Nos. 20-688 and 20A100

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IN THE SUPREME COURT OF THE UNITED STATES

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ORLANDO CORDIA HALL, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.

(CAPITAL CASE)

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

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In 1994, petitioner kidnapped, raped, and buried alive a 16-year old girl. Following a jury trial, petitioner was convicted of interstate kidnapping resulting in death, among other offenses, and sentenced to death. The district court and the Fifth Circuit accorded him extensive review on direct appeal and collateral review under 28 U.S.C. 2255, and this Court denied two petitions for certiorari from the resulting judgments. Recently, petitioner has recently made several additional attempts to attack his convictions through a second and successive Section 2255 petition, and through two petitions for a writ of habeas corpus under 28 U.S.C. 2241 in the Southern District of Indiana (his place of confinement). He has also been a party to lengthy litigation challenging the federal execution protocol, and he has a stay application in that litigation currently pending before this Court

(No. 20A99). This petition for a writ of certiorari and accompanying stay application challenge another decision by the same D.C. Circuit panel -- Judges Millett, Pillard, and Rao -- which unanimously rejected petitioner's contentions that the scheduling of his execution with 50 days' notice violated his constitutional rights and that the United States Marshal had been given too little supervisory authority over his execution.

Petitioner styles his present request for emergency relief as an application to stay his execution pending this Court's review of his petition for certiorari, but there is no order in this case that -- if stayed -- would preclude petitioner's execution. Rather, this case arises from a civil complaint petitioner filed on November 3, 2020. The district court found that petitioner was unlikely to succeed on any of his claims, and it denied his request for a preliminary injunction deferring his execution. The court of appeals affirmed that denial. Accordingly, the relief petitioner seeks is more properly characterized as an injunction under the All Writs Act, 28 U.S.C. 1651, barring respondents from proceeding with his execution. A request for such relief "'demands a significantly higher justification' than a request for a stay." Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (per curiam) (citation omitted). Ultimately, though, petitioner cannot meet any applicable standard for emergency equitable relief.

To begin, this lawsuit was filed more than a month after petitioner's execution was scheduled, and that inexcusable delay is alone sufficient to justify a denial of relief. Moreover, as the courts below correctly found, petitioner cannot show a likelihood of success on his claims because there is no merit to his assertion that he has a constitutional or statutory right to additional time to prepare his clemency petition. And petitioner's additional assertion that the U.S. Marshal should have more supervisory authority over his execution is both meritless and duplicative of a claim he has already litigated and lost.

The balance of equities also favors denying any equitable relief. The public and the victim's family have an overwhelming interest in implementing the capital sentence recommended by a jury a quarter-century ago against petitioner, who perpetrated a heinous series of crimes against a child, has had notice that he faces execution for the past 25 years, and has been able to file a clemency petition for the past 13 years under the applicable federal regulation. As the Fifth Circuit recently observed: "It is time -- indeed, long past time -- for these proceedings to end." In re Hall, 2020 WL 6375718, at *7 (5th Cir. Oct. 30, 2020).

STATEMENT

1. In September 1994, petitioner -- a marijuana dealer in Pine Bluff, Arkansas -- believed that a man named Neil Rene had stolen some of his drug money. See Hall, 152 F.3d at 389.

Petitioner and his coconspirators went to Neil Rene's apartment armed with handguns, a baseball bat, duct tape, and a jug of gasoline. Ibid. Neil Rene's 16-year-old sister, Lisa Rene, was the only person in the apartment. Ibid. The coconspirators demanded entry, and the girl called 911 for help. Ibid. After an unsuccessful attempt to kick in the front door, petitioner's coconspirators shattered a sliding glass door with a baseball bat, tackled Lisa, and dragged her to a car where petitioner and another coconspirator were waiting. Ibid. Petitioner then raped Lisa in the car and forced her to perform oral sex on him, and members of the group drove her to Arkansas. Ibid. Once they arrived, petitioner's coconspirators tied Lisa to a chair and raped her repeatedly. Ibid.

