APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORLANDO CORDIA HALL,

Appellant,

v.

WILLIAM P. BARR, in his official capacity as U.S. Attorney General, et al.,

Appellees.

No. 20-5340

1:20-cv-03184-TSC

September Term, 2020

Filed On: November 19, 2020

On appeal from the United States District Court for the District of Columbia

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Before: Millett, Pillard, and Rao, Circuit Judges.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, the emergency motion for stay of execution, the response thereto, and the reply, it is

ORDERED that the emergency motion for stay of execution be denied. It is

FURTHER ORDERED AND ADJUDGED that the district court's November 16, 2020 order be affirmed.

I

In July 2020, the Bureau of Prisons revised its execution protocol to provide death-sentenced inmates only 50 days' advance notice of their execution dates, instead of the 90 days' notice previously afforded by the protocol. Hall argues that shortening the notice period violates substantive due process, equal protection, and the Ex Post Facto Clause of the Constitution, U.S. Const., Art. 1, § 9, cl. 3. None of those arguments succeeds.

First, the provision of 50 days' notice did not deprive Hall of substantive due process. The Federal Bureau of Prisons' execution protocol, which reduced the government's notice period from 90 to 50 days, is a non-binding procedural rule that created no substantive due process right to a particular period of notice when an execution date is set. In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 112 (D.C. Cir. 2020); id. at 125 (Katsas, J.,

concurring); id. at 144 (Rao, J., concurring); Bureau of Prisons' 2020 Execution Protocol at 4 (providing that the protocol "does not create any legally enforceable rights or obligations"). Hall has been on notice of his death sentence since it was first imposed in 1995, sustained on appeal in 1998, and certiorari review by the Supreme Court denied in 1999. See United States v. Hall, 152 F.3d 381 (5th Cir. 1998), cert. denied, 526 U.S. 1117 (1999). Nor has Hall identified any basis in precedent or otherwise "deeply rooted in this Nation's history and tradition" for concluding that a particular notice period is "implicit in the concept of ordered liberty," which is required to make out a violation of substantive due process. Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997) (formatting modified). By regulation, the warden was to provide Hall with at least 20 days' notice of his execution date. 28 C.F.R. § 26.4(a). Hall does not deny that he received that required notice.

Second, the provision of 50 days' notice did not deprive Hall of the equal protection of the laws. As noted, Hall received more than the 20 days' notice required by federal regulation. 28 C.F.R. § 26.4(a). The amendment of the execution protocol to provide 50 days' notice likewise has applied prospectively and evenhandedly to all inmates who have received execution dates since its adoption. See Gov't Br. 13, 27; J.A. 66 ¶ 12. Hall identifies no equal protection principle or precedent that bound the federal government, once it adopted internal guidance anticipating a 90-day notice period, to adhere to that same timeframe forever more. Instead, on this record, application of the non-binding guidance that is in

effect at the time an execution date is set fully comports with the requirement of equal protection.

Third, the Ex Post Facto Clause stands as no barrier to the provision of 50 days' notice. The Ex Post Facto Clause proscribes the retroactive imposition of a "greater punishment[] than the law annexed to the crime[] when committed." Peugh v. United States, 569 U.S. 530, 533 (2013). Even assuming the Ex Post Facto Clause applies in the context of a non-binding notice provision like this, the protocol's notice period operated fully prospectively and did not alter Hall's imposed sentence of death. Moreover, Hall does not deny that capital punishment was an available sentence at the time he committed his crimes of conviction, and he has not pointed to anything in the law at the relevant time that required either a particular execution date or 90 days of advance notice.

II

Hall separately argues the combination of the 50-day notice period and the COVID-19 pandemic have violated his due process right to pursue clemency. But any "minimal procedural safeguards" the Due Process Clause guaranteed to Hall's clemency proceedings, Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment), have been satisfied. We need not resolve the precise scope of any due process protections here, because Hall has long had notice, the opportunity, and the assistance of counsel to pursue clemency. At the heart of Hall's due process claim is the assumption that he could not have conducted an investigation and synthesized the information to support his petition for clemency until his execution date was set on September 30, 2020. Not so. While

federal regulations set a deadline for submitting a clemency petition of no later than 30 days after the execution date is set, the starting line for Hall to pursue clemency was after his "first petition" for collateral relief under 28 U.S.C. § 2255 was "terminated." 28 C.F.R. § 1.10(b). Hall's first Section 2255 petition was finally denied in 2007. United States v. Hall, 455 F.3d 508, 510 (5th Cir. 2006), cert. denied, 549 U.S. 1343 (2007). So Hall has had thirteen years to develop his case for clemency relief.

Hall, in fact, filed for clemency in December 2016, but then voluntarily withdrew it in January 2017. J.A. 64 ¶ 5. In addition, on October 30, 2020 – the deadline for submitting a clemency application – Hall's counsel reached out to the Office of the Pardon Attorney to obtain an extension to pursue clemency a second time. J.A. 65 ¶ 7. The Office of the Pardon Attorney offered (i) to treat that request as a clemency petition, (ii) to permit Hall to supplement it with documentation over the next fifteen days, and (iii) to allow an oral presentation by counsel, noting that the Office had been able to render a clemency recommendation in all of the requests it had received from other applicants during the pandemic before their execution dates. J.A. 65-66 ¶¶ 9, 11. But Hall's counsel declined to pursue that opportunity. Those two opportunities provided Hall whatever clemency process may have been due to him. This record also persuades us that throughout these proceedings Hall has benefitted from the representation of counsel sufficient to satisfy 18 U.S.C. § 3599.

III

Finally, Hall argues that, by providing the Bureau of Prisons a role in the execution process, the

execution protocol violates the Federal Death Penalty Act's requirement that a United States Marshal "supervise implementation of the sentence[.]" 18 U.S.C. § 3596(a). This court has not yet definitively resolved that statutory question. When this court first considered this issue in April of 2020, Judge Katsas rejected that argument on its merits. Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d at 124-125 (Katsas, J., concurring). He explained that, under the protocol, a United States Marshal must "oversee the execution," "direct which other personnel may be present," and order the commencement of the execution process. Id. at 124. In addition, the individuals "administering the lethal agents [act] at the direction of the United States Marshal," and the Marshal is tasked with notifying the court once the sentence has been carried out. Id. at 124-125. In Judge Katsas's view, those roles satisfied the statutory requirement of supervision. However, neither of the other two panel members resolved the merits of that issue. Id. at 145-152 (Tatel, J., dissenting); id. at 145 (Rao, J., concurring) (concluding that the argument was forfeited).

We need not resolve that argument here. Hall is appealing the district court's denial of a preliminary injunction halting his execution. As a result, he must demonstrate that he is "likely to succeed on the merits" of that argument. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Given Judge Katsas's reasoning, it is debatable whether Hall has demonstrated a likelihood of success on this claim. But even if he does, he must also establish a likelihood that the assertedly improper division of responsibilities between the United States Marshal

and the Bureau of Prisons irreparably harms him. Id. Hall, however, has made no argument as to how he is prejudiced, let alone irreparably harmed, by the United States Marshal not directly undertaking additional aspects of the execution process. He makes no argument that anything about his execution process would change if his interpretation of the Federal Death Penalty Act succeeded. For those reasons, even assuming Hall has the better of the statutory interpretation argument, he has not met the burden of demonstrating a right to the extraordinary relief of a preliminary injunction halting his execution.

For the foregoing reasons, the judgment of the district court denying a preliminary injunction is affirmed, and the motion for a stay of execution is denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith to the district court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORLANDO CORDIA HALL,

Applicant,

v.

WILLIAM P. BARR, in his official capacity as U.S. Attorney General, et al.,

Appellees.

No. 20-5340

1:20-cv-03184-TSC

September Term, 2020

Filed On: November 19, 2020

MANDATE

In accordance with the judgment of November 18, 2020, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 20-cv-3184 (TSC)

ORLANDO CORDIA HALL,

Plaintiff,

v.

WILLIAM P. BARR, ET AL.,

Defendants.

MEMORANDUM OPINION

Plaintiff Orlando Cordia Hall, an inmate on federal death row, has filed this action to delay his November 19, 2020 execution. Though he was sentenced to death in 1995, this court enjoined his execution pending resolution of challenges brought by several federal death row inmates to an earlier version of the Bureau of Prisons' (BOP) execution protocol. Having found those claims obsolete given the BOP's adoption of a new protocol in 2019 (the 2019 Execution Protocol or the Protocol), the court vacated the injunction barring Plaintiff's execution on September 20, 2020. Ten days later, BOP noticed Plaintiff's execution for November 19, 2020, thus providing him fifty days' notice.

Plaintiff argues that the timing of his execution, particularly given the COVID-19 pandemic, deprives him of meaningful access to, and representation in, the clemency process in violation of his rights under the Due Process Clause and 18 U.S.C. § 3599. He further contends that the fifty-day notice violates his rights under the Due Process Clause, the Ex Post Facto Clause, and the Equal Protection Clause. He also alleges that the 2019 Execution Protocol constitutes ultra vires agency action in violation of the Federal Death Penalty Act (FDPA), a claim the court has already addressed and dismissed in the *Execution Protocol Cases* litigation.

Before the court are Plaintiff's motion for a temporary restraining order and/or preliminary injunction, (ECF No. 3), and Plaintiff's emergency motion for a hearing, (ECF No. 14). For the reasons set forth below, Plaintiff's motions will be DENIED.

