks, in any event," because his underlying arguments for postponing his execution lack merit. C.A. Op. 9; see id. at 9-11. Petitioner argues (Pet. 7-8; Appl. 5-6) that delaying his execution is necessary so that not just one, but all three, of his appointed counsel can attend in

person. But neither the Constitution nor any statute or regulation grants petitioner any right to an execution date that facilitates attendance by all of his (or his preferred) counsel.

Just three hours before his execution is scheduled to occur, and days after the court of appeals affirmed the denial of his motion, petitioner sought certiorari and emergency relief from this Court to forestall his execution pending disposition of his certiorari petition. That request should be denied. Petitioner has failed to show any reasonable probability that this Court will grant review. Nor has petitioner shown any significant possibility that this Court, if it grants review, would reverse. Indeed, because the relief he seeks from this Court is in substance an injunction barring his execution -- not a stay of any lower-court order that disturbed the status quo -- he must show not just a reasonable probability of reversal, but "legal rights" that are "indisputably clear." Wisconsin Right to Life, Inc. v. Federal Election Comm'n (WRTL), 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted). He cannot meet that more demanding standard. The balance of equities also weighs decisively against emergency relief. The application should be denied.

STATEMENT

1. a. Since the First Congress "made a number of" offenses "punishable by death" in the Crimes Act of 1790, Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019), Congress has not prescribed rules for fixing execution dates. That statutory framework is

consistent with the fact that "at common law the sentence of death was generally silent as to the precise day of execution." Holden v. Minnesota, 137 U.S. 483, 496 (1890). This Court has determined, however, that the Constitution permits either the Executive or Judiciary to set an execution date. Id. at 495-496.

As a matter of historical practice, in the federal system, both the executive and judicial branches have set execution dates in death penalty cases. See 7 Op. Att'y Gen. 561, 562 (1855); Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898, 4899-4900 (Jan. 19, 1993); United States v. Lee, No. 97-cr-243, 2020 WL 3921174, at *3 (E.D. Ark. July 10, 2020). That varied practice in which either the Executive or the Judiciary may set an execution date has persisted and continued to the recent past.

b. Congress has at various times set rules for the method of execution. The Crimes Act of 1790 prescribed hanging as the method of execution. See In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 108-109 (D.C. Cir. 2020) (per curiam) (Protocol Cases), cert. denied sub nom. Bourgeois v. Barr, No. 19-1348 (June 29, 2020). That provision governed until 1937, when Congress determined that the method of execution would be the method prescribed by the laws of the State within which sentence was imposed. Id. at 109. Congress repealed the 1937 provision in 1984, and the Attorney General promulgated regulations (BOP regulations) in 1993 to "fill this gap." Ibid.

The BOP regulations provide, in relevant part, that "[e]xcept to the extent a court orders otherwise, a sentence of death shall be executed * * * [o]n a date and at a time designated by the Director of [BOP]," "[a]t a federal penal or correctional institution designated by the Director," "[b]y a United States Marshal designated by the Director of the United States Marshals Service," and "[b]y intravenous injection of a lethal substance or substances in a quantity sufficient to cause death." 28 C.F.R. 26.3(a). The regulations direct federal prosecutors to file a "proposed Judgment and Order" with the district court reflecting these procedures and providing that "[t]he prisoner under sentence of death shall be committed to the custody of the Attorney General or his authorized representative for appropriate detention pending execution of the sentence." 28 C.F.R. 26.2(a). They also address who may visit with the prisoner in the week preceding the execution and who, at the invitation of the warden or the prisoner, may be present at the execution to witness it. 28 C.F.R. 26.4(b)-(d).

c. In 1994, Congress enacted the Federal Death Penalty Act (FDPA). It provides, in a section entitled "[i]mplementation of a sentence of death," that "[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." 18 U.S.C. 3596(a). "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." Ibid.

Three federal defendants -- Timothy McVeigh, Juan Raul Garza, and Louis Jones, Jr. -- were executed in the first decade after the FDPA's enactment. The execution date for each was ultimately set by the Executive Branch. See D. Ct. Doc. 1413-1, at 6, United States v. Lee, No. 97-cr-243 (E.D. Ark. July 7, 2020). For more than 15 years after Jones's 2003 execution, however, legal and practical impediments prevented federal executions from occurring. Suits challenging the then-existing federal execution protocol were stayed while this Court considered constitutional challenges to state lethal-injection procedures in, for example, Baze v. Rees, 553 U.S. 35 (2008); see Protocol Cases, 955 F.3d at 110. In addition, "anti-death-penalty advocates induced the company that manufactured" one of the drugs in the federal protocol "to stop supplying it" for executions. Bucklew, 139 S. Ct. at 1120.

d. BOP explored a single-drug execution protocol using pentobarbital and, after careful study, adopted that protocol in 2019. Protocol Cases, 955 F.3d at 110. BOP noted that recent state executions had used that drug without difficulty, and courts had rejected constitutional challenges to it, ibid., including this Court in Bucklew. BOP was able to "locate[] a 'viable source' for obtaining it." Ibid. The Attorney General thus announced the resumption of federal executions and scheduled the first of those

for December 2019. Several of those dates were enjoined as litigation continued in the Protocol Cases. But the D.C. Circuit ultimately rejected the challenges to the 2019 protocol, id. at 112-113, and this Court denied certiorari in June 2020, Bourgeois v. Barr, supra (No. 19-1348). Since then, five federal prisoners have been executed: Daniel Lewis Lee, Wesley Ira Purkey, Dustin Lee Honken, Lezmond Mitchell, and Keith Dwayne Nelson.

2. a. In 2001, less than two months after being released from prior terms of state and federal imprisonment for serious felony offenses, petitioner murdered Joann Tiesler. 441 F.3d 914, 918-919 (2006), cert. denied, 550 U.S. 905 (2007). Petitioner was planning to abscond from federal supervision, including the psychosexual examination he had been ordered to undergo, and needed a vehicle. Id. at 919. Tiesler was a nurse who lived in a cabin that was within walking distance of the cabin in Georgia where petitioner was staying. Id. at 919-920.