The next day, petitioner told his coconspirators that Lisa "kn[e]w too much." Hall, 152 F.3d at 389. Petitioner and a coconspirator dug a grave in a nearby park. Ibid. Together with a third coconspirator, they then took Lisa to the park, but they were unable to find the makeshift grave in the dark. Id. at 389-90. The group therefore drove Lisa back to the motel, where they held her captive for one more night. Id. at 390.

The following morning, petitioner and two coconspirators again drove Lisa to the park. Hall, 152 F.3d at 390. Petitioner led Lisa -- blindfolded -- to the grave. Id. at 389-90. Petitioner covered her head with a sheet and hit her in the head with a

shovel. Id. at 390. Lisa tried to flee, but one of the men tackled her. Ibid. Petitioner and a coconspirator took turns hitting her with the shovel, and the coconspirator gagged her, dragged her into her grave, poured gasoline over her, and buried her. Id. Lisa was alive but unconscious when she was buried, and although she may have regained consciousness in the grave before her death, she ultimately succumbed to the combined effects of asphyxia and multiple blunt-force injuries. United States v. Hall, 455 F.3d 508, 511 (5th Cir. 2006), cert. denied, 549 U.S. 1343 (2007).

2. In 1994, a federal grand jury in the United States District Court for the Northern District of Texas indicted petitioner on multiple charges, including interstate kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1); conspiracy to commit kidnapping in violation of 18 U.S.C. 1201(c); traveling in interstate commerce to promote possession of marijuana with intent to distribute in violation of 18 U.S.C. 1952; and using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. 924(c). See United States v. Hall, 94-CR-121, Dkt. No. 15 (N.D. Tex. Nov. 22, 1994) (Superseding Indictment). The government filed notice of its intent to seek the death penalty with respect to the charge of interstate kidnapping resulting in death, pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591-3598. The jury

found petitioner guilty on all counts and, after a penalty phase, recommended a sentence of death, which the district court accepted. Hall, 152 F.3d at 390, 417.

The Fifth Circuit affirmed petitioner's convictions and sentence in 1998. Hall, 152 F.3d at 389. This Court denied certiorari. 526 U.S. 1117 (1999) (No. 98-7510). Petitioner then filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. See Hall v. United States, No. 00-CV-422, 2004 WL 1908242, at *1 (N.D. Tex. Aug. 24, 2004). The district court denied the motion, ibid.; the Fifth Circuit declined to issue a certificate of appealability, United States v. Hall, 455 F.3d 508, 510 (5th Cir. 2006); and this Court denied certiorari, 549 U.S. 1343 (2007) (No. 06-8178). Petitioner later filed two requests for authorization to file a successive Section 2255 motion in light of new precedent, both of which were denied. See In re Hall, No. 16-10670 (5th Cir. June 20, 2016); In re Hall, No. 19-10345, 2020 WL 6375718 (5th Cir. Oct. 30, 2020).

3. While petitioner was appealing and collaterally attacking his sentence in the Fifth Circuit, he also joined litigation in the U.S. District Court for the District of Columbia challenging the then-existing federal lethal-injection protocol. In 2006, that court entered a preliminary injunction barring petitioner's execution (and others). The preliminary injunction remained in place for the next 14 years but was vacated on

September 20, 2020. In re Fed. BOP Execution Protocol Cases (Protocol Cases), No. 19-MC-145 (TSC), 2020 WL 5604298, at *4 (D.D.C. Sept. 20, 2020).

When the D.C. district court terminated its preliminary injunction, petitioner became eligible to be scheduled for execution. On September 30, 2020, the Attorney General announced that the Federal Bureau of Prisons (BOP) had scheduled petitioner's execution to take place on November 19, 2020 -- providing petitioner with 50 days' notice, as specified in BOP's nonbinding protocol, see Protocol Cases Doc. 171, at 23, and well beyond the 20 days' notice required by BOP regulations, 28 C.F.R. 26.4(a). The Attorney General noted that petitioner, whose 1995 conviction is one of the oldest on federal death row, was "the only child murderer on federal death row who is eligible for execution and not subject to a stay or injunction." See https://www.justice.gov/opa/pr/execution-scheduled-federal-death-row-inmate-convicted-murdering-child.

