UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-1074

United States of America

Appellee

v.

Lisa M. Montgomery

Appellant

Appeal from U.S. District Court for the Western District of Missouri - St. Joseph
(5:05-cr-06002-GAF-1)

ORDER

Before SHEPHERD, KELLY and ERICKSON, Circuit Judges.

Appellant's motion for a stay of execution pending appeal is granted. Judge Shepherd would deny the motion.

January 12, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI ST. JOSEPH DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-06002-01-CR-SJ-GAF**
	)	
LISA M. MONTGOMERY,	)	
	)	
Defendant.	)	

ORDER

Now before the Court is Defendant Lisa M. Montgomery's ("Defendant") Motion to Enforce the Court's Judgment.[1] (Doc. # 448). In likely anticipation of this Motion and in response to a footnote included in an opinion entered on January 8, 2021 in a case initiated by Defendant in the United States District Court for the District of Columbia, the Government filed a "Notice of Supplemental Authority" in the above-captioned case, asserting its position that the stay of execution the Court imposed if Defendant appealed her sentence was lifted when her 2255 motion was denied. (Doc. # 447). The Government is correct; in the Court's view, the stay lifted when it denied her 2255 motion. The Court had no intention to limit execution of the judgment beyond exhaustion of appeals. For this reason and the reasons explained in the Government's Notice, it is

ORDERED that Defendant's Motion is DENIED.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: January 10, 2021

[1] The Court does not construe Defendant's Motion as one for a stay of execution. If Defendant was seeking a stay in the alternative, such request is also DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA

-vs-

Case No.: 05-06002-01-CR-SJ-GAF

LISA M. MONTGOMERY

USM Number:

Frederick J. Duchardt, Jr., CJA
John O. Connor, CJA

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Count 1s on 10/22/07 of the Superseding Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1201(a)(1)	Kidnapping Resulting Death	December 17, 2004	1s

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: April 4, 2008

/s/ Gary A. Fenner
GARY A. FENNER
UNITED STATES DISTRICT JUDGE

April 4,2008

IMPRISONMENT

It is the judgment of the Court that the defendant is sentenced to death on Count 1s.

The time, place and manner of execution are to be determined by the Attorney General, provided that the time shall not be sooner than 60 days nor later than 90 days after the date of this judgment. If an appeal is taken from the conviction or sentence, execution of the judgment shall be stayed pending further order of this Court upon receipt of the Mandate of the Court of Appeal.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00	**$**	**$**

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

Note: Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Lump sum payment of **$100.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LISA MARIE MONTGOMERY, .
. Case Number 20-cv-3261
Plaintiff, .
.
vs. .
.
WILLIAM P. BARR, et al., . January 7, 2021
. 2:02 p.m.
Defendants. .
- - - - - - - - - - - - - - - - -

TRANSCRIPT OF TELEPHONIC MOTION HEARING
BEFORE THE HONORABLE RANDOLPH D. MOSS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ALEC SCHIERENBECK, ESQ.
O'Melveny & Myers LLP
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New York, New York 10036

SANDRA BABCOCK, ESQ.
Cornell Law School
157 Hughes Hall
Ithaca, New York 14853

EDWARD UNGVARSKY, ESQ.
Ungvarsky Law, PLLC
114 North Alfred Street
Alexandria, Virginia 22314

For the Defendants: ALAN SIMPSON, AUSA
U.S. Attorney's Office
400 East Ninth Street, Suite 5510
Kansas City, Missouri 64106

Official Court Reporter: SARA A. WICK, RPR, CRR
333 Constitution Avenue Northwest
U.S. Courthouse, Room 4704-B
Washington, D.C. 20001
202-354-3284

Proceedings recorded by stenotype shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

(All participants present telephonically.)

THE COURTROOM DEPUTY: Your Honor, this is Civil Action 20-3261, Lisa Marie Montgomery versus William Barr, et al. Appearing for plaintiff, Sandra Babcock, Edward Ungvarsky, and Alec Schierenbeck. Appearing for defendant, Alan Simpson.

THE COURT: All right. Thank you, all. I appreciate your prompt responses to the Court's order and promptly getting on the telephone for this hearing today.

Who is speaking on behalf of the plaintiff today?

MR. SCHIERENBECK: Your Honor, this is Alec Schierenbeck. I will be speaking on behalf of Ms. Montgomery.

THE COURT: Okay. Why don't you go ahead, then.

MR. SCHIERENBECK: Thank you, Your Honor.

We are, of course, happy to take Your Honor's direction as to where you would like to go this afternoon, but in light of Your Honor's prior opinion, we don't see a need to again address why the defendants have misconstrued the standard for vacatur under the APA or why Ms. Montgomery suffers prejudice as a result of an unlawfully truncated period between notice and execution. Instead, we plan to address only defendants' argument that the FDPA does not incorporate Missouri law at issue here.