On October 7, 2001, while Tiesler was visiting her fiancé, petitioner broke into her residence armed with a loaded shotgun, a knife, and plastic cable ties. After Tiesler returned to her cabin, petitioner struck her in the back of her head with his shotgun. Petitioner then tied Tiesler's ankles together and bound her hands behind her back with the plastic cable ties. He stripped Tiesler and forced her to kneel at the foot of her bed, where he raped and sodomized her. Afterward, petitioner strangled Tiesler with an electrical cord, slit her throat, and stabbed her

repeatedly in the back. Petitioner left Tiesler's naked body bound on her bed, where she was discovered by neighbors the following day. He loaded Tiesler's Ford Explorer with supplies and drove toward Canada. 441 F.3d at 919-920.

Petitioner was apprehended two days later at the U.S.-Canadian border, driving Tiesler's vehicle. The knife that he had used to kill Tiesler was in the vehicle, as were two notes that he had written on the back of a torn map. One note stated, "Please call the police and report this vehicle as stolen. Thanks, The Thief," and the other note stated, "Please, please, please forgive me Joanne * * * . You were an angel and I killed you. Now I have to live with that and I can never go home. I am a vagabond and doomed to hell." 441 F.3d at 919-920 nn.2-3.

b. In 2002, a federal grand jury in the Northern District of Georgia charged petitioner with taking a motor vehicle from Tiesler by force, violence, and intimidation resulting in her death, in violation of 18 U.S.C. 2119(3). Superseding Indictment 32-33. The jury found him guilty and, at the conclusion of the sentencing phase, returned a sentence of death. 441 F.3d at 920.

The district court entered a written judgment committing petitioner to the Attorney General's custody while petitioner pursued his appeals and further providing that, when the judgment became final, "the Attorney General shall release [petitioner] to the custody of the United States Marshal who shall make the arrangements for the execution and implementation of the sentence."

Judgment 3 (D. Ct. Doc. 417 (Mar. 11, 2004)). Petitioner was remanded to federal custody at the Federal Correctional Center in Terre Haute, Indiana (FCC Terre Haute). 441 F.3d at 920.

On direct appeal, the court of appeals affirmed petitioner's conviction and sentence. 441 F.3d at 914-931. This Court denied his petition for a writ of certiorari. 550 U.S. 905 (No. 06-7877).

c. The following month, petitioner moved the district court to appoint counsel to bring a collateral attack. D. Ct. Doc. 476 (May 14, 2007); see 18 U.S.C. 3599(e). The court appointed John R. Martin and Sandra L. Michaels. D. Ct. Doc. 479 (May 25, 2007).

In April 2008, those attorneys filed in the district court a motion to vacate, set aside, or correct petitioner's sentence pursuant to 28 U.S.C. 2255. D. Ct. Doc. 493 (Apr. 22, 2008). Following a three-day evidentiary hearing, the court denied the motion in a 191-page ruling. D. Ct. Doc. 551 (Mar. 30, 2012). The court of appeals affirmed, 739 F.3d 1297 (2014), and this Court denied certiorari, 575 U.S. 904 (2015) (No. 19-5536).

d. In 2015, petitioner moved the district to reappoint attorneys Martin and Michaels under 18 U.S.C. 3599(e) to represent petitioner "for whatever remaining legal processes are available to him, as well as a request for commutation of his sentence by the President." D. Ct. Doc. 577 (Apr. 3, 2015). The court granted the motion. D. Ct. Docs. 578, 579, 580 (Apr. 13, 2015).

In December 2016, petitioner's counsel filed a clemency application on his behalf, but the following month petitioner

requested to withdraw that application. D. Ct. Doc. 598-1, at 2-3 (Aug. 28, 2020). The Department of Justice's Office of the Pardon Attorney administratively closed LeCroy's clemency application without prejudice on January 24, 2017. Ibid.

e. In 2018, petitioner moved the district court to appoint the Federal Defender Services of Eastern Tennessee (FDSET) as additional counsel to assist in representing him "through the conclusion of proceedings related to his capital conviction and sentence of death, including executive clemency proceedings." D. Ct. Doc. 583, at 1 (Dec. 4, 2018). The court granted that request, D. Ct. Doc. 584 (Jan. 7, 2019), and FDSET attorney Stephen Allen Ferrell entered an appearance on petitioner's behalf in March 2019, D. Ct. Doc. 585 (Mar. 1, 2019). Ferrell has visited petitioner twice since his appointment. 9/2/20 Tr. 19.

3. a. Throughout those proceedings, LeCroy has remained at FCC Terre Haute. In March 2020, BOP announced that in-person legal visits generally would be suspended to mitigate the risk of exposure to COVID-19 by external visitors. D. Ct. Doc. 598-2, ¶ 4. But BOP allows for case-by-case accommodations of in-person legal visits; provides for unmonitored legal calls; and, since July 2020, has offered unmonitored video conferencing with outside counsel. Id. ¶¶ 5, 8. Since BOP began its modified operations, petitioner has had 10 unmonitored calls with legal counsel and has not made any video-conferencing requests. Id. ¶ 7. BOP was also prepared to accommodate attorney Ferrell's one request for an

in-person meeting with petitioner, which was scheduled for August 24, 2020, but Ferrell ultimately canceled that meeting. Id. ¶ 5.

b. On July 31, BOP notified petitioner and his counsel that it had scheduled petitioner's execution for September 22. 8/24 Mot. 4. On August 1, the government also entered a notice of the execution date on the docket. D. Ct. Doc. 591.