I. BACKGROUND

Plaintiff was sentenced to death by the U.S. District Court for the Northern District of Texas in October 1995 and is currently incarcerated at the United States Penitentiary, Terre Haute. His conviction and sentence were affirmed on direct appeal, and his motion to vacate his sentence under 28 U.S.C. § 2255 was denied by both the District Court and the U.S. Court of Appeals for the Fifth Circuit. Several years later, based on intervening Supreme Court decisions, Plaintiff sought permission to file a successive § 2255 petition to challenge his firearm conviction under 18 U.S.C. § 924(c). The Fifth Circuit rejected that request late last month. *See In re Hall*, 2020 WL 6375718 (5th Cir. Oct. 30, 2020).

After Plaintiff's initial unsuccessful § 2255 challenge in 2007, he intervened in a pending civil action brought in this court by other federal death row prisoners challenging the BOP's lethal injection protocol. (*Roane v. Gonzales*, No. 05-cv-2337 (D.D.C.), ECF No. 38.) The court thereafter entered a preliminary injunction barring Plaintiff's execution and consolidated that case along with similar cases brought by other federal death row prisoners into a single action. (*See generally Execution Protocol Cases*, No. 1:19-mc-145.) The injunction remained in place from June 11, 2007 until September 20, 2020. (*Execution Protocol Cases*, ECF No. 266.)

On October 30, 2020, thirty days after BOP noticed Plaintiff's execution date, Plaintiff's counsel emailed the Office of the Pardon Attorney and the White House Counsel's office, detailing the need for an investigation and requesting additional time to prepare Plaintiff's clemency application given the extraordinary conditions created by the COVID-19 pandemic. (Compl. ¶ 118; Compl. Ex. 11.) On November 2, 2020, a staff member from the Office of the Pardon Attorney at the Department of Justice advised Plaintiff's counsel that the office lacked the authority to reprieve, withdraw, or reschedule an execution date. (Compl. ¶ 120). Nevertheless, the staff member indicated that the October 30 email could be construed as a petition for commutation and that the Pardon Attorney would be willing to hold a telephonic hearing during the week of November 2. (*See* Compl. Ex. 13.) Counsel for Plaintiff informed the Office of the Pardon Attorney that such a request could not be properly construed as a petition for commutation and that agreeing to treat the request for an extension as

a clemency petition may constitute a violation of counsel's professional obligations to Plaintiff. (Compl. Ex. 12.) Accordingly, Plaintiff did not file a clemency petition.

On November 3, 2020, Plaintiff filed a complaint and motion for a temporary restraining order and/or a preliminary injunction with this court.

II. DISCUSSION

The standards for a temporary restraining order and a preliminary injunction are identical. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). In considering whether to grant the "extraordinary remedy" afforded by injunctive relief, courts assess four factors: (1) the likelihood of the plaintiff's success on the merits, (2) the threat of irreparable harm to the plaintiff absent an injunction, (3) the balance of equities, and (4) the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008) (citations omitted); *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017). The U.S. Court of Appeals for the District of Columbia Circuit has traditionally evaluated claims for injunctive relief on a sliding scale, such that "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). It has been suggested, however, that a movant's showing regarding success on the merits "is an independent, free-standing requirement for a preliminary injunction." *Id.* at 393 (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)).

A. Inexcusable Delay

Defendants first argue that Plaintiff's motion is inexcusably delayed and could be denied on that basis alone. (*See* ECF No. 15, Def. Opp'n at 3–4.) The argument is not without merit. As the Supreme Court has made abundantly clear, particularly in the death penalty context, the "'last-minute nature of an application' that 'could have been brought' earlier . . . 'may be grounds for denial of a stay'" or other equitable relief. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). Plaintiff was notified of his execution on September 30, but waited until November 3—a little more than two weeks before his execution—to file suit. Nevertheless, the court is unwilling to deny Plaintiff's motion on this basis. While the delay has certainly put the parties and the court on a tight timeline to resolve the motion, taking thirty days to file a new complaint and accompanying motion for relief is not per se unreasonable. Furthermore, many of the events described in the Complaint occurred several days before it was filed. (*See, e.g.*, Compl. ¶¶ 118–21 (describing events occurring between October 30, 2020 and November 2, 2020).)

B. Likelihood of Success on the Merits

Plaintiff first contends that the timing of his November 19 execution deprives him of clemency representation and access to the clemency process in violation of his Fifth Amendment procedural due process rights (Counts I and II), and his statutory right to clemency representation pursuant to 18 U.S.C. § 3599 (Count III) ("the clemency claims"). Next, he argues that the fifty-day execution notice violates his Fifth Amendment substantive due process

rights (Count IV), and inflicts a greater punishment in violation of the Ex Post Facto Clause (Count V) ("the notice claims"). Plaintiff also alleges that, in providing only fifty days' notice, Defendants arbitrarily treated him differently from other similarly situated inmates in violation of the Equal Protection Clause (Count VII). Finally, Plaintiff recycles an argument made in the *Execution Protocol Cases* litigation, arguing that the 2019 Protocol violates the FDPA (Count VI). Based on the record before it, including the Supreme Court's rulings in other challenges to the 2019 Protocol, the court finds that Plaintiff is unable to show a likelihood of success on any of these claims.

1. Clemency Claims

Plaintiff alleges that Defendants are violating his procedural due process and statutory rights by executing him in the middle of a pandemic, which has made it impossible to meaningfully pursue clemency. The argument raises issues that the court finds troubling, but, ultimately, unlikely to succeed.

i. Procedural Due Process

"The Fifth Amendment Due Process Clause protects individuals from deprivations of 'life, liberty, or property, without due process of law.'" *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) (citing U.S. Const. amend. V). A procedural due process violation "occurs when an official deprives an individual of a liberty or property interest without providing appropriate procedural protections. Liberty interests arise out of the Constitution itself or 'may arise from an expectation or interest created by state laws or policies.'" *Id.* (quoting *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)).

At issue here is Plaintiff's continued interest in life, which he claims is burdened by his inability to have meaningful access to the clemency process. (*See* ECF No. 3-1, Pl. Mem. at 16– 17.) Notwithstanding an impending execution, a death row inmate "maintains a residual life interest, e.g., in not being summarily executed by prison guards." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 (1998) (plurality opinion) (Rehnquist, C.J.). Indeed, "[w]hen a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement has been extinguished. But it is incorrect . . . to say that a prisoner has been deprived of all interest in his life before his execution." *Id.* at 289 (O'Connor, J., concurring in part); *see also id.* at 291 (Stevens, J., concurring in part and dissenting in part) ("There is [] no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does."). Defendants do not appear to contest this point. Thus, the question is whether Defendants have provided adequate procedural safeguards for Plaintiff's clemency proceedings.[1]

The procedures required for federal clemency proceedings are limited. This is because "[f]ederal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law." *Harbison v. Bell*, 556 U.S. 180, 187 (2009) (citing U.S. Const. art. II, § 2, cl. 1 (setting forth the president's clemency power)). It is "a matter of

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[1] It is unclear whether Plaintiff alleges that access to clemency itself is an independent liberty interest. While this might alter the court's procedural due process analysis, the conclusion is the same—for the reasons discussed, Plaintiff has not stated a viable procedural due process claim.

grace, over which courts have no review." *United States v. Pollard*, 416 F.3d 48, 57 (D.C. Cir. 2005) (quoting *United States ex. Rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950)). Nevertheless, controlling Supreme Court precedent holds that "some *minimal* procedural safeguards apply to clemency proceedings." *Woodard*, 523 U.S. at 289 (O'Connor, Souter, Ginsburg, & Breyer, JJ., concurring in part); *id.* at 292 (Stevens, J., concurring in part and dissenting in part) ("[E]ven if due process is required in clemency proceedings, only the most basic elements of fair procedure are required.") At a minimum, these procedures appear to be adequate notice and an opportunity to be heard. *See id.* at 290 (O'Connor, J.).

Plaintiff argues that he has not been afforded these minimal procedural safeguards for his clemency proceedings in two key respects. First, that given the timing of his execution, he did not have an adequate opportunity to prepare his clemency petition in accordance with the federal clemency regulations set forth at 28 C.F.R. §§ 1.10–.11. Second, that the ongoing COVID-19 pandemic has effectively made it impossible to participate in a meaningful clemency process in such a short time. However, the court finds that, under Supreme Court precedent, the procedures afforded to Plaintiff—of which he chose not to avail himself—were adequate.

Federal clemency regulations provide that "[n]o petition for reprieve or commutation of a death sentence should be filed before proceedings on the [inmate's] direct appeal of the judgment of conviction and first petition under 28 U.S.C. § 2255 have terminated." 28 C.F.R. § 1.10(b). To leave time for

adequate review, a petition "should be filed no later than 30 days after the petitioner has received notification from the Bureau of Prisons of the scheduled date of execution" and "[a]ll papers in support of a petition . . . should be filed no later than 15 days after the filing of the petition itself." *Id.* Furthermore, clemency counsel "may request to make an oral presentation of reasonable duration to the Office of the Pardon Attorney in support of the clemency petition." *Id.* § 1.10(c).

Despite his arguments to the contrary, Plaintiff had meaningful access to all these procedures. First, he was permitted to file a clemency application within thirty days of receiving his execution notice. It was only on the very last day of the application period that Plaintiff's counsel, having not yet filed a petition, sought an extension from the Office of the Pardon Attorney. Notwithstanding that that office did not have the authority to grant an extension, it nevertheless offered to construe Plaintiff's request as a petition in order to preserve Plaintiff's access to the clemency process. (*See* ECF No. 15-1, Gillespie Decl. ¶¶ 8–9.) The Office of the Pardon Attorney also offered to arrange for a hearing via telephone given Plaintiff's stated concerns about the pandemic. (*Id.* ¶ 9.) Plaintiff's counsel rejected these offers and chose not to file a clemency petition.