And we think plaintiffs are wrong starting with the text.

The dictionary definitions of "implementation" are broad. They includes the act of putting a plan into action or carrying it out, as Judge Wilkins has noted. Notice is a critical part of carrying out the death sentence and thus implementing it.

The government, of course, its own construction of "implementation" in 1993 recognized as much. Its regulation that promulgated its notice and timing rules, we're entitled to implementation of death sentences in federal cases.

Now, the text is buttressed by Judge Rao's controlling opinion in *Execution Protocols 1*. Judge Rao said that the FDPA incorporates all procedures at, quote, whatever level of generalities state law might be framed, including, quote, granular details. She construed "implementation" to include date, time, and place.

Defendants read *Execution Protocols 1* as a manner case and not as an implementation case. And I think that is defendants' way of trying to wiggle away from Judge Rao's reasoning.

THE COURT: Can I ask you to pause there for a second.

I'm on board with the proposition that the case is not just about the meaning of the word "manner" and is about the meaning of the entire phrase, including the word "implementation."

But given the fact that the setting of the execution date wasn't at issue in that case -- and that case dealt with a much narrower question -- I am interested in how you sort of get to the conclusion that what she said on that issue created binding

circuit precedent, because that's a pretty, you know, expansive view of when a concurring opinion can create binding circuit precedent, and that so that any time there's any sort of reasoning in that opinion that touches on questions that go, you know, well beyond what was at issue in the case, that that can then create a binding sort of precedent as long as there's another opinion which doesn't necessarily engage in the same reasoning but reaches the same bottom line on that issue, on the question of the meaning of the word.

MR. SCHIERENBECK: I understand your point, Your Honor, and I think there are a few ways of thinking about that.

First is, of course, *Execution Protocols 1* didn't concern a date and time provision itself, but it did construe the statute to include all procedures at whatever level of generalities state law might be framed. It's factually distinguishable in not having touched upon a date, time, or place requirement, but its reasoning isn't distinguished based on that factual distinction.

Now, under sort of *Marks* principles which Your Honor alluded to in our last conversation, the controlling opinion is the reasoning of the judge who concurred in the judgment on the narrowest grounds, and Judge Rao's reasoning was the narrowest. Judge Katsas would have stated that nothing other than the top-line method is incorporated. And Judge Rao vacated the District Court on narrower grounds. She said the state

execution protocols in question were not incorporated because they were not positive law, simply on that narrow not positive law grounds. And so that is how she reasoned, and that reasoning was necessary for the judgment. So I think that's how you get to construing as binding.

There's also the overlap between Judge Rao and Judge Tatel. And I understand that Judge Tatel did not concur in the judgment, but construing the Panel's decisions as a whole, Judge Rao took all state procedures. Judge Tatel said that the FDPA incorporates all implementation procedures, and subsequently, Judge Tatel clarified that that narrower view of scheduling and notice provisions are incorporated within the meaning of "implementation procedures," at least in his view, although that is certainly not binding on the Court.

So that's how we get there, Your Honor.

Now, I think I will move to what I take to be defendant's big argument now on opposition, which is newly raised, this, quote unquote, structural argument. Now, we think the better reading of 3596(a) is that the provision merely establishes that an execution will only be implemented after exhaustion of direct and collateral review. At that point the sentence is to be implemented, and it is the marshal who is going to supervise implementation.

Now, Judge Rao saw no conflict between following, quote, all procedures under law and the marshal's role in supervision.

And I would direct Your Honor to Judge Rao's opinion at 133 and 134 where she really goes into this issue and is obviously construing the marshal's role as a part of the whole statute.

Now, there are additional problems with defendants' argument. The first is that although defendants appear to argue at this point that the statute that incorporates death effectuation procedures, their view would carve out even some death effectuation procedures, including critical death effectuation procedures, like how drugs are obtained and compounded. And I can think of no more potential element of state law in terms of inflicting the punishment of lethal injection than determining the safety and provenance of the chemicals to be used themselves.

Also, if release is instrumental to the marshal's duty to supervise implementation of law, then certainly the government should be able to identify when release to the marshal occurs, but they haven't even tried. I'm not sure as a matter of practice there is even a technical or formal transfer of custody.

Also, I think the government's obscurity on that point points to why the FDPA doesn't turn merely on the DOJ's own internal decision about when formal transfer of custody occurs, because if it did the government could evade the FDPA all together simply by saying the marshal only formally takes custody upon pushing the button for the electrocution chamber or

what have you, at the very last moment of the infliction of punishment.

Now, I will skip getting into at length why we think the government is wrong on the effectuation of death reading. They give no linguistic reasoning why the broad terms of "implementation of the manner" should be narrowed to just "effectuation of death," and they misread Judge Tatel's opinion as adopting that view. The other circuits they cite are inapposite and really provide no more reasoning than the government does. Because even if effectuation is the line, scheduling is a critical part of carrying out the sentence and thereby effectuating it.