Shortly after his execution date was set, petitioner initiated a series of filings in various courts. Within seven days, he had filed a motion to reconsider or set aside the D.C. district court's lifting of its injunction in the Execution Protocol case. In re Fed. BOP Execution Protocol Cases, No. 19-MC-145, Doc. 287 (October 6, 2020). Within nine days, he had also filed an opposition to the government's motion for an expedited

ruling on his application to file a successive Section 2255 motion in the Fifth Circuit. In re Orlando Hall, No. 19-10345, (5th Cir. Oct. 8, 2020). In the time since, he has pursued a previously stayed 2241 petition in the Southern District of Indiana, e.g., Hall v. Watson, No. 17-CV-176, Dkt. No. 44 (Nov. 6, 2020), and filed a second Section 2241 petition in the same court, Hall v. Watson, No. 20-cv-599, Doc. 1 (Nov. 12, 2020). To date, every court has rejected petitioner's attempts to stay his execution. In re Hall, No. 19-10345, 2020 WL 6375718, at *6 (5th Cir. Oct. 30, 2020) (denying application for successive authorization of Section 2255 motion and stay); Hall v. Watson, No. 20-3216 (7th Cir. Nov. 18, 2020) (affirming denial of first Section 2241 petition and stay); Hall v. Watson, No. 20-3229 (7th Cir. Nov. 19, 2020) (affirming denial of stay of execution in connection with second Section 2241 petition).

4. Petitioner filed the instant civil complaint in the United States District Court for the District of Columbia on November 3, 2020 -- 34 days after his execution was scheduled, and just 16 days before it was set to occur. Petitioner asked the court to issue a preliminary injunction deferring his execution based on four main claims. First, petitioner argued that the 50-day notice period in BOP's nonbinding execution protocol combined with the COVID-19 pandemic did not allow his counsel sufficient time to submit an adequate clemency petition. Second, petitioner

asserted that the 50-day notice period violated his due-process rights and constituted an Ex Post Facto Clause violation because a prior version of the execution protocol gave defendants a 90-day notice period. Third, petitioner maintained that his 50-day notice period violated his equal-protection rights because the notice period was different from that afforded other death-row inmates. Fourth, petitioner claimed that BOP's updated execution protocol conflicts with the FDPA by usurping the supervisory role of the United States Marshal's Service. See Pet. App. 11a, 14a-31a.

a. On November 16, 2020, the district court denied petitioner's motion for injunctive relief. Pet. App. 10a-32a. The court acknowledged that the government's contention that petitioner's motion was "inexcusably delayed" was "not without merit." Id. at 14a. But the court declined to deny the motion on that basis, finding instead that each of petitioner's claims failed on the merits. Id. at 14a-31a.

The district court first rejected petitioner's clemency-related claims, observing that petitioner had "meaningful access to all" of the federal clemency procedures, and that any alleged insufficiency of that process was "largely" the result of petitioner's "delay." Pet. App. 18a-19a. The court also rejected petitioner's assertion that he was entitled to more time for the clemency process because of the COVID-19 pandemic, following the

reasoning of other courts in holding that COVID-19 concerns do not provide a basis for delaying a federal execution. Id. at 20a (citing cases).

The district court then rejected petitioner's assertion that he should have been given the 90-day notice period described in a prior version of the execution protocol instead of the 50-day period specified in the current protocol. Pet. App. 21a-25a. The court found that petitioner's claim to additional notice lacked merit whether viewed as a procedural or substantive due-process challenge because BOP's nonbinding protocol is a mere procedural rule that "contains no rights-creating language," id. at 23a, and because petitioner had received more than the 20-day notice period required by longstanding BOP regulations, id. at 25a. Petitioner's related Ex Post Facto Clause claim failed for similar reasons -- namely, because petitioner had not shown "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)." Id. at 27a. And the court likewise rejected petitioner's assertion that his equal-protection rights were violated, observing that petitioner received more than the 20-day notice the regulations require -- just like "all inmates executed" under the protocol. Id. at 29a.