Plaintiff next points out that, had he followed the federal clemency regulations, the Office of the Pardon Attorney would have had only five days in which to consider his application. But Defendants have submitted an affidavit from the Office of the Pardon Attorney representing that this would have been

sufficient time to consider the application and make a recommendation. (*Id.* ¶ 11.)

Even assuming five days were insufficient for meaningful review of his petition, that compressed schedule was largely caused by Plaintiff's delay in filing for clemency. The federal clemency regulations provide that a death row inmate may not file an application "before proceedings on the [inmate's] direct appeal of the judgment of conviction and first petition under 28 U.S.C § 2255 have terminated." 28 C.F.R. § 1.10(b). Plaintiff's appeal of his sentence ended in 1998 when the Supreme Court declined to hear his case, *Hall v. United States*, 526 U.S. 1117 (1998), and his first § 2255 petition was terminated in 2007, *Hall v. United States*, 549 U.S. 1343 (2007). Thus, Plaintiff had thirteen years to file a clemency petition, notwithstanding that his execution had not yet been scheduled. While the regulations also require an applicant to file his clemency petition "no later than 30 days after the [applicant] has received notification . . . of the scheduled date of execution," *see* 28 C.F.R. § 1.10(b), there was nothing to prevent Plaintiff from filing the application sooner, especially after the BOP gave notice in June 2019 that it was resuming executions under the new Protocol, and after the BOP conducted its first execution in July of this year.

For these reasons, the court is not persuaded that the COVID-19 pandemic has denied Plaintiff access to the clemency process. The government has shown that sufficient procedures are in place to ensure timely processing of Plaintiff's clemency petition, notwithstanding his delayed filing. The Office of the Pardon Attorney offered Plaintiff the opportunity to

present his case during a telephone hearing no later than November 6, which would have left more than a week for review. (Gillespie Decl. ¶ 9.) Moreover, courts across the country have declined to delay executions for pandemic-related reasons. *See, e.g.*, *LeCroy v. United States*, 975 F.3d 1192, 1197 (11th Cir. 2020) (rejecting request to stay execution due to counsel's inability to meet with the plaintiff in person); *Peterson v. Barr*, 965 F.3d 549, 551–53 (7th Cir. 2020) (denying motion to stay execution filed by members of victim's family citing COVID-19 concerns). The court finds no basis on which to do so here.

Finally, Plaintiff repeatedly relies on Justice O'Connor's concurrence in *Woodard* to advance his due process claims (both related to clemency and notice), but he omits key language from that opinion. In emphasizing the minimal process required in clemency procedures, Justice O'Connor posited that "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part). Plaintiff has presented no such arbitrary scenario here. *Woodard* involved an inmate who received a mere ten-day notice of his hearing, whose counsel was unable to attend the hearing, and who was unable to testify or submit documentary evidence at the hearing. Despite these limitations, Justice O'Connor found that the inmate did *not* present a viable due process claim. *See id.* at 289–90.

For the reasons stated above, Plaintiff has failed to demonstrate a likelihood of success on the merits of his due process claims.

ii. Statutory Claim

Plaintiff claims that he has been deprived of the right to counsel set forth in 18 U.S.C. § 3599 because his attorneys are unable to assist him with preparing his clemency application due to the pandemic. Section 3599 provides that each attorney appointed to represent an indigent client must "represent the defendant throughout every subsequent stage of available judicial proceedings . . . and proceedings for executive or other clemency as may be available to the defendant." Plaintiff has failed to demonstrate how the pandemic burdens that right, especially since he could have prepared and filed a clemency application at any point over the past thirteen years, and at least since June 2019, when BOP announced the resumption of executions using the 2019 Protocol. While he may not be able to meet with his attorneys in person, he may communicate with them through other means. *See Lecroy*, 975 F.3d at 1197.

2. Notice Claims

The gravamen of Plaintiff's notice claims is that the Due Process Clause and the Ex Post Facto Clause entitle him to at least ninety days' notice of his execution. This is so, Plaintiff argues, because every version of the BOP's Execution Protocol from at least 1993 to July 31, 2020 provided that death row inmates would receive a ninety-day notice prior to their executions. The 2019 Protocol was changed on July 31, 2020 to provide only fifty days' notice.

i. Due Process

Plaintiff's substantive due process claim is not a model of clarity. It appears as a procedural due process claim in the complaint (Count IV) but seems to transform into a substantive due process claim in subsequent filings. Moreover, his substantive due process claim relies on cases involving *procedural* due process violations. (*See* Pl. Mem. at 21 (citing *Wilkinson*, 545 U.S. at 221 (adjudicating procedural due process claim regarding placement in a supermax prison); *Sandlin v. Connor*, 515 U.S. 472, 483–84 (1995) (adjudicating procedural due process claim involving prison disciplinary procedures); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (same))). Nonetheless, analyzed under both a procedural and substantive due process framework, the claim does not entitle Plaintiff to injunctive relief.

As discussed above, a plaintiff alleging a procedural due process violation must identify a cognizable liberty interest arising from the Constitution or "an expectation or interest created by state laws or policies." *See, e.g.*, *Doe v. District of Columbia*, 206 F. Supp. 3d 583, 621 (D.D.C. 2016) (distinguishing procedural from substantive due process claims). Here, Plaintiff argues that earlier versions of the Execution Protocol created an expectation that death row inmates would be notified ninety days before their executions. Thus, having only received a fifty days' notice, he will be deprived of forty days of life.

As the court has already held in the *Execution Protocol Cases* litigation, there is no enforceable notice requirement set forth in the Execution Protocol. The Protocol "explains[] internal government procedures." (Compl. Ex. 2, Execution Protocol at 19.) While those

procedures "should be observed and followed as written unless deviation or adjustment is required," the Protocol expressly cautions that it "does not create any legally enforceable rights or obligations." (*Id.*) Accordingly, the D.C. Circuit concluded that the Execution Protocol was a "procedural rule" that "contains no rights-creating language." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 125–26 (D.C. Cir. 2020) (Katsas, J., concurring); *see id.* at 145 (Rao, J., concurring) (finding that the protocol "possesses the essential features of a procedural rule"); *see also Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (explaining that procedural rules "do not themselves alter the rights or interests of parties"). Thus, as the court has already held, the Execution Protocol does not entitle Plaintiff to notice ninety days before his execution.

Thus, to the extent Plaintiff intended to present the claim in Count IV as a procedural due process violation, he has failed to demonstrate a likelihood of success on the merits.

* * * * * *

Plaintiff's substantive due process claim meets a similar fate. The Due Process Clause of the Fifth Amendment "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). It "provides heightened protection against government inference with certain fundamental rights and liberty interests . . . [such as] the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity and to abortion." *Id.* at 720 (citations omitted). Because these rights "are

not set forth in the language of the Constitution, the Supreme Court has cautioned against expanding the substantive rights protected by the Due Process Clause." *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 702 (D.C. Cir. 2007). Accordingly, courts must "exercise the utmost care whenever [] asked to break new ground in this field." *Glucksberg*, 521 U.S. at 720.

A substantive due process analysis has "two primary features." *Id.* First, the alleged right must be "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (internal quotation marks and citations omitted). Second, the individual asserting the substantive right must supply "a careful description of the asserted fundamental liberty interest." *Id.*

Mindful of the Supreme Court's directive to proceed cautiously, the court finds that Plaintiff has failed to identify a substantive due process right. The liberty interest at issue here is a narrow one—the right to ninety days' notice before execution. (*See* Pl. Mem. at 21.) While individuals sentenced to death are undoubtedly entitled to some notice before an execution is carried out (to at least provide sufficient time to challenge the sentence), there is certainly no "deeply rooted" history or tradition that they are entitled to ninety days or some other specified period. As far as the court is aware, the practice of providing federal death row inmates with ninety days' notice of execution began in 1993. Since then, the federal government has only executed ten individuals, three of whom received less than ninety days' notice.

Furthermore, as discussed above, the Execution Protocol creates no enforceable rights. The only law expressly providing Plaintiff a right to notice of his execution is a 1993 regulation that requires only twenty days' notice. *See* 28 C.F.R. § 26.4(a).

Plaintiff has failed to show that a ninety-day notice is a "deeply rooted" historical practice in this nation's history, and therefore his substantive due process claim fails.

ii. Ex Post Facto Clause

The Ex Post Facto Clause prohibits the retroactive application of a "law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime when committed." *Peugh v. United States*, 569 U.S. 530, 532–33 (2013) (discussing U.S. Const. art I, § 9, cl. 3). This prohibition applies with equal force to changes in legislation, regulations, and guidelines. *See Bailey v. Fulwood*, 793 F.3d 127, 134 (D.C. Cir. 2015).

Here again, Plaintiff relies on earlier versions of the Execution Protocol providing ninety days' notice. In his view, the change from ninety to fifty days' notice inflicts greater punishment because "it will shorten his life by a minimum of 40 days." (Pl. Mem. at 25.) The court understands that every day of life is precious to someone facing imminent death. However, it is not clear how forty fewer days of life inflicts a greater punishment on an individual who was sentenced to death twenty-five years ago and who has long since exhausted his appeals. Plaintiff's death sentence will remain the same whether he is given fifty or ninety days' notice of his execution.