Now, a few other points. The government stresses the historic role of the marshal, and of course, we have never argued that the marshal sets the execution date. Our point is that the marshal ensures that the execution is carried out in accordance with law. Although the law provides the timing provision, he ensures that the execution is carried out in accordance with that timing provision.

The government's argument just proves too much. The marshal doesn't select the top-line method either. Of course, the marshal has to follow the top-line method prescribed by law. It's always been federal law that suggested what the top-line method would be or direct following state procedure with respect to the top-line method. I don't think there's any question --

THE COURT: So let me ask you a question about this.

The marshal is required to supervise the implementation in accordance with state law. If you are right and if the government is right -- which I think it is that the historical backdrop here was that the courts set the execution date, and indeed, in this case the Court did set the execution date.

If the Court sets the execution date for a Saturday afternoon and there is a state law that says that under state procedures executions should not occur on the weekends, the Court issues an order setting a date for Saturday afternoon. The marshal shows up.

Is the marshal at that point in time supposed to say, look, I can't actually -- the execution cannot go forward because in my view the Court's order is inconsistent with state law?

MR. SCHIERENBECK: I don't know whether as a practical matter, Your Honor, that happens. I think the statute envisions that the marshal has a duty to ensure that the execution is carried out in accordance with law. And here the law is not just the courts set date, but it's the state law. And so yes, I think that's the scheme the statute envisions.

You could think of it as the marshal being delegated the responsibility on behalf of the entire Department of Justice to ensure that the execution is implemented in accordance with applicable law.

THE COURT: Okay. Since I've already interrupted you,

let me ask you another question, which is, if the Court were to rule against Mrs. Montgomery on this current motion, what do you think that I should do?

You've moved for summary judgment. The government has not moved for summary judgment. And it's not clear to me that there would be an appealable order at that point if I were to simply deny your motion for summary judgment.

So I guess my question for you is, would you agree that I can treat the government's opposition as a cross-motion for summary judgment and just resolve this case on the merits?

And part 2 of that question is, if I did that, should I enter final judgment in the case on the grounds that the D.C. Circuit has already rejected your other argument with respect to the regulations? What do I do to preserve your appellate rights?

MR. SCHIERENBECK: Your Honor, I think because we want to move as expeditiously as possible to enforce our -- to keep this case going, a final judgment on this claim would be appropriate. Your Honor, we still have an outstanding *Woodard* claim in the initial complaint, and I don't think we are prepared to say that final judgment on that *Woodard* claim would be appropriate at this juncture.

THE COURT: Is there more to do with respect to that claim?

MR. SCHIERENBECK: Potentially, Your Honor. The

government's consideration of Ms. Montgomery's clemency petition is ongoing. And were the government to depart from the minimal safeguards of due process with respect to that claim, we may be before Your Honor on that claim.

THE COURT: How would they -- how would that come about just hypothetically?

I mean, I take it it's not based on sort of the original basis of the claim in that the lawyers were ill, but that they didn't give the claim adequate consideration. I'm not quite sure what that would look like.

MR. SCHIERENBECK: I understand, Your Honor. I don't want to suggest that this is, you know, in the offing, but if you want an example of what it might look like, suppose the Office of the Pardon Attorney is struck by coronavirus and we find out that they are incapable of considering this petition.

THE COURT: All right. That's fair enough.

So your position, then, is that -- and I'm not saying what I will do, but that if I were to rule against you on the present motion for summary judgment, that I should treat the government's opposition as a cross-motion and enter partial summary judgment on Count 2 of Mrs. Montgomery's supplemental complaint.

Do I have it right?

MR. SCHIERENBECK: I think that's fair, Your Honor. I confess I have not walked through all of the pieces. There

would also be, I suppose, an option to certify that issue for interlocutory appeal.

THE COURT: Yeah, I'm not sure that that is going to get you the expedition you want. If I certify it for interlocutory appeal, first of all, I would need briefing on the question of whether the standards of 1292(b) are satisfied, and then you would have to get an order from the Court of Appeals granting interlocutory appeal before then the case could even be teed up to the Court of Appeals.

MR. SCHIERENBECK: The point is well-taken, Your Honor. I do think that construing the government's motion as a cross-motion would be appropriate under those circumstances.

THE COURT: It does seem to me that there's nothing left -- again, without suggesting how I'm going to come out one way or the other on this issue, I don't need the briefing. It's not like there's discovery that's going to be taking place or further briefing on it. So it seems the parties have fully presented their views with respect to that claim and it is ripe for resolution one way or the other.

MR. SCHIERENBECK: I would agree, Your Honor. It's purely legal. This is an administrative law case. The record's here. Your Honor could rule.