Finally, the district court rejected petitioner's claim that the updated execution protocol was ultra vires because it deprived the U.S. Marshals Service of the supervisory role assigned by 18 U.S.C. 3596(a). Pet. App. 29a-31a. The court noted that it had "already rejected this claim" in the protocol litigation, and it reiterated that the protocol "does not divest the U.S. Marshal of [its] supervisory authority," but rather "mandates that the U.S. Marshal 'oversee the execution and * * * direct which other personnel may be present at it.'" Id. at 30a (quoting Protocol Cases, 955 F.3d at 124 (Katsas, J.)).

b. Petitioner appealed and sought a stay of execution from the D.C. Circuit. The court of appeals affirmed the district court's decision and denied a stay in an opinion issued at 1 a.m. EST today.

Turning first to petitioner's notice-related claims,[1] the court of appeals found that petitioner had not shown that shortening the notice period from 90 to 50 days was a violation of his rights under substantive due process, equal protection, or the Ex Post Facto Clause. Pet. App. 2a-3a. It concluded that there was no due-process violation because petitioner "has been on notice of his death sentence since it was first imposed in 1995"; the execution protocol creates no enforceable rights; and petitioner

[1] Petitioner has not raised any of his notice-related claims before this Court. Accordingly, they are forfeited.

has pointed to no evidence that a 90-day notice period was "deeply rooted in the Nation's history and tradition." Id. at 3a (quoting Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997). The court noted that BOP regulations (in effect for decades) require only 20 days' notice. Ibid. (citing 28 C.F.R. 26.4).

The court of appeals concluded that there had been no equal-protection violation because petitioner had received more than the 20 days required by regulation and because the government had applied the execution protocol's amended 50-day notice "prospectively and evenhandedly to all inmates who have received execution dates since its adoption." Pet. App. 3a. And the court found that the Ex Post Facto Clause "stands as no barrier" to the 50-day notice period because, even assuming the Clause applies in this context, "the protocol's notice period operated fully prospectively and did not alter [petitioner's] imposed sentence of death." Id. at 4a.

The court of appeals then rejected petitioner's clemency-based claims, concluding that "any 'minimal procedural safeguards' the Due Process Clause guaranteed to petitioners clemency proceedings have been satisfied." Pet. App. 4a (quoting Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor J., concurring in part and concurring in the judgment)). It observed that petitioner could have begun pursuing clemency once his first petition for collateral relief was denied in 2007, and petitioner

had filed and then withdrawn a clemency application almost four years ago. Id. at 5a. Moreover, when petitioner sought an extension for filing his second clemency application from the Office of the Pardon Attorney on October 30, 2020, the "Office offered (i) to treat that request as a clemency petition, (ii) to permit [petitioner] to supplement it with information over the next fifteen days; and (iii) to allow an oral presentation by counsel" and the same timely consideration of the clemency application extended to other petitioners. Ibid. The court determined that those opportunities had "provided [petitioner] with whatever clemency process he may have been due." Ibid. Further, the record "persuade[d]" the court that petitioner sufficiently benefited from the representation of counsel throughout his proceedings, satisfying 18 U.S.C. 3599. Ibid.

Finally, the court of appeals found that petitioner was not entitled to a preliminary injunction based on his assertion that the execution protocol violates the FDPA's requirement that the United States Marshal "supervise implementation of the sentence." Pet. App. 5a-6a (quoting 18 U.S.C. 3596(a)). The court observed that Judge Katsas had previously rejected this argument in a concurrence, such that it was "debatable" whether petitioner could demonstrate a likelihood of success on the claim. Id. at 6a (citing Protocol Cases, 955 F.3d at 124-125 (Katsas, J., concurring)). Regardless, petitioner had not shown the

irreparable harm required for a preliminary injunction, because he had not made any argument that remedying "the assertedly improper division of responsibilities between the United States Marshals and the Bureau of Prisons" would change "anything about his execution process." Id. at 6a-7a.

ARGUMENT

Petitioner's request for emergency relief, and his petition for a writ of certiorari, should be denied. As an initial matter, petitioner states that the emergency relief he is seeking is a stay of execution, but he cannot obtain that form of relief in this case. A stay "temporarily divest[s] an order of enforceability," Nken v. Holder, 556 U.S. 418, 428 (2009), and there is no order before this Court that, if divested of enforceability, would bar petitioners' executions. Rather, the only orders before the Court in this suit are those denying petitioner's request for preliminary injunctive relief deferring his execution.