In support of his argument that a shortened notice period inflicts a greater punishment, Plaintiff relies on two cases which are more than a century old. In *Rooney v. North Dakota*, the Supreme Court found that a statute which increased the required time between conviction and the implementation of a death sentence was not an ex post facto punishment because it benefitted the prisoner. 196 U.S. 319, 266 (1905). And in *In re Tyson*, 22 P. 810, 812 (Colo. 1889), the Colorado Supreme Court stated, in dicta, that executing a defendant before the expiration of the minimum time required between conviction and execution would constitute an ex post facto punishment.

The court does not share Plaintiff's broad interpretation of these cases. Neither addresses whether reducing the notice period given to an individual already awaiting execution inflicts a greater punishment. *Cf. Peterson*, 965 F.3d at 552–53 ("[I]f a prisoner sued for inadequate notice of an execution date, a court could review that decision. But if the BOP observed the minimal requirements in the regulations . . . then it has the unconstrained discretion to choose a date for the execution."). Rather, *Rooney* and *Tyson* involved minimum time limits prescribed by statute between judgment and execution. Indeed, an analogous federal law prohibits the execution of a death row inmate less than sixty days after the entry of the judgment of death. *See* 28 C.F.R. § 26.3(a)(1).

As mentioned above, the court does not reach this conclusion lightly—Plaintiff is undoubtedly correct that "[j]ust a few more days of life is of inestimable value to a man who is to be executed." (Pl. Mem. at 24

(quoting *In re Petition of Ellisor*, 140 F. Supp. 720, 727 (S.D. Tex. 1956)).) Nevertheless, Plaintiff has failed to establish that deviation from an unenforceable agency practice inflicts greater punishment on an individual who received the notice to which he was entitled—twenty days' notice in accordance with 28 C.F.R. § 26.4(a) and sixty days between judgment and execution in accordance with 28 C.F.R. § 26.3(a)(1)—and who was sentenced to death more than two decades ago.

3. Equal Protection

Plaintiff alleges that he has been "denied equal protection under the Fifth Amendment as he has not received the same process that other death row prisoners have been afforded to pursue clemency." (Compl. ¶ 184.) The basis of his claim is that Defendants shortened the notice period "affording significantly more process to those scheduled for execution prior to the COVID-19 pandemic than those scheduled for execution during the COVID-19 pandemic." (*Id.* ¶ 180.)

The Fourteenth Amendment prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause applies to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S 497 (1954). Thus, the "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

To succeed on an equal protection claim, a plaintiff must "demonstrate that he was treated differently than similarly situated individuals and that [the

government's] explanation does not satisfy the relevant level of scrutiny." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1123 (D.C. Cir. 2005). Where, as here, an equal protection claim does not involve a suspect class, the court applies rational basis scrutiny. *See FCC v. Beach Commc'ns., Inc.*, 508 U.S. 307, 313 (1993) (nothing that the government action "must be upheld against equal protection challenge if any reasonably conceivable state of facts could provide a rational basis for the classification"). "Review of an equal protection claim in the context of agency action is similar to that under the APA . . . [that is,] the only question is whether . . . treatment of [the plaintiff] was rational (i.e., not arbitrary and capricious)." *Nazareth Hosp. v. Sec'y U.S. Dep't of Health and Hum. Servs.*, 747 F.3d 172, 180 (3d Cir. 2014); *see also Cooper Hosp. / Univ. Med. Ctr. v. Burwell*, 179 F. Supp. 3d 31, 47 (D.D.C. 2016).

The court finds that Plaintiff is unlikely to succeed on his equal protection claim for the same reason his other constitutional claims fail: the Execution Protocol does not bestow enforceable rights on death row inmates. The D.C. Circuit has made it clear that the Protocol is a statement of agency policy. *Execution Protocol Cases*, 955 F.3d at 125–26 (Katsas, J., concurring); *see id.* at 145 (Rao, J., concurring). Accordingly, it is not subject to review under the APA analysis. *See, e.g.*, *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006) (explaining that an agency's statement of policy is unreviewable); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974) ("A general statement of policy . . . does not establish a binding norm. It is not finally

determinative of the issues or rights to which it is addressed." (internal quotation marks and citations omitted)); *Fed. Law Enf't Officers Ass'n v. Rigas*, 2020 WL 4903843, at *7 (D.D.C. Aug. 20, 2020) (same).

Ultimately, the law provides that all inmates executed under the 2019 Execution Protocol be given at least twenty days' notice of their executions, and Defendants have complied with that law.

4. Ultra Vires Agency Action

Plaintiff also argues that the 2019 Execution Protocol conflicts with the FDPA, 18 U.S.C. § 3596, by purportedly displacing the U.S. Marshal Service from its statutorily assigned role to "supervise implementation" of a federal death sentence. (*See* Compl. ¶¶ 173–78.) The court has already rejected this claim in the *Execution Protocol Cases* litigation.

Section 3596 of the FDPA requires that in carrying out a death sentence, "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). The critical word here is "supervise,"[2] which is undefined in the statute. The court must therefore rely on its plain meaning. "To 'supervise' is to 'superintend' or 'oversee,'" but not to "formulate," "determine," or "select" the manner of federal execution. *Execution Protocol Cases*, 955 F.3d at 134 (Rao, J., concurring)

[2] As Judge Rao explained in her concurrence, "[t]he ordinary meaning of 'implementation of the sentence' includes more than 'inflicting the punishment of death.'" *Execution Protocol Cases*, 955 F.3d at 133 (Rao, J., concurring).

(citing Supervise, Merriam Webster's Collegiate Dictionary (11th ed. 2014)).

The legislative history of the federal death penalty indicates that "supervise" does not mean the U.S. Marshal has the exclusive authority to carry out federal executions or to institute procedures for doing so. In prior federal death penalty statutes, Congress used more expansive language to describe the U.S. Marshal's duties during an execution. For instance, in the 1937 version, Congress provided that the U.S. Marshal was "charged with the execution of the sentence." *See* 50 Stat. at 304.

The 2019 Protocol does not divest the U.S. Marshal of this supervisory authority. In fact, it mandates that the U.S. Marshal "oversee the execution and to direct which other personnel may be present at it." *Execution Protocol Cases*, 955 F.3d at 124 (Katsas, J.). The execution cannot begin without the Marshal's approval, and it is the Marshal who certifies that the execution has been carried out. *Id.* The court therefore concludes that the U.S. Marshal supervises—i.e., oversees and superintends over—the execution.

Furthermore, the fact that the U.S. Marshal must supervise an execution does not preclude other DOJ components from participating. Indeed "all functions of agencies and employees of the Department of Justice"—of which both the Marshal Service and the BOP are parts—"are vested in the Attorney General." Thus, any authority inherent in the Attorney General's power to enforce a death sentence that has not been specifically assigned to a DOJ component may be delegated. *See* 28 U.S.C. §§ 509, 510; *United States v. Giordano*, 416 U.S. 505, 514 (1974) (finding unexceptional the proposition that the Attorney

General may freely delegated his power where Congress does not say otherwise).

The 2019 Protocol, as written, still provides the U.S. Marshal the power to supervise the implementation of a death sentence. Therefore, the court finds that the 2019 Protocol does not improperly delegate authority to the BOP.

C. Remaining Factors for Injunctive Relief

Having concluded that none of Plaintiff's claims are likely to succeed on the merits, the court need not balance the remaining factors. *See Greater New Orleans Fair Hous. Action Center v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1083 (D.C. Cir. 2011) (noting that a substantial likelihood of success the merits is often dispositive); *Toxco Inc. v. Chu*, 724 F. Supp. 2d 16, 29 (D.C. Cir. 2010) (quoting *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 38 F. Supp. 2d 114, 140 (D.D.C. 1999)) ("[A]bsent a 'substantial indication' of likely success on the merits, 'there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review.'"). Plaintiff is not entitled to the injunctive relief sought.

D. Emergency Motion for a Hearing

Plaintiff has also filed an emergency motion for a hearing. (ECF No. 14.) The court finds that such a hearing is not necessary given that Plaintiff has presented no disputed issues of fact that need be resolved. *See Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) ("[I]f there are genuine issues of material fact raised in opposition to a motion for a preliminary injunction, an evidentiary hearing is required."); *see also* LCvR 65.1(d) ("[A] hearing on an application for

preliminary injunction shall be set by the Court no later than 21 days after its filing, unless the Court decides the motion on the papers"). Thus, Plaintiff's emergency motion for a hearing will be denied.

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for a temporary restraining order/preliminary injunction and emergency motion for a hearing must be DENIED. The court will issue an accompanying order accordingly.

Date: November 16, 2020

Tanya S. Chutkan

TANYA S. CHUTKAN

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 20-cv-3 184 (TSC)

ORLANDO CORDIA HALL,

Plaintiff,

v.

WILLIAM P. BARR, ET AL.,

Defendants.

ORDER

For the reasons set forth in the accompanying memorandum opinion (ECF No. 23), Plaintiff's motion for a temporary restraining order/preliminary injunction, (ECF No. 3), and emergency motion for a hearing, (ECF No. 14), are hereby DENIED.

Date: November 16, 2020

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No.: 1:20-cv-03184

ORLANDO CORDIA HALL,

Plaintiff,

v.

WILLIAM P. BARR, ET AL.

Defendants.

Death Penalty Case

Execution Date: November 19, 2020

DECLARATION OF ROBERT C. OWEN
PURSUANT TO 28 U.S.C. § 1746

I, Robert C. Owen, declare and state the following:

1. I am an attorney licensed to practice in Texas and Illinois and am a member in good standing of the bars of both states. I maintain my office in Chicago's historic Monadnock Building at 53 West Jackson Blvd., Ste. 1056.