THE COURT: Okay.

MR. SCHIERENBECK: I think there are only two points, Your Honor, that I wanted to press in this opening presentation.

First is -- two of many points, I should say.

The first is that I take the government to argue that they understand that references to state officials can't be an insurmountable problem to incorporate in state law in the FDPA, or else the FDPA would be totally eviscerated. I take the government's argument to be that references to courts are different, but it doesn't quite explain why. The government doesn't dispute that it could give 90 days' notice. It doesn't dispute that these rules have the force and effect of law. It suggests that the rules are only binding on courts and litigants and counsel, but of course, the government is a litigant in a criminal prosecution that ends in a sentence of death.

And to the extent the government is referencing practical problems that arise from having to follow Missouri law, those are the very practical problems that were rejected by the panel in the *Execution Protocols 1* case.

And finally, I feel compelled to respond to the argument from the government in its most recent filing that we have unnecessarily delayed in bringing this claim. As Your Honor is aware, we have moved quite expeditiously in trying to enforce Ms. Montgomery's rights. The pleading was filed within two weeks of the government setting the execution date. The government appears to argue that Ms. Montgomery could have challenged the execution date before it was even set, but basic rules of the Administrative Procedure Act require final agency

action prior to a challenge to that agency action.

And to the extent we are now on the precipice of the execution in litigating this claim, that is a consequence of the government's actions in this case that are under review, in rushing to the execution chamber in an unprecedented way in violation of federal law.

THE COURT: This touches on a question I had for you, which is, the judgment from the District Court in this case, the District Court in Missouri, says that the execution would be no sooner than 60 days, no later than 90 days from the entry of a judgment. Give me a second here. And then the Missouri Supreme Court rule says that any execution shall be at least 90 days but not more than 120 days after the date of the order.

My question to you is, was the order entered by the District Court invalid, in your view, because it didn't comply with the Missouri Supreme Court rules? And if so, were you untimely raising an objection with respect to that? That obviously has been around for years.

MR. SCHIERENBECK: Your Honor, we haven't made that argument. We didn't make that argument in our supplemental complaint as to the judgment. We didn't add it to this proceeding after Your Honor raised that very interesting point in our last conversation. So we are simply not pressing that point at all.

THE COURT: Okay. But are you pressing it before the

District Court in Missouri, and what's the status?

It at least puzzles the Court and perhaps troubles the Court if there is actually a judicial decree from a sister court which is not being complied with here. It may not be an issue for me to resolve, but I am concerned at least about the prospect that there could be an order from a federal court here that's not being complied with. I am just curious as to what's going on with that. You have previously represented to me that the order that has been provided to me is the only thing that is on the docket in Missouri and that the District Court judge, the sentencing court has not entered any further order or modified its order in any respect. So I am still scratching my head about that issue.

MR. SCHIERENBECK: I understand, Your Honor. We have not returned to Judge Fenner on that point.

THE COURT: Okay. Obviously, that's not my decision as to whether you go to Judge Fenner with it. It's one of the things that complicates my analysis as I think about it. If I conclude that the historic backdrop for the statute is that the Court set the execution date, the Court actually did set the execution date or a range of dates here in this case, and it's leaving me scratching my head a little bit about what we're talking about here where -- what Judge Fenner did was somehow improper, in your view, or if the government is not complying with Judge Fenner's order in some respect, I'm left scratching

my head.

Isn't your remedy to go to Judge Fenner rather than this Court with those issues?

MR. SCHIERENBECK: I understand, Your Honor. If we were pressing a claim with respect to Judge Fenner's judgment, the appropriate forum would likely be Judge Fenner. But because we're bringing an APA claim in this jurisdiction and our claims were based on, you know, the federal regulations and now the FDPA, we think these questions are appropriate for Your Honor.

THE COURT: All right. For me -- and I realize the issue is not one that's presented to me and presumably one that should be presented, if at all, to Judge Fenner. It complicates things a little bit for how I think about it, because if the backdrop is the courts typically set the execution dates, to address this case without talking about and thinking about what has actually happened in the sentencing court is a little bit artificial. It's made my consideration in the case a little bit more difficult.

MR. SCHIERENBECK: I understand, Your Honor, and I think we may need to investigate that claim a bit more, you know, and consider what to do. But we don't think that claim is before Your Honor. In all candor, there have been a lot of moving pieces here, and we are riding the horse we have at the moment.

THE COURT: And I understand that. It does help me to

at least know where things stand for purposes of preparing my opinion. So thank you for that.

MR. SCHIERENBECK: Of course.

THE COURT: Anything else you want to add?

MR. SCHIERENBECK: Not at the moment, Your Honor. Thank you.

THE COURT: Okay. I will let you reserve some time, and I will hear from Mr. Simpson now.

MR. SIMPSON: Thank you, Your Honor.