On August 24, more than three weeks later, petitioner filed in the district court a motion asking the court "to reset or modify" his execution date. 8/24 Mot. 1; see id. at 2, 14. Petitioner asserted that the health condition of his lead counsel, attorney Martin, would prevent Martin from attending petitioner's execution in person on September 22 due to concerns about COVID-19. Id. at 2-4. Petitioner's motion further asserted that, because attorney Martin and attorney Michaels are married and live together, attorney Michaels also could not attend the execution in person "without endangering Mr. Martin's health." 8/24 Mot. 6; see id. at 4. Petitioner did not contend, however, that his third counsel, attorney Ferrell, would be unable to attend the execution in person due to COVID-19. See C.A. Op. 10 n.3.

Petitioner's motion requested that the court "order that [petitioner's] execution date be reset until sometime after a vaccine is available so that his lead counsel may fulfill all of the duties this Court appointed him to perform." 8/24 Mot. 6. Citing statements by a federal health official projecting a "good chance the United States will have an effective vaccine by the end

of 2020 or very early 2021," the motion asked that the execution be postponed to "a date in April or May 2021." Id. at 13-14.[1]

Petitioner's motion disclaimed seeking an injunction against or stay of his execution. 8/24 Mot. 2, 8. Instead, he argued that the court had the authority to override his scheduled execution date under the All Writs Act or the BOP regulations. Id. at 6-9, 12. The government opposed the motion, contending that the relief it requested was in substance a request to enjoin petitioner's execution or for a stay of execution, for which petitioner had failed to meet the traditional requirements for such relief, and that the motion lacked merit. D. Ct. Doc. 598, at 11-30.[2]

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[1] Petitioner's motion also asked that the execution date be reset so that his counsel could meet with petitioner to prepare a renewed clemency application. 8/24 Mot. 1, 9-11. After the motion was filed but before the district court ruled on it, however, petitioner's attorneys submitted a renewed clemency application to the Department of Justice's Office of Pardon Attorney. D. Ct. Doc. 599 (Aug. 31, 2020); see D. Ct. Op. 18. Having received written and oral submissions from petitioner, the Office completed its investigation and assembled an appendix of submitted and researched materials, and the Department has made its recommendation.

[2] On September 4, 2020, petitioner filed a civil complaint in the District Court for the District of Columbia, now consolidated with the remaining Protocol Cases, No. 19-mc-145 (D.D.C.), alleging that executing him pursuant to the protocol would violate the FDPA based on asserted inconsistencies with Georgia law. He also sought a preliminary injunction based on his FDPA claim. On September 20, 2020, the district court denied his request for a preliminary injunction. In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (D.D.C.) (ECF No. 263). Petitioner appealed and sought an injunction pending appeal, which the court of appeals denied. C.A. Order, No. 20-5285 (D.C. Cir. Sept. 21, 2020). He also amended his complaint to allege that the protocol violates the Federal Food, Drug, and Cosmetic

c. On September 4, 2020, following briefing and a hearing, the district court denied the motion. D. Ct. Op. 1-19. The district court determined that "granting the requested relief (i.e., continue or postpone execution) would amount to a stay" of petitioner's execution. D. Ct. Op. 10. "[N]o matter how Counsel seeks to package it," the court found, "the factual basis for the Motion and the nature (and effect of the relief being sought reveal that [petitioner] actually seeks a stay of execution." Id. at 17. And it noted that petitioner "ha[d] not attempted to satisfy the traditional criteria" for a stay. Id. at 18. The court also rejected petitioner's contentions that the All Writs Act or the BOP regulations provided independent authority to reschedule his execution. D. Ct. Op. 8-9, 11-18.

4. Petitioner appealed, and following expedited briefing, the court of appeals unanimously affirmed. C.A. Op. 1-12.

a. Like the district court, the court of appeals determined that in substance petitioner sought a stay of execution. C.A. Op. 5-6. It explained that, "[a]lthough [petitioner's] motion carefully avoided using the word 'stay,'" he "ha[d] failed to explain how his pleading can sensibly be understood as anything other than a request to stay his execution." Id. at 5. And the

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Act (FDCA), 21 U.S.C. 301 et seq., and joined a motion for summary judgment on that claim filed by the other plaintiffs in that case. On September 20, 2020, the district court granted summary judgment to the plaintiffs on the FDCA claim but denied injunctive relief. See In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (D.D.C.) (ECF No. 261). Petitioner has not appealed that ruling or sought emergency relief based on his FDCA claim.

court explained that petitioner could not obtain a stay of his execution without satisfying the traditional requirements for that extraordinary remedy, i.e., 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." Id. at 6. And here petitioner "ha[d] not even attempted to satisfy -- and indeed, ha[d] sworn off -- th[o]se requirements." Id. at 6. The court noted that "the same result would obtain" if that relief were viewed as an injunction rather than a stay. Id. at 8 n.2.

The court of appeals additionally determined that petitioner had not identified any source of law other than traditional equitable remedies that would empower the district court to postpone petitioner's execution. C.A. Op. 6-8. The court of appeals explained that, under this Court's precedent, the All Writs Act "does not absolve [petitioner] of his responsibility to make the showing necessary to obtain a stay." Id. at 8. And the court observed that the BOP regulations "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." Id. at 7. "If they did," the court noted, "no death-sentenced inmate would ever again go to the trouble of trying to satisfy the stay factors." Ibid. (emphasis omitted).

b. The court of appeals additionally determined that, "in any event," petitioner "is not entitled to relief he seeks," because his underlying arguments for delaying his execution lack merit. C.A. Op. 9. As relevant here, the court rejected petitioner's contention that postponing the execution was necessary because two of his three appointed attorneys otherwise could not attend in person. Id. at 9-11. The court explained that the Constitution does not "guarantee a condemned inmate the right to have his lawyer present at his execution," and petitioner had not identified any statute or regulation conferring such a right. Id. at 9; see id. at 10-11.[3]

The court of appeals rejected petitioner's assertion that such a right can be found in 18 U.S.C. 3596(a), which states that an execution shall be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." C.A. Op. 10-11. Petitioner contended that Section 3596(a) required the execution to comply with a law of Georgia (the State in which he was sentenced) providing that "the convicted person may request the presence of his or her counsel." Id. at 10 (quoting Ga. Code Ann. § 17-10-41). The court explained it "needn't decide today precisely what the phrase 'in the manner prescribed by the law of