2. I hold a bachelor's degree in Comparative Literature (1984) and a master's degree in Speech Communication (1986) from the University of

Georgia. I earned my J.D. degree at Harvard Law School (1989).

3. I am a criminal defense attorney and for the most part limit my practice to capital cases. I was first licensed as a lawyer in 1989. From 1995-1998, I served as an Assistant Federal Public Defender in Seattle, Washington, and in that role handled a wide range of non-capital matters in addition to a few capital cases. Other than during that interval, I have devoted almost my entire thirty-year legal career to defending clients facing the death penalty, primarily in appellate and post-conviction litigation. I have done so in a variety of practice settings (in a non-profit law office, in a public defender agency, in a small private practice, in a law school clinic, in a solo practice). My cv (circa 2019) is attached as Exhibit 1.

4. In the current iteration of my practice, I directly represent individual clients in capital cases in state and federal court. By virtue of a contract funded by the Defender Services Division of the Administrative Office of the United States Courts, I also serve as a consultant and advisor to other attorneys handling such cases.

5. I have successfully argued four capital cases at the Supreme Court of the United States (*Tennard v. Dretke* (2004), *Abdul-Kabir v. Quarterman* (2007), *Brewer v. Quarterman* (2007), and *Skinner v. Switzer* (2011)). I am regularly invited to present at national training programs focusing on capital defense. I directed or co-directed death penalty defense clinics at the law schools of the University of Texas at Austin (1998-2012) and Northwestern University (2013-2019). In 2011, I received a medal from the Bar of the

City of Paris (France) in recognition of my work in the struggle for human rights.

6. I have represented Orlando Cordia Hall continuously since 1999. I was initially appointed for Mr. Hall's initial post-conviction proceeding under 28 U.S.C. § 2255, as co-counsel to Marcia A. Widder.

7. This declaration addresses two main subjects: what work needs to be done to prepare and submit a petition for commutation of sentence on behalf of Mr. Hall, and why; and how my personal circumstances place me and my loved ones at greater risk for complications if I become infected with the novel coronavirus and contract its associated disease, COVID-19. I will address those topics in that order.

8. Mr. Hall's trial counsel conducted almost no investigation into his background and what little they did was undertaken after jury selection in his capital trial had already started. Thus, one of the tasks Ms. Widder and I had to pursue in Mr. Hall's 2255 proceeding was to conduct a thorough investigation, as required by prevailing professional standards for defending a client in a capital case. That post-conviction investigation was conducted primarily between 2001 and 2004. It was incomplete, however, due to funding restrictions imposed by the district court. For example, the court refused to authorize any funds for the work of a mitigation expert essential to developing the mitigating evidence that trial counsel failed to investigate, leaving my co-counsel Ms. Widder and me to fund her work out of our own pockets. The same lack of resources prevented us from performing additional investigation to support the clemency application we hastily prepared and submitted in late 2016 at the tail-end of the Obama

Administration, in case the President chose to exercise his clemency powers to commute the sentences of death row inmates. As explained below, it was incomplete and inadequate, and we withdrew it before it was acted upon when President's Obama's second term ended without such commutations.

9. The December 2016 clemency application contained little personal information about Mr. Hall. Instead, it focused primarily and at length on systemic flaws with the administration of the federal death penalty such as geographic and socio-economic inequities and racial bias. It also addressed the lack of procedural fairness in the trial underlying Mr. Hall's death sentence. Only the last fourteen of this application's seventy pages dealt at all with Mr. Hall's capacity to live safely and productively in prison, how his background shaped his involvement in the crime, and what value his life would have to others if it were spared. We submitted a few sworn statements that we had obtained during the post-conviction proceedings more than a decade earlier, supplemented by ten letters, mostly very brief, from some of Mr. Hall's family members, plus two more letters from Ms. Widder and me. The petition did not focus on these traditional grounds for clemency because we lacked the resources to conduct the type of investigation that typically attends preparation of an adequate clemency application.

10. Mr. Hall now faces execution on November 19. In my judgment, to satisfy our professional obligations as counsel at this stage of the proceedings, Ms. Widder and I need to create a completely different kind of clemency application from the one that was submitted in 2016 and later withdrawn. In contrast to

what was submitted before, Mr. Hall's clemency application needs to be fully developed as a vehicle for presenting detailed evidence to (1) explain how Mr. Hall's life experiences affected his involvement in the crime; (2) show that he is deeply remorseful for the crime, poses no threat of future criminal violence in prison and can live out his life constructively there; and (3) paint a detailed portrait of his rich and vibrant connections to his family, which will make clear how he has productively used his time on death row to maintain his family relationships and, in particular, to provide loving guidance to his five children, as well as the great loss his execution would cause to his many loved ones. Those strategic goals can only be meaningfully pursued via a thorough factual investigation conducted according to the prevailing standard of practice for capital defense. That, in turn, would require travel and in-person contact with sources of relevant information.

11. Unfortunately, the global pandemic of novel coronavirus creates a risk of serious illness or death to me and my loved ones if I choose to travel and to have in-person contact with individuals outside my household for the purpose of preparing such a fully developed clemency application for Mr. Hall, or investigating possible bases for further litigation in his case. If that were not the case, I would undertake a complete factual investigation, of which the following examples are illustrative.

Mr. Hall's turbulent background of abuse and privation.

12. Even the limited investigation we were able to perform in connection with Mr. Hall's post-conviction proceeding made clear that the circumstances of Mr.

Hall's upbringing were traumatizing and painful. Despite the fact that the courts rejected Mr. Hall's post-conviction challenge to his trial attorneys' failure to develop and present this information to the sentencing jury, the full story of Mr. Hall's background was essentially unknown to the jurors who sentenced him to death.1[1] Accordingly, that story remains relevant to the President's decision whether death is the appropriate sentence. To fully develop that information, we would need to conduct in-depth, in-person interviews with the following persons:

13. We have information that in his late teens, Mr. Hall was left to care for his two younger brothers, ***Demetrius Hall*** (Texas) and Tracy Hall, with no adult in the home. At times, the boys had neither electricity nor food. The teenage Mr. Hall tried to make ends meet by working legitimate low-wage jobs, but ultimately was lured into the drug trade. In addition, Demetrius was a witness to violent attacks on his mother Betty at the hands of his (and Mr. Hall's) father A.J. in the family household when Demetrius and Mr. Hall were children, and that Demetrius likewise saw Mr. Hall suffer serious

[1] 1 Mr. Hall's trial counsel presented a superficial and abbreviated case at the sentencing hearing, offering only eight witnesses. Six described bad qualities of co-defendants Webster and Beckley, and Mr. Hall's behavior in jail while awaiting trial. Only two witnesses, Mr. Hall's mother Betty and his sister Cassandra Ross, touched on Mr. Hall's upbringing and character, and trial counsel failed to elicit anything more than vague and conclusory descriptions. Based on this sketchy evidence, only one juror found the "circumstances surrounding [Hall's] upbringing" mitigating, a finding the Fifth Circuit found reasonable given that the evidence as presented by trial counsel was insubstantial. *See United States v. Hall*, 152 F.3d 381, 413 (5th Cir. 1998).

physical abuse at the hands of both parents, including being beaten with switches and belts. During § 2255 proceedings, we were not able to interview Demetrius, who at the time was serving a lengthy prison sentence for his involvement in this crime, about these important events and experiences. We believe it essential to Mr. Hall's clemency application that we meet with Demetrius in person to explore his thoughts and recollections about these emotionally difficult and sensitive matters, and to assist him in crafting a declaration to convey his first-hand experiences of Mr. Hall's turbulent family history and the damage it caused to him and his siblings.

Mr. Hall's history of sexual abuse

14. In 2016, we learned for the first time that as a child (around ages 7-10), Mr. Hall was the victim of sexual abuse at the hands of Charles (last name unknown), an adult neighbor of Mr. Hall's grandmother in the town of Summerfield, Louisiana. Although Charles has died, there are others who may be able to corroborate Mr. Hall's account. For example, Mr. Hall's older brother ***Scottie Hall*** (Arkansas) has indicated to us that he had reason to believe Charles was behaving improperly with and toward children, but it was impossible to explore this in appropriate depth and detail over the telephone. In addition, Mr. Hall's younger brother ***Demetrius Hall*** (Texas) may likewise have relevant information. In addition, Charles was married to a woman who worked with Mr. Hall's mother Betty Hall at the Con-Agra chicken processing plant in El Dorado, Arkansas and who may still be available to interview. We need to pursue interviews with all these witnesses, as well as thorough interviews with our client ***Orlando Hall***

regarding these incidents. We also need to identify an ***expert in child sexual abuse*** who can evaluate the impact that these traumatic experiences had on Mr. Hall, including conducting an in-person mental health evaluation.

Mr. Hall's exemplary conduct during previous incarcerations and while on Death Row.

15. Mr. Hall has exhibited exemplary conduct in prison. Prior to his current incarceration, he served only one prison term, when he was incarcerated in the Arkansas state prison system for selling drugs. Records show that he quickly reached the highest-level trusty status during that prison term. As an Arkansas inmate, Mr. Hall did not commit a single disciplinary infraction – proving him, in the words of a corrections expert, an "ideal inmate."