Defendants believe that scheduling of Montgomery's execution complied with the Federal Death Penalty Act, as apparent from the text and structure of the FDPA. The FDPA provides that the person who has been sentenced to death is committed to the custody of the Attorney General until exhaustion of the procedures for appeal. And post-sentence, Montgomery was committed to the custody of the Attorney General. She exhausted her appeals in May 2020, and she remains in the Attorney General's custody today. She's confined in Texas, as Your Honor well knows.

The FDPA next provides that when the sentence is to be implemented, the Attorney General shall release the person to the custody of a marshal, and that has not yet occurred. Montgomery is at the Federal Medical Center Carswell and will not be placed into the custody of a marshal for purposes of the FDPA as opposed to transfer until she is in the execution room

and the execution is ready to proceed.

THE COURT: But let me ask you about that. Does that mean that in essence the requirement in the FDPA that the marshal supervise implementation of the execution according to state law is in essence a nullity or can be rendered a nullity by planning by the Department of Justice in that some other official can decide what chemical to use for purposes of the execution, who is going to be in the room for the execution, everything whatsoever relating to implementation, and that the marshal can simply walk in eight seconds before the execution is set to take place and say go ahead and do it, and there actually would be nothing to the requirement that the supervision be in accordance with state law because the marshal would be doing nothing other than simply saying do it after all the other decisions and actions have taken place?

MR. SIMPSON: No, Your Honor, because those state laws govern the actual implementation of the sentence. And I believe that this is something that Judge Rao discusses in her concurrence where she says that most state statutes and formal regulations, including a reference to Missouri's, govern the implementation of a sentence at a high level of generality. But there are still nonetheless requirements applying to the sentence, that is, the chemicals to be used or that chemicals used to effectuate that shall have been procured in a particular way. It's not merely a reference to -- it's not merely a

requirement to the types of plans that various officials must undertake.

So for example, with respect to witness attendance, if its state law says that state officials shall plan for certain people to be able to attend, then I think that that would not be a procedure which effectuates -- or in any event, that would not be comparable -- and it's probably a better example to use the prescription -- not the prescription, but the actual chemical requirement that Your Honor mentioned and that Mr. Schierenbeck mentioned. But there, the requirement is actually on the chemical to be used, not on merely the type of chemical that shall be obtained for use.

THE COURT: So are you disagreeing, then, with Judge Rao?

MR. SIMPSON: I don't believe that I'm disagreeing with Judge Rao.

THE COURT: Well, because Judge Rao seems to say that part of the implementation even includes the setting of the date.

MR. SIMPSON: Your Honor, we believe that Judge Katsas's concurrence was correct and that Judge Rao's concurrence did not address this particular issue.

And I think that the context of that particular opinion is important. There, Judge Chutkan had found that the requirement to conduct executions in the manner prescribed by state law

applies both to the selection of the execution method as well as to additional procedural details, for example how the intravenous catheter is to be inserted. And Judge Rao reads that "manner" included procedural details where the details were a part of state statutes or formal regulations, including Missouri's and again not referencing state court rules of practice and procedure. But we believe that Judge Katsas's recent concurrence is correct that that case did not present and had no occasion to decide whether the FDPA extends to these matters that precede the release of the prisoner to the marshal.

THE COURT: I will ask you the same question I asked Mr. Schierenbeck about what I should do. If I agree with plaintiff, it's pretty clear what I would do. I would enter summary judgment in plaintiff's favor. If I agree with the defendants, what do you think I should do? Would it be appropriate for me to treat your opposition as a cross-motion for summary judgment and just enter judgment in your favor, in favor of the defendants on that claim?

MR. SIMPSON: I believe that that would be appropriate, Your Honor. The defendants want to see this matter brought forth expeditiously. We've made various arguments about that and note that this issue has been apparent for many months. And in fact, Ms. Montgomery attempted, after her date was set in October, to intervene into the federal death penalty -- into the execution protocol litigation but did not raise this particular

claim, even though it was readily apparent.

Moreover --

THE COURT: I'm sorry. Just to finish on this point.

MR. SIMPSON: Yes. Sorry, Your Honor. Yes, please.

THE COURT: So it is appropriate to treat your opposition as a cross-motion. Would it be appropriate for me also to enter, as I did before, a partial judgment, this time on Count 2 of the supplemental complaint, which would then permit for prompt appellate review?

MR. SIMPSON: Yes, Your Honor.

THE COURT: All right. Thank you. I'm sorry. I cut you off.

MR. SIMPSON: Your Honor, I don't want to belabor the point. I think it's well addressed in the briefs. But this particular issue or this alleged violation has been apparent for some number of months, and it was only recently brought to -- brought forth. And we believe that the delay and here now where any relief on this claim would occur nearly five days at the earliest before the execution means that this falls within the category of cases that the Supreme Court has repeatedly discouraged capital defendants from not raising these claims earlier, and various other defendants -- or other inmates have actively brought these claims.