What petitioner actually appears to seek is an order under the All Writs Act, 28 U.S.C. 1651, barring respondents from proceeding with his executions on a particular date and in a particular way. Such an order would be an injunction -- an "in personam" order "directed at someone, and govern[ing] that party's conduct." Nken, 556 U.S. at 428. An injunction pending further review "'demands a significantly higher justification' than a

request for a stay." Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (citation omitted). To obtain such relief, an applicant must show "legal rights" that are "indisputably clear." Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers).

Ultimately, though, the precise standard is immaterial, because petitioner cannot prevail under any applicable standard for equitable relief pending further review. Petitioner cannot establish a reasonable probability that this Court will grant certiorari and a significant possibility of reversal, let alone an "indisputably clear" right on the merits. To the contrary, petitioner inexcusably delayed in filing this suit, and both lower courts correctly found that his claims were likely to fail even if they had been timely brought. Moreover, petitioner cannot establish that the balance of equities favors postponing his execution, which would undermine the interests of the government, the victim's family, and the public in the timely enforcement of a sentence issued more than a quarter of a century ago. No further review, or delay, is warranted.

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

Petitioner asserts that this Court is likely to grant review and reverse the lower courts' rejection of his claims that the Constitution guarantees him more than 50 days between the date his execution is set and the date it is carried out because he needs

more time to pursue the clemency process. Petitioner also asserts that the Court will grant certiorari and reverse the lower courts' rejection of his FDPA claim that his execution must be enjoined because the involvement of the Federal Bureau of Prisons will give the U.S. Marshal an insufficient role in supervising his execution. These arguments fail for multiple reasons.

1. Petitioner's claims may be rejected at the threshold because of his inexcusable delay in bringing them before the courts. Last-minute stays or injunctions of federal executions "'should be the extreme exception, not the norm.'" Barr v. Lee, 140 S. Ct. 2590, 2591 (2020) (quoting Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019)). 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, 139 S. Ct. at 1134 (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)); see Gomez v. U.S. Dist. Ct., 503 U.S. 653, 654 (1992) (same).

As the district court recognized, petitioner could have brought this lawsuit at least a month before he did. Pet. App. 14a. Petitioner's execution date was set on September 30, 2020, yet he did not press his claims that the chosen date was too soon until November 3, 2020 -- 34 days after the date was set and just over two weeks before the execution was to occur. That delay was clearly unwarranted, especially considering that petitioner both (a) filed a motion to alter or amend the district court's judgment in the related protocol litigation within seven days, and (b)

sought a stay in the Fifth Circuit nine days after his execution was scheduled. See pp. 7-8, supra. Petitioner has offered no persuasive explanation for why he was able to move so much more quickly in those cases. Indeed, petitioner's stay application before this Court is silent about his delay in bringing suit, and instead misleadingly claims that petitioner filed this suit "within days" of the announcement of his execution date. Stay Appl. 33.

Petitioner therefore seeks extraordinary last-minute equitable relief based on claims that "could have been brought" earlier. Bucklew, 139 S. Ct. at 1134 (quotation marks omitted). That alone constitutes "grounds for denial of" his request. Ibid. (quotation marks omitted); cf. ibid. (noting that this Court has "vacated a stay entered by a lower court * * * where the inmate waited to bring an available claim until just 10 days before his scheduled execution" for a 24-year-old murder conviction).

2. Even if this Court ignores petitioner's delay, there is still no likelihood that it will grant certiorari or reverse because the lower courts correctly found that petitioner has not shown a likelihood of success on his claims. Pet. App. 2a-6a, 14a-31a.

a. Petitioner first contends that his due-process rights were violated because he had only 50 days after his execution date to complete the clemency process and because he had to complete the process during the COVID-19 pandemic. But as the lower courts explained, neither assertion has merit.