16. In 2016, ***Mark Bezy***, a former warden at the Terre Haute federal correctional complex where Mr. Hall has been held since 1999, reviewed what was then Mr. Hall's complete Bureau of Prisons file (i.e., his file through 2015). Mr. Bezy found that Mr. Hall's record to that date was "remarkable" in that in his then-20 years of post-trial incarceration under a death sentence, Mr. Hall had received only seven disciplinary write-ups, "all reflecting minor violations and none involving violent or dangerous behavior." Through 2015, Mr. Hall's disciplinary history contained "no indications" that he posed "a threat to safety or the orderly running of an institution." But today the information reviewed by Mr. Bezy covers only about 75% of Mr. Hall's BOP incarceration. Thus, one task that must be performed in order to prepare a complete clemency application now, in 2020, is to obtain Mr. Hall's updated Bureau of Prisons records

and provide them to Mr. Bezy to determine whether they strengthen his confidence in his expert opinion that if Mr. Hall's death sentence were commuted, he could live peaceably and productively in a general population prison environment. We anticipate that it would also be necessary to have Mr. Bezy meet with Mr. Hall in person and interview him about his record in the BOP.

17. Other witnesses who have never been interviewed and who likely possess relevant information about Mr. Hall's adjustment to confinement include the following.

18. ***A former Bureau of Prisons employee*** (Indiana) – for several years, this individual had regular contact with Mr. Hall on Death Row in the Secure Confinement Unit at the U.S. Penitentiary in Terre Haute. We believe this individual would be able to offer firsthand accounts to corroborate and personalize Mr. Bezy's conclusions about Mr. Hall's "remarkable" record of successful adjustment in prison and his prospects for being a fully compliant inmate if his life is spared and he is moved to a general population setting.

19. ***Former Bureau of Prisons mental health staffer*** (Texas) – This individual saw Mr. Hall on numerous occasions at the Federal Medical Center in Ft. Worth, Texas, while Mr. Hall was held there in 1995, and had a generally very positive appraisal of Mr. Hall. In a 2001 phone conversation, this individual told a member of Mr. Hall's post-conviction counsel team that Mr. Hall could fairly be described as a "model inmate." Unfortunately, because in 2001 this individual was still employed by the Bureau of Prisons, it was not possible for us to obtain a thorough

interview or a written statement. Now that this individual is no longer employed by the Bureau of Prisons, that restriction no longer pertains.

20. ***Second BOP medical staffer*** (location unknown, possibly Texas) –according to documents in our possession, this medical staffer had contact with Mr. Hall from October 1994 (shortly after his arrest) until March 1995, on occasions when Mr. Hall's family members reported that he was experiencing suicidal thoughts. To the extent those reports were accurate, they likely reflect the depth of shame and remorse Mr. Hall was experiencing for his involvement in Lisa Rene's murder. For that reason, a complete clemency investigation must include locating and interviewing this individual about his or her contacts with, and appraisal of, Mr. Hall.

21. In addition, upon information and belief, there are ***other BOP employees*** (locations unknown but likely including Indiana and Texas) who have had contact with Mr. Hall during the years he has spent in federal custody (both prior to trial and since his conviction) who would confirm that Mr. Hall is non-dangerous and completely compliant, and poses no threat whatsoever to prison staff or other inmates. We expect that interviewing the individuals of whose existence we are presently aware would produce the names of such other potential witnesses. Pursuing such witnesses would be necessary to the complete development and presentation of Mr. Hall's clemency application (even if some continue to be employed by the BOP, which might mean negotiation and/or litigation would be necessary to secure access to them).

Mr. Hall's alleged plan to escape from custody prior to trial

22. Prior to trial, Larry Nichols, another inmate in the facility where Mr. Hall was being held, informed the Government that Mr. Hall was planning an escape attempt in which he intended to take his own attorneys and/or the trial judge hostage. The Government then called Nichols to testify to those same allegations at Mr. Hall's capital sentencing hearing. His testimony was almost certainly a major factor in the jury's unanimous determination that Mr. Hall would constitute a future danger. Mr. Hall, however, has consistently maintained that no such plan ever existed and that he had no connection to a homemade weapon introduced at trial that was recovered from a common area in the jail (and which Nichols claimed Mr. Hall had secreted there as part of his escape plan). Mr. Hall's denial is consistent with his prior record of successful adjustment to confinement and with the accounts of at least two other prisoners who were in the same jail area at the same time, both of whom dispute Mr. Nichols' allegations against Mr. Hall and provided sworn statements to that effect in 2000. At this stage of proceedings, we would want to explore whether Mr. Nichols entered into similar plea agreements with the government in subsequent cases.

23. ***Benjamin C. Millican*** (location unknown, possibly Texas, last released from BOP custody in 2015) and ***Haywood G. Alexander*** (location unknown, possibly Texas, last released from BOP custody in 2006) may also have relevant information that would undermine the testimony of Larry Nichols and thus support Mr. Hall's claim that he is not a

danger to anyone and has adjusted peaceably to confinement. Mr. Millican and Mr. Alexander were inmates in the same jail area at the same time as the inmates from whom we obtained helpful statements. They likely observed and interacted with both Mr. Hall and Mr. Nichols. Mr. Alexander was described in another inmate's statement as having frequently talked with Mr. Nichols about how a prisoner might obtain favorable treatment from the prosecution by providing information against other inmates. A complete clemency investigation would involve locating and interviewing both Mr. Millican and Mr. Alexander. Information provided by either could support further contact with Larry Nichols (location unknown) himself; although Mr. Nichols did not provide helpful information when a representative of our team contacted him in 2010, that might well change if he were confronted with contrary statements from Mr. Millican or (especially) Mr. Alexander.

Mr. Hall's culpability relative to the other participants in the crime

24. Mr. Hall has always maintained that despite his involvement in abducting, holding, and eventually killing Ms. Rene, he did not sexually assault her. That fact could be central to any chance at clemency, and thus warrants full investigation, which would include interviews of the co-defendants. Information suggests that the evidence the prosecutor presented at trial about Mr. Hall's sexual assault of the victim and the relative culpability of the different participants in the crime may have been inaccurate or at least incomplete. Given these circumstances, we need to interview codefendants ***Steven Beckley*** and ***Marvin***

Holloway (as well as Mr. Hall's younger brother ***Demetrius Hall***, see supra). All three were incarcerated for varying terms of years in connection with this case and all three have been released from custody since Mr. Hall's § 2255 proceeding concluded. In particular, we need to interview Mr. Beckley to explore why he did not accuse Mr. Hall of sexually assaulting Lisa Rene until he had already made repeated custodial statements that never mentioned that presumably significant fact, even though, in his multiple prior statements, he fully inculpated himself in the crime (including confessing that he sexually assaulted Lisa Rene), and inculpated Mr. Hall in all the events of the crime except sexually assaulting Lisa Rene. In my experience, co-defendants (and other compromised prosecution witnesses) are often more forthcoming about their participation in the offense and the reliability of their testimony once they are out of custody. Mr. Beckley was released from custody in April 2020. In addition, we understand that Marvin Holloway recently attempted to write Mr. Hall, but that the prison refused the letter because it violated correspondence rules due to colored ink or paper. We would also interview formerly death-sentenced codefendant ***Bruce Webster***, who at this time has had his death sentence vacated on the ground that he is a person with intellectual disability, as soon as that decision becomes final.

The value of Mr. Hall's life and his strong and vital connections to the lives of his family members

25. Perhaps the most significant -- and significantly unfinished -- task in fully developing a clemency application for Mr. Hall is providing a

detailed account of the very strong bonds he shares with his immediate and extended family, and the vital and positive role he plays in their lives. Our post-conviction investigation focused primarily on trying to excavate the underlying events in Mr. Hall's background, like his traumatic experiences of deprivation and mistreatment. Our goal at that time was to uncover essential context for understanding how those life experiences diminished Mr. Hall's moral culpability, and for appreciating how Mr. Hall came to be involved in the crime and why he did not intervene to save Lisa Rene. In working with family witnesses between 2000 and 2004, we paid little attention to developing and presenting a richly detailed account of the positive aspects of Mr. Hall's life now, as opposed to the damaging aspects of his upbringing in El Dorado, Arkansas in the 1970s and 80s. A § 2255 proceeding is backward-looking; it focuses on the fairness of the defendant's trial. Our aim was to show that Mr. Hall's trial counsel unreasonably failed to present evidence available in 1995 that could have affected the jury's judgment about the appropriate punishment. However dismally Mr. Hall's trial attorneys performed in 1995, evidence of how his relationships with other family members deepened, strengthened, and evolved over the course of the years that followed was not relevant to assessing counsels' performance at trial. Moreover, such evidence could not have been fully developed more than fifteen years ago, at the time of our § 2255 investigation, because at that time Mr. Hall's children were still young and unable to reflect on the positive example he set for them from prison or to appreciate the time and attention he gave to being a supporting and loving father (and now grandfather).