And I note Mr. Schierenbeck's opposition to that is only that they could not have brought an APA claim before a date was,

in fact, set, but they could have brought an injunction action, as many other inmates did. And I think that it relates to the point in the briefs about why Ms. Montgomery's argument has to be incorrect, and that is that she can avoid a sort of -- the standard for a stay of execution or for equitable relief based solely on the APA, that her rule would counsel the precise sort of delay that the Supreme Court has repeatedly discouraged.

THE COURT: Let me ask you about the judgment again. I know I've had this conversation with you before. But do you have anything else to update on this?

I guess I still am confused as to the basis the government has for concluding that you go forward with the execution here on the date that's scheduled where there's a court order that says that the execution -- the Attorney General can determine the time, place, and manner of the execution, provided that it should be no sooner than -- no sooner than 90 days, no later than 90 days after the date of this judgment, and the judgment is stayed pending appeal and then also pending further order of the Court.

And so reading that, it looks to me as though there's at least an argument that the judgment actually has been stayed and is still stayed in the District Court in Missouri, and if it's not stayed in the District Court in Missouri, then it seems like the time that was specified has run and you need to go back to Judge Fenner to get him to either clarify or set a new date.

I am interested in the government's position on that question.

MR. SIMPSON: Your Honor, we do not believe that the 60 to 90 days provision is applicable because there was a direct appeal taken and subsequent to that a timely 2255 proceeding. And we believe that the further order contemplated by Judge Fenner's criminal judgment was his 2255 order which denied relief and a certificate of appealability. And that order, collateral review entirely became final in May of 2020, and that now -- at any point in time thereafter, Ms. Montgomery was subject to defendant's scheduling for execution.

THE COURT: Maybe it's Judge Fenner's business and not my business as to whether that complies with his order. But it's not obvious to me by any means. It's a little hard, I think, to reconcile with what the order and judgment actually says, but I will leave that to the parties and Judge Fenner.

For me, I don't think the question -- and I think Mr. Schierenbeck was clear that the issue is not presented to me in this case, but it poses a little bit of a quandary for me in how I think about this case. As I said to Mr. Schierenbeck, I tend to agree with what I believe is your position, Mr. Simpson, that the sort of background norm here upon which the legislation was adopted was that the courts set the execution date, and therefore, your argument is that it is not the marshal who sets the execution date, it's been historically the Court does. In

fact, that's what happened here. But then the judgment doesn't actually jive with what's going on, which is causing me a little bit of a quandary.

MR. SIMPSON: Your Honor, both the judgment as well as the FDPA were entered well after the Department of Justice had promulgated its regulations that provide for the director of the Federal Bureau of Prisons to set execution dates.

THE COURT: I don't think that's quite a fair reading of it, because as you also know, until just a couple of weeks ago, the federal regulations said that the U.S. Attorney should go to the Court and request that the Court set an execution date that, in essence, delegates authority to the Bureau of Prisons to set the date, which is sort of what happened here. It may have been the Attorney General instead of the Bureau of Prisons.

And Judge Fenner entered the order along the lines contemplated by the regulations, and the regulations also said that the director of the Bureau of Prisons shall set the date except as otherwise provided by the Court. So we still kind of run back into this judgment from the District Court in Missouri.

MR. SIMPSON: And Your Honor, defendants have no opposition to go in to Judge Fenner, but we also do not believe that this criminal judgment that we have requires us to do so, and we're not in a position where we believe that that's a necessary action.

But I understand Your Honor's concern, and I believe that

defendants just disagree as to the conclusions to be drawn from those cases.

THE COURT: Let me ask you, was I correct in my wind-up to that question that it is defendants' position that sort of the historical norm preceding adoption of the FDPA was the courts set the execution date and that that norm counsels against plaintiff's contention here that Congress contemplated that it would be the U.S. Marshal that would be implementing the judgment in setting a date in accordance with state law?

MR. SIMPSON: Your Honor, yes, with my prior caveat about the regulation. I think that Congress enacted the FDPA with knowledge of the regulations and intending to supplement and by the FDPA make federal executions easier, particularly in locations or states where there are no -- where there is no death penalty.

So the answer is yes, but I don't believe that there's any limitation thereby on defendants' ability to set dates. So as a matter of historical practice, we agree that the marshal really never set dates, apart from this instance which we mentioned in the historical briefing regarding when a Court might set a window, for example, and I believe that that actually occurred in the *Rosenberg* case.

But apart from that, marshals did not set dates, and I think that that is reinforced by the structure of the FDPA in that section where it says that the supervision of the marshal,

of that implementation is only occurring upon release to a marshal. So it contemplates sort of a single person and not a lengthy period of time, that that corresponds with historical practice and understanding.