Clemency is an exclusively executive function, committed to the sole discretion of the President. U.S. Const. art. II, § 2, cl. 1 (providing that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States"); see Harbison v. Bell, 556 U.S. 180, 187 (2009). A court has no power to regulate such "exclusively executive" functions. See, e.g., Newdow v. Roberts, 603 F.3d 1002, 1012 (D.C. Cir. 2010) ("A court * * * does not sit in judgment of a President's executive decisions."). Although the Department has issued "advisory" regulations to guide the clemency process -- including regulations applicable to death-row inmates, 28 C.F.R. 1.10 -- those regulations "create no enforceable rights in persons applying for executive clemency," 28 C.F.R. 1.11.

In any event, the Department has fully complied with its advisory regulations here. Petitioner has had since 2007 to submit his clemency application, see Hall, 549 U.S. at 1343; 28 C.F.R. 1.10(b), and he did submit a clemency application in December 2016, but withdrew it in January 2017. See C.A. J.A.64 (¶ 5). Moreover, when petitioner's execution was scheduled on September 30, 2020, he still had an additional 30 days to submit a clemency application. See 28 C.F.R. 1.10(b). On October 30, 2020 -- the last day of the clemency application period -- petitioner's counsel sent a letter to the Office of the Pardon Attorney claiming that they needed more time given the COVID-19 pandemic. Even then, the

Pardon Attorney offered to (1) construe that letter as a timely clemency petition, (2) allow petitioner to supplement it, and (3) hear an oral presentation from his counsel. See C.A. J.A.65 (¶¶ 7, 9). If petitioner's attorneys had pursued those options, the Pardon Attorney would have been able to complete its clemency review and recommendation before the scheduled execution, as it had done for the four other federal death-row inmates who filed clemency applications this year -- including William LeCroy and Christopher Vialva, who received 53 and 55 days' notice of their executions, respectively. See C.A. J.A.65-66 (¶¶ 11-12). But petitioner's counsel rejected that option and did not file a new clemency application. See C.A. J.A.65 (¶ 10).[2]

Indeed, petitioner does not dispute that the government has complied with its advisory clemency regulation, but he nonetheless asserts that his due process and statutory rights have been violated. That is incorrect for at least four reasons.

First, because the Constitution commits the clemency process exclusively to the President, petitioner has no cognizable procedural rights beyond those the President creates. Petitioner's reliance on Ohio Adult Parole Authority v. Woodard,

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[2] Applicant's counsel also could have asked the Pardon Attorney to construe their October 30 letter as a placeholder petition asking for a "reprieve," 28 C.F.R. 1.1 -- i.e., a postponement of the execution on the very grounds they raise here. They did not do so.

523 U.S. 272 (1998), Pet. 2, 19-21, 27, does not suggest otherwise because Woodard concerned a state clemency proceeding. Unlike state clemency power, the President's federal pardon authority is expressly granted by the Constitution. U.S. Const. art. II, § 2, cl. 1

Second, as the court of appeals explained, even assuming Woodard applies, it would not establish that any constitutional violation occurred here. Pet. App. 4a-5a. In Woodard, a plurality of the Supreme Court: (1) rejected the premise that a state's "clemency procedures * * * violate due process" simply because they lacked certain procedures the inmate desired; and (2) reinforced that the clemency power is "committed * * * to the authority of the executive." 523 U.S. at 276, 282. And while Justice O'Connor's concurrence noted that "some minimal procedural safeguards apply to clemency proceedings" -- such as where "a state official flipped a coin to determine whether to grant clemency" or where a state "arbitrarily denied a prisoner any access to its clemency process," id. at 289 -- this case is not remotely comparable.

Petitioner contends (at 21) that he was "denied access to the clemency process in the first place" because his execution was not scheduled until September 30. But, as the court of appeals observed, petitioner "has long had notice, the opportunity, and the assistance of counsel to pursue clemency" because he could

have begun that process in 2007 when his first motion for habeas relief was conclusively denied. Pet. App. 4a. Indeed, petitioner filed a clemency application in 2016 before withdrawing it in 2017. See C.A. J.A. 64 (¶ 5). Further, even after his execution was scheduled, petitioner still had 30 days to submit a clemency application and 15 days to supplement it. See 28 C.F.R. 1.10(b). And, contrary to petitioner's claim that submitting a petition would have been a "meaningless ritual," Pet. 19, the Office of the Pardon Attorney has made clear that it could have thoroughly reviewed and addressed his application had he submitted it within that timeframe -- just as it has with respect to other recent federal executions. C.A. J.A.65-66 (¶¶ 11-14); see C.A. J.A.14.