[3] The court of appeals also rejected on the merits petitioner's contention that postponing his execution is necessary to vindicate a statutory right to assistance of counsel in preparing his clemency application under 18 U.S.C. 3599(e). C.A. App. 9-10. Moreover, as noted above, before the district court ruled in this case, petitioner had submitted his renewed clemency application to the Department of Justice. See p. 13 n.1, supra.

the State in which the sentence is imposed' entails" because, "[w]hatever that phrase means, * * * it does not extend to ensuring a lawyer's presence at execution." Id. at 11. The court observed that its conclusion accorded with recent decisions of other circuits and all three separate opinions in In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106 (Protocol Cases), cert. denied sub nom. Bourgeois v. Barr, No. 19-1348 (June 29, 2020). See C.A. Op. 11 (citing United States v. Mitchell, 2020 WL 4815961, at *2-3 (9th Cir. Aug. 19, 2020), stay denied, No. 20A32 (Aug. 25, 2020), and Peterson v. Barr, 965 F.3d 549, 554 (7th Cir. 2020), stay denied, No. 20A6 (July 14, 2020)).

5. On September 18, 2020, petitioner filed a petition for rehearing en banc. On September 21, he moved for a stay pending disposition of that petition; the court of appeals denied that motion the same day. 9/21/20 C.A. Order. On September 22, the court denied the petition for rehearing. 9/22/20 C.A. Order.

ARGUMENT

Petitioner's application for a stay of execution, and his petition for a writ of certiorari, should be denied. Petitioner identifies no reason why this Court's review of the decision below is warranted and falls far short of meeting the high bar for the extraordinary relief he seeks to postpone his execution just hours before it is scheduled based on a claim that the court of appeals denied days ago.

A party seeking a stay pending review must establish "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" in addition to "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). The movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted); cf. San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (Circuit Justice considering request for stay pending appeal must consider likelihood that, if lower court rules against petitioner, this Court would review and reverse, and must then "balance the so-called stay equities").

Petitioner here, however, must meet an even higher standard. Petitioner does not challenge the validity of his death sentence or seek to stay the district-court judgment embodying that sentence. Nor does he ask the Court to suspend the operation of any other lower-court ruling that has disturbed the status quo. Instead, petitioner asks (Appl. 1, 7) the Court to bar the Executive Branch from carrying out his scheduled execution pending the Court's consideration and disposition of his certiorari petition. Thus, although petitioner purports to seek a "stay" (Appl. 1), he is in fact seeking an injunction from this Court under the All Writs Act, 28 U.S.C. 1651(a), to bar the Executive Branch from executing him. That relief "'demands a significantly

higher justification' than a request for a stay" pending review. Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (per curiam) (citation omitted). In particular, petitioner must show not merely a reasonable probability of reversal, but "legal rights" that are "indisputably clear." Wisconsin Right to Life, Inc. v. Federal Election Comm'n, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted); see South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). Petitioner has not shown that the relief sought is warranted even under the standard governing stays of court orders, much less under the higher standard for obtaining an injunction from this Court.

First and foremost, petitioner has failed to establish a reasonable probability that this Court will grant certiorari and even a significant possibility of reversal, let alone "legal rights" that are "indisputably clear," WRTL, 542 U.S. at 1306 (Rehnquist, C.J., in chambers) (citation omitted). Both courts below correctly applied this Court's precedent in determining that the district court could not grant the relief petitioner requested -- postponing his scheduled execution -- without his satisfying the stringent criteria for a stay of execution, including a likelihood of success on the merits. And petitioner undisputedly "has not even attempted to satisfy th[ose] requirements necessary to stay his execution -- even temporarily." C.A. Op. 8. Both courts also properly rejected petitioner's effort to circumvent

that well-settled rule by invoking the All Writs Act, 28 U.S.C. 1651(a), see, e.g., Dunn v. McNabb, 138 S. Ct. 369, 369 (2017) (per curiam), or the BOP regulations. Petitioner has identified no reason why the decision below warrants plenary review, and he has shown no likelihood that this Court would overturn that decision.

Moreover, as the court of appeals further determined, petitioner would not be entitled to relief in any event because the grounds he asserted for postponement lack merit. Petitioner contends that, unless his execution is postponed until some indefinite date in 2021, two of his three counsel will be unable to attend his execution. But as the court explained, petitioner has no constitutional or statutory right to the attendance of those two attorneys in addition to his third appointed attorney, whom he has not asserted would be unable to attend.

Finally, the balance of equities weighs strongly against granting emergency relief. The government has an overwhelming interest in the timely enforcement of a criminal sentence imposed by a federal jury after a fair trial and upheld after thorough appellate and post-conviction proceedings. That interest is magnified by the heinous nature of petitioner's crimes. Petitioner has had ample opportunity to litigate his conviction and sentence, and he has done so. This is not "'the extreme exception'" in which "last-minute judicial intervention" in an execution is

appropriate. Barr v. Lee, No. 20A8 (July 14, 2020) (per curiam), slip op. 3 (citation omitted). The application should be denied.

I. THERE IS NO REASONABLE PROSPECT THAT THIS COURT WOULD REVIEW AND REVERSE THE COURT OF APPEALS' DECISION

Petitioner moved in the district court for an order postponing his scheduled execution "until sometime after a [COVID-19] vaccine is available," which he anticipates will occur in 2021, "so that his lead counsel" may attend his execution in person. 8/24 Mot. 6. Like the district court, the court of appeals determined that the relief petitioner sought would in substance be a stay of execution -- indeed, it would be an injunction -- and thus could be granted only if petitioner met the traditional requirements for such extraordinary relief. And petitioner did not "even attempt[] to satisfy * * * th[o]se requirements." C.A. Op. 6. That determination is correct, and petitioner identifies neither any reasonable probability that this Court would grant plenary review nor any likelihood (much less certainty) that it would reverse.