And so all of these decisions about scheduling are far antecedent to the actual release to the marshal and the implementation of the sentence.

THE COURT: Okay. Anything else, Mr. Simpson?

MR. SIMPSON: Yes, I did want to mention one other thing. I'm just going to jump through in my notes. I had one final point.

And that is that we believe this case is -- that this particular claim is different than the regulatory claim in that even if Your Honor were to determine that Ms. Montgomery is correct on the merits that scheduling is something the marshal is supposed to supervise, that the director of BOP's designation of Montgomery's date is not itself contrary to law or in excess of statutory authority. And accordingly, it cannot be vacated under the APA. Any legal action -- or any legal violation or provision of law would be a failure of the marshal to supervise under the FDPA.

So unlike this Court's prior order where the regulation, if it applied at all, made the setting of the execution date itself contrary to law, here, the FDPA does not directly govern what BOP designates. At most, it prescribes the way in which the

marshal supervises. Accordingly, we do not believe that APA vacatur would be an available remedy to set aside BOP's designation.

Again, assuming that Montgomery is right on the merits of her argument, any relief would have to be via an injunction, which requires a showing of irreparable harm. And I think that Your Honor understands my point, but to put it another way, there is space between the textual duty imposed on the marshal by the FDPA and the thing that Ms. Montgomery is seeking to vacate.

THE COURT: I get that point. That's helpful. Thank you.

MR. SIMPSON: Okay. So with that, Your Honor, defendants would rest on their briefs.

THE COURT: All right. Thank you.

Mr. Schierenbeck, your rebuttal? You may be on mute, Mr. Schierenbeck.

MR. SCHIERENBECK: Thank you, Your Honor. Only two quick points.

The first is that in discussing with co-counsel Your Honor asked about the status of our *Woodard* claim, and it was brought to my attention that there is a situation we are monitoring. I just want to say, all we are doing is monitoring what is very fast-moving, and there are currently questions about the ability of the executives to carry out the duties of office and whether

that would be probative of a *Woodard* claim and is something we are monitoring.

THE COURT: One thing I should just caution the parties about is that I will be unavailable for most of the day on Saturday. If you need to come to me with any emergency requests, I'm going to be hard to get in touch with on Saturday.

MR. SCHIERENBECK: Understood, Your Honor.

THE COURT: Anything further, Mr. Schierenbeck?

MR. SCHIERENBECK: No, Your Honor. The only point I think is this last argument which I had not took the defendants to have made in their papers, that there is a distinction between the duty of the marshal to supervise implementation and the agency action we're challenging here. It's entirely new to me, and Your Honor, it's something I think we would have to discuss with co-counsel to adequately respond to. I wonder, if Your Honor would allow, that I am able to consult with them and if necessary file a paper no later than 5:00 on that point.

THE COURT: Yeah, I will allow that. I haven't been focusing on this myself. I can't tell you that it will be time well spent on your part, but if you would like to file something by 5:00, you are welcome to do so.

MR. SCHIERENBECK: I understand, Your Honor. I don't think there's -- at first blush, there's not much to it, but I simply haven't -- because it wasn't in their papers, I haven't thought it over.

THE COURT: Completely fair. I'm not objecting at all. It's completely fair if you would like to file something. All I was saying is that if it's in the papers it's not something I focused on previously. So it's not as though I'm getting ready in the next couple hours to issue an opinion that is going to rely on that reasoning. But if you would like to file something by 5:00 p.m. tonight addressing that, you are welcome to do so if you think that is something you would like to do.

MR. SCHIERENBECK: I understand, Your Honor. And if no paper comes, I think then it would mean that we also found no reason to respond. Thank you.

THE COURT: Fair enough. That's completely fair. Anything else, Mr. Schierenbeck, you want to raise?

MR. SCHIERENBECK: No, Your Honor. Thank you very much.

THE COURT: Okay. And Mr. Simpson, anything further from you?

MR. SIMPSON: No, Your Honor. Thank you.

THE COURT: Thank you, all. And once again, I appreciate your incredibly hard work on this matter on a very short timetable. I know the pressure you are all operating under, and I know that things are tough in the world right now anyway with the virus and people having to work from home with family around. So I am very appreciative of your efforts. So

thank you.

I will issue an opinion as soon as I possibly can. One way or the other, I want to make sure that whoever is unhappy with what I do they have an opportunity to take further steps.

Thank you, all.

(Proceedings adjourned at 2:48 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Please Note: This hearing occurred during the COVID-19 pandemic and is, therefore, subject to the technological limitations of court reporting remotely.

/s/ Sara A. Wick — January 8, 2021

SIGNATURE OF COURT REPORTER — DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LISA MARIE MONTGOMERY,

Plaintiff,

vs.