Third, petitioner contends (at 21-22) that his due-process rights were impeded because the COVID-19 pandemic has made it more difficult to complete his clemency application. But that ignores that he had more than 12 years before the pandemic to complete the investigatory process he describes. See Pet. App. 5a (observing that petitioner's due process claim is premised on the erroneous "assumption that he could not have conducted an investigation and synthesized the information to support his clemency until his execution date was set on September 30"). Further, multiple courts have recognized that COVID-19 does not justify delaying executions. See Pet. App. 20a (collecting cases). And for good reason. Pandemic-related complications are "not the result of"

any governmental "actions, but of the pandemic itself." Protocol Cases Doc. 261, at 16.

As a practical matter, the government has -- like most institutions in the last several months -- taken multiple steps to adapt its normal procedures, including steps to facilitate petitioner's ability to prepare and submit a clemency application. For example, BOP personnel have provided him with access to unmonitored phone calls with counsel, and petitioner has taken advantage -- participating in approximately 33 legal calls since March 2020, including calls scheduled every weekday between October 5 and early November. C.A. J.A.68-69 (¶ 7). The Office of the Pardon Attorney has also made remote procedures available, which have been employed by the four other federal inmates who have sought clemency between July and September 2020. C.A. J.A.65-66 (¶¶ 11-12). Petitioner provides no basis to conclude that the pandemic has created such distinct burdens for him, Pet. 21-22, that the Constitution requires the government to reschedule his execution (and only his execution) until an undetermined future date. See LeCroy v. United States, 975 F.3d 1192, 1197 (11th Cir.)(rejecting a death-row inmate's assertion of a constitutional violation based on his counsel's pandemic-induced inability to meet with him "to assist in the preparation and filing of a clemency petition").

Fourth and finally, petitioner's claim that he is being

deprived of a statutory right to counsel under 18 U.S.C. § 3599 because of pandemic-related complications fails -- especially because petitioner has "had thirteen years" to work with his counsel to "develop his case for clemency relief." Pet. App. 5a. Section 3599, moreover, was designed simply to provide indigent defendants with appointed counsel, see Harbison, 556 U.S. at 184-86, not to involve courts in overseeing the details of the clemency process, see, e.g., Bowles v. Desantis, 934 F.3d 1230, 1242 (11th Cir. 2019).

b. Petitioner also contends that the execution protocol violates the FDPA because the U.S. Marshal has not "supervise[d] implementation of the sentence." 18 U.S.C. § 3596(a). Petitioner is precluded from obtaining relief on this claim because the district court granted summary judgment against petitioner in the Protocol Cases on this very issue. Protocol Cases Doc. 261, at 24-26. Because petitioner did not appeal that ruling, he is precluded from prevailing on it now. See Herrera v. Wyoming, 139 S. Ct. 1686, 1697 (2019) ("Under the doctrine of issue preclusion, a prior judgment * * * foreclos[es] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.") (quotation marks omitted).

In any event, petitioner's argument is wrong for the reasons described by Judge Katsas in the Execution Protocol litigation:

the protocol "does not divest the U.S. Marshal of this supervisory authority," but instead "mandates that the U.S. Marshal 'oversee the execution and * * * direct which other personnel may be present at it.'" 955 F.3d at 124 (Katsas, J., concurring). But even if there were any merit to the argument, it could not form the basis of a preliminary injunction because -- as the court of appeals explained -- petitioner has not shown that the alleged statutory violation has affected his execution in any way. Pet. App. 6a-7a.