Petitioner does not assert that the court of appeals' central holding conflicts with any decision of this Court or of another court of appeals. Indeed, petitioner has pointed to no other case where an inmate sought the particular remedy he requested here -- an order "reset[ting] or modify[ing]" his execution date to an unspecified date in the next year, to enable not just one, but all of his counsel (or his preferred counsel) to attend. 8/24 Mot. 1. And this Court has rejected efforts to circumvent the traditional

standards for enjoining or staying executions by disguising a request for a stay of execution as a novel remedy, including by invoking the All Writs Act, 28 U.S.C. 1651(a). See, e.g., McNabb, 138 S. Ct. at 369. Petitioner's failure to show any reasonable probability that certiorari will be granted is sufficient by itself to deny the emergency application.

In any event, petitioner has not come close to making the requisite showing on the merits. To obtain the injunction he seeks, petitioner must demonstrate "legal rights" that are "indisputably clear." WRTL, 542 U.S. at 1306 (Rehnquist, C.J., in chambers) (citation omitted). Petitioner cannot meet even the less demanding standard for a stay by showing "a significant possibility of reversal." Barefoot 463 U.S. at 895.

A. The Lower Courts Correctly Determined That Petitioner Was Required, But Failed, To Satisfy All Of The Traditional Prerequisites For An Injunction Or Stay Of Execution

1. This Court's precedent makes clear, and petitioner does not dispute, that an inmate who seeks to halt a scheduled execution must satisfy the familiar requirements for obtaining an injunction or stay of execution. See, e.g., McNabb, 138 S. Ct. at 369 ("[I]nmates 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." (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006))); Glossip v. Gross, 576 U.S. 863, 876 (2015) (same for

preliminary injunction against execution). An injunction "is an extraordinary and drastic remedy" that is "never awarded as of right." Munaf v. Geren, 553 U.S. 674, 689-690 (2008) (citation omitted). It "should not be granted unless the movant, by a clear showing, carries the burden of persuasion" that the traditional requirements are met. Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (citation and emphasis omitted).

Those well-settled requirements include showing that the movant is at least "likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Glossip, 576 U.S. at 876 (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)) (preliminary injunction); see Nken v. Holder, 556 U.S. 418, 434 (2009) (stay); see, e.g., Barr v. Lee, No. 20A8 (July 14, 2020) (per curiam), slip op. 1 (vacating stay of execution "because, among other reasons, the plaintiffs have not established that they are likely to succeed on the merits"); see also Winter, 555 U.S. at 32 (standard for a "permanent injunction" is "essentially the same," but the movant must show "actual success," not merely a "likelihood of success" (citation omitted)).

It is also common ground in this case that petitioner did not meet those traditional requirements for an injunction or stay of execution. As the court of appeals repeatedly observed, petitioner "ha[d] not even attempted to satisfy" them. C.A. Op. 8; see id.

at 2, 6. Indeed, petitioner acknowledged below that he "cannot meet the standards for a stay of execution because he cannot show any likelihood of success on the merits." Pet. C.A. Br. 8-9.

2. The only dispute here is therefore whether the relief that petitioner sought from the district court is in substance either an injunction or stay of execution. The court of appeals, like the district court, correctly determined that it is. Petitioner did not challenge his death sentence or the judgment embodying it. Instead, he sought an order directing the Executive Branch not to carry out the execution as scheduled, and to set a different, future execution date "sometime after a [COVID-19] vaccine is available." 8/24 Mot. 6. That order would "tell[] someone" outside the Judicial Branch both "what * * * not to do" (carry out the execution as scheduled) and "what to do" (set a new execution date sometime next year). Nken, 556 U.S. at 428.

Although recognizing that the label did not affect the outcome in this case, C.A. Op. 8 n.2, the court of appeals characterized the relief petitioner sought as a stay of execution. See, e.g., id. at 5. It observed that "a stay operates by 'halting or postponing some portion of the proceeding, or . . . temporarily divesting an order of enforceability,'" ibid. (quoting Nken, 556 U.S. at 428), which "is precisely the relief [petitioner] seeks." Id. at 6 (emphasis omitted); accord D. Ct. Op. 17. Petitioner, however, is not seeking to suspend any court order -- he does not and cannot challenge his death sentence -- but to bar

the Executive from carrying out his sentence. But on either view -- whether petitioner sought from the district court an injunction or a stay of execution -- he was required to satisfy similar standards for an equitable remedy postponing an execution.

3. Petitioner's contrary arguments lack merit.

a. As he did in the lower courts, petitioner maintains (Pet. 8) that he did not seek an injunction or stay, but only an order to "reset or modify" his existing execution date. Such an order, he has argued, would "tell[] the Executive Branch when to carry out his sentence," not whether it may do so. Pet. C.A. Reply 3. But the legal operation of the order that he requested would be the same as one styled as enjoining or staying the execution: it would bar the Executive from executing him until the new date.

Moreover, although at times petitioner framed his request as asking the district court to fix a new date certain (in "April or May, 2021"), 8/24 Mot. 14, he also argued that the court "must order that [his] execution date be reset until sometime after a vaccine is available," id. at 6. And although petitioner anticipated that would occur in "Spring 2021," ibid., that was simply his best guess based on public officials' predictions. In reality, petitioner sought an order barring his execution unless and until a particular circumstance (absence of a vaccine) ceases, whenever that might be. Such an order cannot fairly be described as merely "modify[ing]" the execution date. See MCI Telecommmc'ns Corp. v. American Tel. & Tel. Co. 512 U.S. 218, 227-228 (1994).

It would require the Executive to "change fundamentally" (id. at 227) its existing determination that set petitioner's execution for September 22, 2020. That is quintessential injunctive relief.