26. Today, Mr. Hall maintains near-constant contact with his family members via telephone and email. To present a fully developed case for mercy in 2020, we need to interview them about how he relates to family members, how he shares joy at their successes and commiserates with their failures, and how he helps provide a steady source of love and understanding for his children as they navigate their own lives as parents. In addition to being focused on issues relating to Mr. Hall's traumatic upbringing, our most substantial contacts with Mr. Hall's family members took place more than fifteen years ago. There is a tremendous amount of additional information to be gathered from family interviews about the value of Mr. Hall's life to his loved ones, as reflected in how their relationships with him have grown and deepened over those fifteen years. The family members we need to interview in person on these topics include ***Betty Hall*** (Mr. Hall's mother, in Arkansas); ***Cassandra Ross*** (his sister, in Texas); ***Jerry Ross*** (his brother-in-law, in Texas); ***Marco Ross*** (his nephew, in Texas); ***Skyler Ross*** (his niece, in Texas); ***Pamela Palmer*** (his sister, in Texas); ***Tracy Hall*** (his younger brother, in Arkansas or Texas); ***Demetrius Hall*** (his youngest brother, in Texas); ***Scottie Hall*** (his older brother, in Arkansas); ***Albert Moore*** (his half-brother, in Louisiana); ***Jackie Rice*** (his half-brother's wife, in Louisiana); ***Shontay Anders*** (his daughter, in Texas); ***Preisha Green*** (his daughter, in Arkansas); ***Te'Aushia Hall*** (his daughter, in Arkansas); ***Orlando Hall, Jr.*** (his son, in Wisconsin); ***Shanyce Matthews-McGee*** (mother of Orlando Hall, Jr., in Wisconsin); Eric Hampton (his son, in Arkansas); ***Jamie Garrett***

(mother of Eric Hampton, in Arkansas); Juanita Taylor (his cousin, in Arizona); ***Alexis Tubbs*** (his niece, in Arkansas); ***Tantarras Smith*** (his niece, in Arkansas); ***Kevin Norful*** (his nephew, in Missouri); ***Vada Smith*** (family friend, in Arkansas); ***Christopher Thomas*** (friend, in Arkansas). Each of Mr. Hall's children now has children of their own, and many of those children are old enough to have their own relationships with Mr. Hall that stretch back as much as a decade. Those family members, too, must be interviewed in person.

Trial jurors

27. Jurors' views about the appropriateness of carrying out a death sentence can change over time. For example, a juror might learn that the defendant has adjusted peaceably to prison in the years since trial and has proved to be a model inmate rather than posing a continuing threat to others. Such a juror might conclude as a result that she was mistaken to assume that only execution, rather than confinement, could adequately protect society from the defendant. Where jurors' views have undergone such changes, it is vital that the executive decision-maker know about them in weighing whether to grant clemency. In a number of capital cases, juror affidavits urging mercy have been cited by such decision-makers in announcing favorable clemency decisions, as when then-Governor Mitch Daniels in 2005 commuted the death sentence of Arthur Baird in Indiana. Accordingly, after obtaining permission from the presiding judge pursuant to local rule, we need to interview the trial jurors, all or most of whom are likely still in Texas: ***Marcia Dawn Graves, Timothy Ray Nesbit, Donald Robert McCormick,***

Benjamin T. McGowen, "Mary Ann" Herring, Jacquelyn Kay Holmes, Linda Louise Harrell, Patsy A. Brandon, Gary Clarence Killion, Billy Dwayne Dean, Stacey Leigh Donaldson.

Video presentation in support of clemency

28. The prevailing standard of practice for capital defense supports creating a video presentation to accompany and supplement Mr. Hall's clemency application. Compelling visual images would help bring to life the case for mercy. Such a video could ultimately include footage of any of the potential witnesses identified above and would, at a minimum, include footage of Mr. Hall. Creating such a video would require me and co-counsel to have in-person contact with Mr. Hall and the witnesses.

Polygraph examination in support of clemency

0. As the foregoing discussion makes clear, there are at least two issues relevant to Mr. Hall's clemency application that involve disputed facts: whether Mr. Hall in fact plotted an escape from custody prior to trial (as jail inmate Larry Nichols alleged), and whether Mr. Hall in fact sexually assaulted the victim Lisa Rene (as cooperating codefendant Steven Beckley eventually alleged after never having previously made that claim in any of his numerous statements to the authorities). To support our clemency application on these grounds, we need to submit Mr. Hall to examination by a qualified polygraph examiner to probe further into those allegations. Such an examination will require in-person contact between, at a minimum, Mr. Hall and the examiner. It would likely also require in-person contact among me, my co-counsel, and the examiner to discuss and prepare for

the examination and to review the results. While the results of such an examination would not be admissible in court, they might well help persuade the President that the Government's only evidence tending to show that Mr. Hall cannot live peacefully and safely in prison – Nichols' testimony, which is already rebutted by Mr. Hall's record as an inmate both before the alleged escape plot and since – was in fact false. They might also persuade the President that Mr. Hall did not, in fact, sexually assault Lisa Rene, which could diminish his culpability sufficiently to justify reducing his death sentence to life imprisonment without the possibility of release. As with the request to interview BOP employees, this plan could require negotiation and/or litigation to obtain access to Mr. Hall by a qualified polygraph examiner.

30. According to my primary care physician, I have one medical condition which bears an established connection to an increased risk of serious illness or death if I become infected with the novel coronavirus. See Exhibit 2, submitted under seal. I am also under a physician's care for a second condition which may also increase my risk from COVID-19. Id. And I am 58 years old, and older age is also associated with higher rates of severe illness from COVID-19. Id. For these reasons, my physician deems it "medically important" that I "avoid travel and close contact with other people" unless and until there is an effective treatment or a vaccine for COVID-19. Id.

31. My wife has suffered her entire life from a medical condition that can cause her trouble breathing, and it is worsening as she ages (she is now 55). She is under a doctor's care for that condition and

takes medication daily to treat it. Even so, from time to time she experiences trouble breathing. COVID-19 is a respiratory disease, meaning of course that it affects the lungs, throat, and nose. According to what I have read, for a person with my wife's condition, infection with the virus could lead to (inter alia) pneumonia or other serious lung disease. My wife is the most important person in the world to me, and I am unwilling to do anything that might risk her health (as by risking becoming infected with the novel coronavirus and possibly passing it on to her).

32. Knowing that we could be at increased risk for severe illness or death as a consequence of the pandemic, my wife and I since March have taken great care to minimize our contact with other people and to take special precautions when it is necessary to leave our house (i.e. wearing a mask, carrying and using hand sanitizer, washing our hands frequently). We live with our cat; we have no children and no one else shares our residence. Other than me and my wife, no one has been in our house since March except on two occasions. In the hottest part of the summer, an A/C technician came to attend to a problem with our air-conditioning unit; this week, with winter looming, a furnace repairman came to service our furnace. Nor have my wife and I ventured out for social contact with others; since March, we have not been in a restaurant, nor a theatre, nor a shop. Our groceries are all delivered to our home. There are a couple of stores near our home where we order goods in advance and then drive up and have someone place the items in the trunk of our car. Both my wife and I leave our home to exercise outdoors, but always masked; she goes for walks and rides her bicycle, and I just bicycle.

Like me, my wife works from home (she is a Senior Lecturer at Northwestern University's Pritzker School of Law, and all her teaching and other interaction with students since March has been conducted remotely via videoconference). I have been to my office in the Loop fewer than five times since mid-March, each time to retrieve a specific item and then return home. Simply put, we are hunkered down at home until the pandemic is brought under control.

33. Mr. Hall has the right to counsel to represent him in "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and in . . . proceedings for executive or other clemency as may be available to the defendant." 18 U.S.C. §3599(e). Mr. Hall's scheduled Nov. 19 execution date forces me to choose between protecting my health and my wife's on the one hand, versus performing the tasks that my three decades of experience as a capital defense lawyer have taught me are necessary to prepare an adequate clemency application that comports with the prevailing national standard of practice for capital cases, and which I have described in detail above.

34. That the Government is willing to hold my indigent death-sentenced client hostage to my willingness to risk my own health and safety, and that of my wife, sometimes fills me with rage, and other times with despair. This country used to be better than that. I hope that someday soon, it will be again.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 1, 2020.

/s/ Robert C. Owen
Robert C. Owen

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No.: 1:20-cv-03184

ORLANDO CORDIA HALL,

Plaintiff,

v.

WILLIAM P. BARR, ET AL.

Defendants.

Death Penalty Case

Execution Date: November 19, 2020

DECLARATION OF MARCIA A. WIDDER

Marcia A. Widder, pursuant to the provisions of 28 U.S.C. § 1746, hereby makes the following declaration:

1. I am an attorney licensed to practice law in the states of Louisiana, Pennsylvania and Georgia. My Louisiana and Pennsylvania bar memberships are on inactive status. I received a bachelor of arts degree from the University of Pennsylvania in August 1988 and a juris doctor degree from Tulane Law School in May 1994. In August 1996, following a two-year judicial clerkship for Hon. James L. Dennis at the

Supreme Court of Louisiana and the United States Court of Appeals for the Fifth Circuit, I moved to Philadelphia to work as an associate for a solo practitioner, Michael R. Needle, with whom I had previously worked as a paralegal and, during law school, as a summer clerk. After working in Philadelphia for two years, I moved back to New Orleans to pursue full-time work as a capital defense attorney.

2. A few months after I arrived in Philadelphia, R. Neal Walker, a capital defense lawyer in New Orleans with whom I had worked during law school at the Loyola Death Penalty Resource Center, asked me to join him as co-counsel on Orlando Hall's federal capital direct appeal. I agreed and began working on the case after receiving the appellate record in, I believe, early 1997. Shortly after I began actively working on Mr. Hall's case, Mr. Walker was struck by a car and almost killed. Because of the serious injuries he sustained, the Fifth Circuit appointed me as counsel under the Criminal Justice Act with the understanding that, while I would serve as lead counsel, due to my inexperience, my work would be overseen by seasoned capital defense attorneys serving as Federal Capital Resource Counsel. See Motion to Extend Time to File Appellant's Brief and to Appoint Co-counsel Marcia A. Widder, dated April 8, 1997; Order, dated April 23, 1997, in United States v. Hall, No. 96¬10178 (5th Cir.).