Petitioner contends (Pet. 29) that the lack of any prejudice or injury to him stemming from the involvement of both the Bureau of Prisons and the United States Marshal is not fatal to his ability to obtain emergency relief on his statutory claim because of his unsupported assertion that there is no need to show "a link between irreparable harm and every claim for which a moving party asserts a likelihood of success." This Court has repeatedly emphasized that a plaintiff cannot pursue injunctive relief unless he can show that he will be harmed by the specific conduct he challenges. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that the district court properly dismissed a claim for injunctive relief where the plaintiff had not shown that he was likely to face future harm from allegedly unlawful police action); Lewis v. Casey, 518 U.S. 343, 358 (1996) (finding that prisoners were not entitled to injunctive relief to remedy

allegedly unlawful prison conditions unless they were themselves harmed by the particular condition). In Lewis, the Court specifically concluded that, if certain alleged inadequacies "exist[ed], they ha[d] not been found to have harmed any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation." 518 U.S. at 358. The court of appeals did not err in finding that the lack of prejudice or injury is sufficient reason to deny petitioner injunctive relief on this claim.[3]

## II. THE EQUITIES WEIGHT HEAVILY IN FAVOR OF DENYING INJUNCTIVE RELIEF

Petitioner asks this Court to postpone the execution of a death sentence recommended by petitioner's jury a quarter century

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[3] Earlier this afternoon, a different district court judge granted a preliminary injunction in another case briefly postponing the execution of Lisa Marie Montgomery based on the court's findings that Montgomery's two lead attorneys are unable to assist in the preparation of her clemency petition because they have contracted COVID-19 and are therefore "functionally incapacitated from performance of any professional obligations." Montgomery v. Barr, No. 20-3261 (D.D.C., Nov. 19, 2020), at 16 (internal quotation marks and citation omitted). The government disagrees with that decision, but -- even if correct -- it provides no support for petitioner's very different assertion that he is entitled to a delay of his execution during the continued existence of the COVID-19 pandemic. The Montgomery district court itself drew a further distinction between the two cases, noting that "unlike" in this case, where "the capital inmate had 13 years to prepare a petition," Montgomery had only had "a few months' time" because her petition for rehearing in the Supreme Court was not denied until August 3, 2020. Id. at 19.

ago. But petitioner does not challenge the conviction for which he was sentenced to death, nor raise any claim that could undermine the sentence it carries. Instead, he seeks more time between the when his execution date was announced and the date it will occur.

The equities do not favor such a request because petitioner has had notice of his capital sentence for 25 years; he exhausted his permissible collateral challenges and has been eligible for execution for 13 years; he has been aware that the government was planning to restart federal executions for more than 16 months; and he has known since July that the government was seeking to vacate the injunction applicable to his specific case. Given that extensive notice, any harm he would suffer from a lack of additional notice is negligible. Cf. Protocol Cases Doc. 261, at 3 (concluding that another defendant "failed to demonstrate that he would suffer irreparable harm from receiving sixteen fewer days' notice of his impending execution"); Vialva, 976 F.3d at 460.

On the other side of the ledger, the public and the victim's family have an overwhelming interest in implementing the capital sentence imposed a quarter-century ago. See, e.g., Bucklew, 139 S. Ct. at 1133-34. Unwarranted additional delay "inflict[s] a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike." Calderon v. Thompson, 523 U.S. 538, 556 (1998) (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993)

(O'Connor, J., concurring)). Delaying executions can also frustrate the death penalty itself by undermining its retributive and deterrent functions. See Bucklew, 139 S. Ct. at 1134; id. at 1144 (Breyer, J., dissenting).

Finally, the government's interest here is especially strong because of petitioner's "heinous, cruel, and depraved" crime. See Hall, 152 F.3d at 406. Petitioner's victim, 16-year-old Lisa Rene, was an innocent bystander, who was subjected by Hall and his co-conspirators to a horrific death, including being kidnapped, repeatedly raped, and buried alive. See id. at 389-90, 406. Her family has waited decades for the sentence to be enforced and they have already traveled to Terre Haute, Indiana for the execution. The technical, notice-based claims that petitioner raises on the eve of his execution date in this lawsuit do not remotely "justify last-minute intervention by" this Court. Lee, 140 S. Ct. at 2591.

## CONCLUSION

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

Respectfully submitted.

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