Method-of-execution challenges litigated under 42 U.S.C. 1983 are illustrative. In those challenges, inmates are permitted to proceed in a civil action -- rather than in habeas corpus -- because they are not contesting the lawfulness of their convictions or death sentences. See, e.g., Hill, 547 U.S. at 579-583; Nelson v. Campbell, 541 U.S. 637, 643-647 (2004). Through such litigation, a movant may obtain a court order that bars a state government from carrying out a death sentence under the state's allegedly unlawful execution protocol. See Hill, 547 U.S. at 580-581. Such an order is unquestionably an injunction, see ibid., even though it does not by its terms command the government categorically never to carry out the sentence. Rather, it means that the execution cannot go forward unless and until some condition is satisfied -- e.g., until the State is prepared to use an execution protocol that satisfies applicable legal standards. Here, similarly, the order petitioner sought would operate as an injunction or stay barring execution unless and until a vaccine is available and all of his counsel can attend his execution.

b. Petitioner has also contended (Pet. C.A. Br. 8-9) that the relief he seeks is not an injunction or a stay of execution because he has no other claims to be litigated in this case. According to petitioner (ibid.), he sought to forestall his

execution not to facilitate further review, but to allow his lead counsel to attend. He contended below that the reason "he cannot show any likelihood of success on the merits" is that "[t]here are simply no more merits to be decided." Ibid. That contention -- which suggests that it is easier to delay an execution after the courts have made clear that the inmate has no meritorious claims -- misconceives the nature of the relief that petitioner sought.

Here, petitioner is asserting an entitlement to preclude his execution unless and until his preferred counsel attends. Petitioner was thus wrong to contend in the court of appeals (Pet. C.A. Br. 9) that "[t]here are simply no more merits to be decided." As in a method-of-execution suit, the relevant "merits" for purposes of his district-court motion for postponement are whether his execution cannot go forward in a particular manner -- here, in the absence of his lead counsel until he can be vaccinated against COVID-19. See p. 26, supra.

Rather than lightening petitioner's burden, the posture of this case should elevate it. Properly understood, he is seeking not simply a preliminary injunction -- i.e., one "merely to preserve the relative positions of the parties until a trial on the merits can be held," University of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) -- but in effect a permanent one. The "standard" for a "permanent injunction" is "essentially the same" as for a "preliminary injunction" except that, instead of a mere "likelihood of success on the merits," a movant seeking permanent relief must

establish "actual success." Winter, 555 U.S. at 32 (citation omitted).

But whether viewed as a preliminary or permanent relief, petitioner must show (among other things) at least a likelihood of success on the underlying merits (that his execution cannot proceed in the absence of preferred counsel) to obtain that relief. He "has not even attempted" to do so, C.A. Op. 6, and as the court of appeals determined, he cannot, id. at 9-11. Excusing him from satisfying that requirement would create an unjustifiable incongruity in capital cases. It is common ground that a death-row inmate seeking to postpone his execution to facilitate further judicial review of a legal claim challenging his execution must satisfy the stringent, well-settled criteria for an injunction or stay of execution. See, e.g., McNabb, 137 S. Ct. at 369. But on petitioner's view, an inmate seeking delay for any other reason need not do so -- and indeed, an inmate could seek delay based on the same underlying factual ground simply by declining to raise any associated legal claim at all.

4. Petitioner additionally contends (Pet. 18-16) that the district court had authority to postpone his execution independent of its equitable powers. But contrary to his contentions, neither the All Writs Act, 28 U.S.C. 1651(a), nor the BOP regulations confer such authority.

a. The All Writs Act provides that "[this] 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 has made clear, however, that the Act cannot be used to end-run traditional requirements for injunctions and stays of execution. "'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,'" and invoking "[t]he All Writs Act does not excuse a court from making these findings." McNabb, 138 S. Ct. at 369 (quoting Hill, 547 U.S. at 584). Applying that principle in McNabb, this Court vacated a district court's order issued under the All Writs Act barring an impending execution "[b]ecause the District Court enjoined respondent's execution without finding that he has a significant possibility of success on the merits," and thus had "abused its discretion." Ibid.

Moreover, the order petitioner requested was not plausibly "in aid of" (28 U.S.C. 1651(a)) the district court's jurisdiction. Petitioner argues (Pet. 7-8, 13-15) that delaying his execution to enable all of his counsel to attend is necessary to give effect to the court's earlier order appointing them to represent petitioner under 18 U.S.C. 3599. That is incorrect. The court's order did not address attending his execution but simply "continue[d] the appointment of [attorney] Martin as lead counsel and [attorney] Michaels as co-counsel to represent [petitioner] in accordance with" forms the court issued authorizing their appointment and

payment. D. Ct. Doc. 578, at 1; see D. Ct. Docs. 579, 580. Nor does an appointment based on Section 3599 implicitly encompass attendance at petitioner's execution.

Section 3599 authorizes a court to appoint counsel in capital cases to "represent the defendant throughout every subsequent stage of available judicial proceedings, including * * * all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures." 18 U.S.C. 3599(e). It does not require counsel's attendance at the execution or confer any authority on the district court to delay a scheduled execution date to enable them to attend. As the court of appeals noted, "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." C.A. Op. 8 n.1 (quoting Baze v. Parker, 632 F.3d 338, 346 (6th Cir. 2011)). Petitioner does not contend that his counsel have been unable to represent him in any of the listed proceedings or that the court's supervisory power over their payment is in peril. And "Section 3599 does not imbue the court with continuing authority or jurisdiction that the Act may then be invoked to protect." Ibid.

b. Petitioner also argues (Pet. 7, 9-10) that the BOP regulations empowered the district court to grant relief. See Pet. C.A. Br. 17-18. The court of appeals correctly rejected that argument. C.A. Op. 6-7.

Petitioner cites (Pet. 10) in 28 C.F.R. 26.3 providing that, "[e]xcept to the extent a court orders otherwise, a sentence of death shall be executed * * * [o]n a date and at a time designated by the Director of [BOP]," with certain limitations. 28 C.F.R. 26.3(a)(1). See Pet. C.A. Br. 17. He has also pointed (ibid.) to similar language in 28 C.F.R. 26.4 addressing the provision of notice of execution dates. Petitioner construes (Pet. C.A. Br. 17-18) the "except" clause to imply that a court may always "order[] otherwise" and thus may freely countermand the Executive Branch's scheduling determination. That reading is mistaken.