3. As required by the CJA, I have been Mr. Hall's attorney since that time.[1] Mr. Hall's case was the first

[1] *See* 18 U.S.C. § 3599(e) ("[E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . all available post-

capital case (of many) to which I was appointed, and it was the first case I briefed and argued in a federal circuit court. Essentially, I cut my legal teeth working on Mr. Hall's behalf.

4. In May 1999, after Mr. Hall's direct appeal had concluded, the district court appointed me and Robert C. Owen, an experienced capital habeas litigator working in Texas, to represent Mr. Hall in habeas corpus proceedings brought under 28 U.S.C. § 2255. *See United States v. Hall*, Nos. 4:94-cr-00121, 4:16-cv-00391-Y (N.D.Tex.), Doc. 919. Mr. Owen and I have served together as Mr. Hall's lawyers ever since.

5. For many years following the conclusion of Mr. Hall's initial § 2255 proceedings in April 2007, he was protected against execution by a preliminary injunction entered with the government's consent in litigation challenging the government's lethal injection protocol. *See Roane v. Barr*, No. 19-mc-145, 2020 U.S. Dist. LEXIS 171732, at *7-8 (D.D.C. Sept. 20, 2020). That injunction remained in place for the next thirteen years, in large measure due to the government's delay in developing an execution protocol after announcing, in 2011, that the drugs required by the 2008 Execution Protocol had become unavailable. *Id.*

6. On September 20, 2020, the district court judge in Roane denied relief on most of the claims still pending in the lethal injection lawsuit and lifted the

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conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in . . . proceedings for executive or other clemency as may be available to the defendant."). *See, e.g., Harbison v. Bell*, 556 U.S. 180, 186 (2009).

preliminary injunctions that had protected Mr. Hall and six other condemned men against execution. Ten days later, on September 30, 2020, the government gave Mr. Hall notice that it intends to execute him on November 19, 2020.

7. Although the government's notice triggered a 30-day deadline to file Mr. Hall's clemency petition and an additional 15-day period in which to file any supporting evidence, *see* 28 C.F.R. § 1.10(b), it is impossible for counsel to prepare an adequate clemency application, or to conduct other necessary investigation in Mr. Hall's case, given the circumstances in which we all find ourselves. For reasons it has not disclosed, the federal government decided it wanted to execute Mr. Hall while the entire Nation, indeed, the entire world, is battling a global pandemic caused by a highly infectious, potentially deadly virus. The not-insignificant risk of catching COVID-19 makes it impossible for me and my co-counsel to conduct the work that is necessary at this stage of proceedings.

8. As the Court no doubt is aware, COVID-19 is a dangerous, highly contagious, airborne disease that can cause severe illness; long-term debilitating damage to numerous systems in the body; and, too often, death. Frankly, it is unconscionable that the federal government seeks in the midst of a national health crisis to conduct executions, which by their nature involve crowding numerous strangers from all over the country into a small room to witness the government extinguishing the condemned man's life.

9. I am familiar with what it is like to have a potentially deadly contagious disease. Three decades ago, before I attended law school, I was living

essentially hand-to-mouth in New York City, taking film production classes at The New School and doing odd jobs in between classes and film-making. When I became ill, I was uninsured and went to the emergency room at the city's public hospital, Bellevue Hospital. I was admitted and hospitalized there for eighteen days. After several days of testing and treatment with broad-based antibiotics, I was diagnosed with tuberculosis which, at the time, was making a resurgence in New York City. Even after eighteen days of treatment, I was allowed to be discharged from the hospital only because I was able to isolate in my apartment in Brooklyn because my roommate was able to stay elsewhere.

10. Following my hospital stay, I underwent months of chemotherapy treatment, consisting of a cocktail of antibiotics: pyrazinamide, rifampin, isoniazid. Because I could not work while I was sick and contagious, I ended up on welfare – a step that prompted me to apply to law schools for the following year. Although I recovered over six months of treatment, for many years afterward, whenever I had a bad bronchial infection or cough, I would become concerned about a relapse because it was my understanding that treatment did not mean my tuberculosis could not return. My concern was not specifically that I would become ill, but the possibility that I would infect someone else with this terrible illness.

11. I report this for two reasons. First, I believe that my history of tuberculosis, coupled with other

health conditions,[2] makes me more susceptible to having a severe case of COVID-19 and thus at risk for serious illness and potentially death.[3] I accordingly

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[2] I am a former smoker of many years, which puts me at higher risk of severe illness from COVID-19. *See https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#smoking*. I am also 59 years old and have a body-mass index of 27.4, factors that may increase the risk of severe complications from COVID-19. *See https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html;https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#obesity*. As the CDC has emphasized, "[i]t is especially important for people at increased risk of severe illness from COVID-19, and those who live with them, to protect themselves from getting COVID-19. https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

Moreover, some treatments for severe COVID-19, such as the use of steroids to prevent or cure the "cytokine storm" (or immune-system overdrive) that is associated with COVID-19 mortality, may put me at risk of a resurgence of tuberculosis. *See, e.g.*, Murphy, RN, MSN, NP-C, Bernardo, MD, *Patient education: Tuberculosis (Beyond the Basics) - UpToDate* at 2/9 (last updated March 6, 2020) ("Reactivation TB may occur if the individual's immune system becomes weakened and no longer is able to contain the latent bacteria" and can occur in people "who take medications that weaken the immune system, such as . . . steroids"), *available at https://www.uptodate.com/contents/tuberculosis-beyond-the-basics.*

[3] I attempted to discuss this matter with my primary care physician of the past eight years and anticipated submitting a letter from him explaining my medical history and conditions, and any increased risk of harm from COVID-19. I learned, however, that my doctor recently suffered a stroke, and as a result is currently on disability and unable to consult with me. I also sought to obtain copies of my medical records, but neither

have been careful to minimize my contact with other people during the pandemic, and to take precautions when I am forced to venture out of my home (i.e. wearing a mask, carrying and using hand sanitizer, washing my hands frequently and especially upon my return home from my occasional medical appointments or trips to the store). My office transitioned to remote work on March 13, 2020, and since then, I have only been to the office on three occasions. In May, I participated in a telephonic oral argument in the Eleventh Circuit Court of Appeals from my office (which was empty, save for the director of my office, who stayed in a separate room for the argument). I was briefly at the office on two other occasions, once to find records that were not digitized and only stored at the office, and once to pick up a jump drive containing case material I needed to work from home. I have otherwise worked exclusively from my house while overseeing my daughter's remote schooling. My colleagues primarily work remotely as well. Per office policy, I have not conducted any in-person investigation since the pandemic, and I am not permitted to travel on an airplane for work until further notice. The prison where my Georgia clients are housed has suspended all visitation, including

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Bellevue Hospital nor Tulane Student Health have those records any longer and time constraints imposed by the current execution schedule prevent me from obtaining New York Medicaid records for purposes of this declaration. Nor is there time for me to seek out a pulmonologist to provide the Court a timely report.

legal visitation, since March 12, 2020, and I have not been to any prison since the pandemic began.[4]

12. My other reason for mentioning my past history of tuberculosis is my particular concern with the risk of infecting others with a potentially deadly illness, in particular my 12-year-old daughter SW. I am my daughter's only parent. I adopted her as a single woman when she was born and am the only immediate family she has ever known. I have no other family in Atlanta and my closest brother (geographically) has medical and current living conditions that would preclude him for the foreseeable future from taking care of my child. Moreover, SW and I live in a small house in Atlanta. It would be nearly impossible to effectively quarantine from my child in the event I had to travel for my job and thereby become exposed to the coronavirus.

13. As set forth in a letter from my child's treating pediatrician, such quarantining would be essential were I to travel to Texas, Indiana, or other locations to perform work on Mr. Hall's behalf because my daughter has a health condition that puts her at significantly greater risk of serious illness should she be exposed to COVID-19. For the sake of my daughter's privacy, that letter is being submitted under seal.

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[4] I accepted employment with the Georgia Resource Center eight years ago with the understanding that I would be permitted to continue to work on Mr. Hall's case during my off hours, and I have been using accumulated vacation time to work on his case since he received notice of his execution. Though my office does not represent Mr. Hall, I nonetheless thought that its policies with respect to the pandemic relevantly reflect the conditions where I live.

14. Mr. Hall has the right to counsel to represent him in "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and in . . . proceedings for executive or other clemency as may be available to the defendant." 18 U.S.C. §3599(e). If the current execution date holds, accordingly, I will be forced to chose between protecting my health and the health of my 12-year-old daughter, and conducting the type of work I know as an experienced capital defense lawyer is necessary to competently represent Mr. Hall. That work would require in-person interviews with numerous witnesses, including three of Mr. Hall's co-defendants who testified against him at trial in exchange for favorable treatment from the government and who, at the time of Mr. Hall's initial habeas proceedings, were still incarcerated for their roles in the crimes and unlikely to be forthcoming.

15. I should not have to choose between doing my job in a professional and competent manner, for a client who deserves my unconflicted representation, and risking either my life or the life of my child. One path risks making my child an orphan, or worse, killing her. The other creates a situation where I have, in essence, abandoned a client to whom I have devoted nearly a quarter-century of faithful professional service, and who remains urgently in need of my assistance. *See, e.g., Christeson v. Roper*, 574 U.S. 373 (2015) (recognizing defendant's right to counsel under 18 U.S.C. § 3599(e), to conflict-free counsel). It is indefensible to be put in that position simply so that the government can rush to carry out an execution that it indifferently delayed for more than a decade by its own inaction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 2, 2020.

/s/ Marcia A. Widder

Marcia A. Widder