The BOP regulations do not grant a district court power to set an execution date. Indeed, they do not confer any authority on courts at all. They are instead part of the 1993 regulations that are addressed solely to the internal operations of the Department of Justice in carrying out executions. See pp. 5-6, supra; United States v. Vialva, No. 99-cr-70 (W.D. Tex. Sept. 11, 2020), slip op. 7 ("[R]eliance on a regulation that governs only DOJ attorneys is misplaced."), aff'd, 2020 WL 5588811 (5th Cir. Sept. 18, 2020), pet. for cert. pending, No. 20-5766 (filed Sept. 21, 2020).

A court's non-exclusive authority to set an execution date is derived from longstanding tradition, not departmental regulation. As "the parties agreed" below, Congress has not "prescribe[d] the rules for fixing the date of execution." D. Ct. Op. 8. In the absence of congressional direction, "both the Executive and Judicial Branches" have long "share[d] jurisdiction" over that

function. Ibid. Exercising that concurrent (not exclusive) jurisdiction, either the court or the Executive may set an execution date in the first instance. See pp. 4-5, supra. Where, as here, the court "elect[s]" the latter option, and the Executive proceeds to set an execution date, the only judicial "mechanism for delaying execution is by pursuing equitable relief," i.e., an "injunction" or "stay of execution." D. Ct. Op. 9-10.

The "[e]xcept to the extent a court orders otherwise" proviso on which petitioner has relied (Pet. C.A. Br. 17-18) is thus merely a recognition that a court, pursuant to its preexisting authority, may set an execution date itself in the first instance. See C.A. Op. 7. That is reinforced by other language in the regulation that "sensibly recognize[s] * * * a court's authority to stay or enjoin a scheduled execution." Ibid. Section 26.3(a)(1) states that, "[i]f 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). That text contemplating a "stay of execution" makes perfect sense on the court of appeals' view that the regulations "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." C.A. Op. 7 (emphasis omitted). But on petitioner's view, the discussion of "stay[s]" is hard to explain. If the "except" proviso already granted sweeping power to courts to

reschedule executions, "no death-sentenced inmate would ever again go to the trouble of trying to satisfy the stay factors." Ibid.

B. Even If The District Court Had Authority To Grant The Requested Relief Without Finding That The Traditional Requirements For An Injunction Or Stay Are Satisfied, Doing So Would Have Been A Grave Abuse Of Discretion

Emergency relief is especially unwarranted in this case because, even if petitioner prevails on his contention that he was not required to satisfy the traditional injunction or stay-of-execution standards, he still would not be entitled to the relief he sought because his claims for delay lack merit. C.A. Op. 9-11.

Petitioner contended (8/24 Mot. 1-2, 6-14) that his execution must be moved from September 22 to a date at least six months later because two of his three counsel (attorneys Martin and Michaels) otherwise cannot attend. But petitioner has no legal right to an execution date when those counsel can attend in person. No provision of the Constitution "guarantee[s] a condemned inmate the right to have his lawyer present at his execution." C.A. Op. 9. Nor has he identified any statute or regulation that confers such a right.

1. Petitioner seeks (Pet. 5, 13) to derive such a right from the FDPA, 18 U.S.C. 3596(a), which provides that an execution shall be implemented "in the manner prescribed by the law of the State in which the sentence is imposed," ibid. -- here, Georgia. Petitioner notes (Pet. 13) that a provision of the Georgia Code states that "the convicted person may request the presence of his

or her counsel." Ga. Code. Ann. § 17-10-41). But Section 3596(a) does not require compliance with that provision.

Every court of appeals to have interpreted Section 3596(a) has held that it "cannot be reasonably read to incorporate every aspect of the forum state's law regarding execution procedure." Peterson v. Barr, 965 F.3d 549, 554 (7th Cir. 2020), stay denied, No. 20A6 (July 14, 2020); see Vialva, 2020 WL 5588811, at *2-*3; United States v. Mitchell, 2020 WL 4815961, at *2-*3 (9th Cir. Aug. 19, 2020), stay denied, No. 20A32 (Aug. 25, 2020); Protocol Cases, 955 F.3d 106, 112 (D.C. Cir. 2020) (per curiam), cert. denied sub nom. Bourgeois v. Barr, No. 19-1348 (June 29, 2020); see also Barr v. Roane, 140 S. Ct. 353, 353 (2019) (statement of Alito, J., joined by Gorsuch and Kavanaugh, JJ.).

Citing those other circuits' decisions, the court of appeals observed that, even under the "most capacious reading," Section 3596(a) "requires [BOP] to follow only those state execution procedures that 'effectuate the death, . . . including choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements.'" C.A. Op. 11 (quoting Protocol Cases, 955 F.3d at 151 (Tatel, J., dissenting)). State laws governing attorneys' attendance fall outside even that most inmate-favoring interpretation. Ibid. The court of appeals accordingly reserved judgment on "precisely what the phrase 'in the manner prescribed by the law of the State in which the sentence is imposed' entails" because, as it explained, "[w]hatever that phrase means, * * *

it does not extend to ensuring a lawyer's presence at an execution." Ibid.; accord Peterson, 965 F.3d at 554 (rejecting argument that Section 3596(a) requires compliance with state laws addressing attendance of witnesses because "[t]he word ['manner'] concerns how the sentence is carried out, not who watches").[4]

2. Petitioner also contends (Pet. 5, 13) that a provision of the BOP regulations precludes carrying out his execution while his preferred counsel are unable to be present. That is incorrect.

The provision petitioner cites, 28 C.F.R. 26.4, provides no entitlement to have counsel personally present for an execution. That regulation merely specifies who may attend an execution; it does not require their attendance for the execution to move forward or create a private right to have those persons present. Although Section 26.4(c) refers to those who "shall be present at the execution," it further mandates that "[n]ot more than" a specified "number[]" of "defense attorneys" (two) or "adult friends or relatives" (three) "selected by the prisoner" "shall be present." 28 C.F.R. 26.4(c)(3). As the Seventh Circuit has recognized, the regulation's plain language places a restriction on the attendance of potential third-party witnesses; it does not bestow any right for them to attend. Peterson, 965 F.3d at 553. A contrary reading

[4] Even if Section 3596(a) did incorporate Georgia law regarding witnesses to an execution, the Georgia statute petitioner cites provides no basis for relief. Section 17-10-41 does not require the presence of counsel or confer a right to an execution date on which an inmate's preferred counsel is able to attend.

would implausibly enable any of the witnesses that the regulation identifies -- including friends or relatives of the condemned -- to obstruct an execution by asserting a scheduling conflict.

3. Finally, citing the preamble to the 1993 BOP regulations, petitioner asserts that the government has previously acknowledged that BOP's authority to set execution dates is "derivative" of the sentencing court's own authority, "acting pursuant to the All Writs Act[,] * * * to order that [its] sentence[]be implemented." Pet. 10 (quoting 58 Fed. Reg. at 4899) (emphasis omitted). Petitioner contends (Pet. 9-11) that the court itself therefore has independent power under the All Writs Act to alter the execution date the Executive sets. That contention, which petitioner raised for the first time in his petition for rehearing, lacks merit.

As the district court observed, it "did not elect to take on the responsibility for setting the date of execution when imposing sentence" and instead "delegated the authority to implement or carry out the sentence to the Attorney General in its [judgment and commitment order]" issued in 2004. D. Ct. Op. 9. At least once the Attorney General (acting through BOP) set the execution date, the court could alter that date only by issuing an injunction or stay of execution. See id. at 9-10. Contrary to petitioner's contention (Pet. 7-8, 12-13), his motion thus did not ask the court merely to "modify" one of its own previous orders; instead, the relief sought would necessarily override action taken by the Executive Branch pursuant to authority previously delegated by the

district court. Granting petitioner's motion thus would not effectuate, but frustrate, the court's earlier order delegating that authority.[5]

II. THE BALANCE OF EQUITIES WEIGHS STRONGLY AGAINST RELIEF

In all events, the application should be denied because the balance of equities weighs strongly against emergency relief and in favor of permitting the government to carry out the lawful sentence that was imposed in 2004 and repeatedly upheld since.

A. "Both the [government] and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (quoting Hill, 547 U.S. at 584). The government has an overwhelming interest in the timely enforcement of criminal sentences, such as petitioner's, imposed by federal juries after fair trials that have been upheld through appellate and post-conviction proceedings. Ibid. Petitioner's sentence became final on direct review in 2007, and the denial of collateral review became final

[5] Petitioner also initially contended that delaying the execution is required to allow his counsel appointed under 18 U.S.C. 3599(e) to confer with him in person in order to prepare a renewed clemency application. 8/24 Mot. 8-11. But that contention is now moot because his renewed application was submitted before the district court ruled. D. Ct. Op. 5, 14, 18. Moreover, as the court of appeals found, petitioner's argument lacks merit. C.A. Op. 9-10. Section 3599(e) does not "specif[y] in-person representation" for the preparation of clemency applications. C.A. Op. 10. And, despite COVID-19, petitioner "still has ready access to the 'represent[ation]' that § 3599(e) contemplates." Ibid. (noting availability of unmonitored phone calls and videoconferences with counsel and in-person meetings with attorney Ferrell).

in 2015. Once post-conviction proceedings "have run their course," as they have here, "finality acquires an added moral dimension." Calderon v. Thompson, 523 U.S. 538, 556 (1998). At that point, further delay "inflict[s] a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims." Ibid. (citation omitted).

The government's interest in implementing petitioner's sentence is magnified by the heinous nature of his crimes. Only 47 days after being released from previous terms of state and federal imprisonment, petitioner broke into Joann Tiesler's home, where he awaited her return. 441 F.3d at 918-920. Once she arrived home, petitioner did not merely take her keys and vehicle to accomplish his plan of absconding from federal supervision. Instead, he violently attacked and killed her -- binding her wrists and ankles with plastic cables, raping her, anally sodomizing her, strangling her with an electrical cord, slitting her throat with a knife, creating a gaping wound from which she bled to death, and plunging his knife into her back five times as she lay face down in her own blood. Id. at 919-920.

Petitioner has had ample opportunity to litigate his conviction and sentence and has done so. His conviction and death sentence were upheld years ago on direct appeal and post-conviction review. 441 F.3d at 917-931; 739 F.3d 1297. And his motion to postpone his execution -- which he filed in the district court more than three weeks after he received notice of his execution

date -- does not "justify last-minute intervention by a Federal Court." Lee, No. 20A8, slip op. 3. This Court has made clear that such interventions "'should be the extreme exception, not the norm.'" Ibid. (citation omitted); see also Barr v. Purkey, No. 20A10 (July 16, 2020) (vacating preliminary injunction).

Petitioner's further delay after the lower courts denied his motion counsels strongly against emergency relief. The court of appeals affirmed the denial of a preliminary injunction on September 16. He waited until last night to seek a stay from that court pending disposition of his rehearing petition. That request was denied before 7 p.m. yesterday, yet petitioner waited until approximately 3 p.m. today to seek this Court's intervention. And although the court of appeals did not deny rehearing en banc until today, petitioner could have sought certiorari, or a stay, from this Court earlier. Indeed, the petition for a writ of certiorari and stay application evidently were prepared in advance, as illustrated by the fact that petitioner filed them within approximately an hour after the denial of rehearing.

Moreover, petitioner now asks this Court to delay his execution not to consider any challenge to his sentence or the method of execution, but merely to enable his preferred counsel to attend his execution in person. That last-minute request for delay is especially unjustified. The application should be denied.

CONCLUSION

The application for a stay of execution and the accompanying petition for a writ of certiorari should be denied.

Respectfully submitted.

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