WILLIAM P. BARR, et al.,

Defendants.
_____/

Civil Action
No. 1:20-cv-3261

Washington, DC
December 23, 2020

11:04 a.m.

TRANSCRIPT OF TELEPHONIC MOTION HEARING
BEFORE THE HONORABLE RANDOLPH D. MOSS
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

DEPUTY CLERK: This is civil action 20-3261, Lisa Marie Montgomery vs. William P. Barr, et al. Appearing for plaintiff, Sandra Babcock, Zohra Ahmed, Edward Ungvarsky and Alec Schierenbeck. Appearing for defendants, Alan Simpson.

THE COURT: Welcome, all. I'll remind you all once again that under the Court's rules and the Chief Judge's standing order, it's not permitted to record or to rebroadcast today's proceedings, and I'm going to order that nobody do so. I'll ask that everyone mute your telephones when you're not speaking so we don't get feedback. Please speak into the handset when you are -- when it is your turn so that we can hear you clearly. And please introduce yourself by name each time that you speak so we have a clear record.

We're here today on the plaintiff's motion to clarify the Court's order, and on plaintiff's motion for partial summary judgment. So I will hear from plaintiffs first.

I don't know, is it Mr. Schierenbeck or Ms. Babcock -- Professor Babcock who's speaking on behalf of the plaintiffs today?

MR. SCHIERENBECK: Your Honor, this is Alec Schierenbeck, and I'll speaking on behalf of plaintiffs today.

THE COURT: Okay. Well, go ahead, please.

MR. SCHIERENBECK: Wonderful. Good morning, your Honor.

THE COURT: Good morning.

MR. SCHIERENBECK: I can begin however you'd like, your Honor, but I was planning to start with our motion for summary judgment and the text of the regulation 26.3.

THE COURT: That's fine.

MR. SCHIERENBECK: Great. Well, our reading of 26.3, your Honor, under which the director cannot reschedule a date until, as the text specifies, when the stay is lifted is confirmed by the text, the context, the logic and the purpose of that regulation. On the text, the regulation uses the mandatory term shall, and it specifies the director must, quote, designate a new date, quote, when the stay is lifted. That phrase, when the stay is lifted, modifies the verb designate which the Government hasn't disputed. So the command is that the director designate a new date only when the stay is lifted.

Now, the Government has put forward two readings of the regulation that permit its action here. Neither are tenable. The first, I think, is they say the whole purpose of the second sentence is merely to ensure prompt rescheduling. And so the sentence doesn't limit the Government's ability to designate a new date at all at any

time during a stay. It's simply a duty to designate after a stay is lifted, if the director hasn't done so prior.

But it's a basic tenet of the interpretation of any text that when a statute or a regulation provides that a thing shall be done in a certain way, it carries with it an implied prohibition against doing it in any other way. Or as the Supreme Court stated as far back as 1871 in the Raleigh case, when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode. And that's precisely what happened here, the regulation --

THE COURT: I'm sorry to interrupt, but in support of that proposition, you cite to Sutherland and you cite to that case from 1871.

Any case law more recent than 1871 that says the same thing?

MR. SCHIERENBECK: Absolutely, your Honor, and I can have that for you in a moment.

THE COURT: Okay.

MR. SCHIERENBECK: It's been cited in the last decade by the Supreme Court and circuit courts as well. We cited the Raleigh v. Reid case to show how far back that proposition goes. And I think it is a basic tenet -- it's also cited, your Honor, in the Garner and Scalia Reading Law text which goes exhaustively through the history of that proposition.

Now, if the Government is right, and if the purpose of that provision is just promptness, then why specify at all that designation should occur when the stay is lifted? In fact, if the director can redesignate during a stay, why does the provision speak to a stay at all? The Government's interest in prompt rescheduling is presumably the same for whatever reason an original date passes. But this sentence doesn't speak to any reason that a date may pass, it speaks to when a date passes by reason of a stay. So that says that the stay is something different and something special that the regulation called out that prescribed when and how a director should react to the passing of a date in response to a stay.

We also point out, your Honor, that to the extent the Government is saying that the general discretion of the director in the first sentence of 26.3(a)(1) is the reason why the director had his power here, well, the basic canon that the specific governs the general means that the specific prohibition in the second sentence overrides and controls the general discretion in the first sentence.

Now, the Government also argues that here there's no problem in the second sentence, because the director -- because the date that was originally designated didn't pass. The director acted before the date passed, and the statute references if the date passes by reason of a stay. But

again, if that were a plausible reading of the provision, then why would the provision specify that re-designation should occur only, quote, when the stay is lifted?

The Government's reading also leads to a bizarre consequence, your Honor. It would mean that the director has unfettered discretion before the date passes, but then his authority is frozen until after the date passes. Now, the passing of the date alone isn't some magic event. The legally consequential event, your Honor, is the stay going into effect.

Now, the Government has made a lot of work in its opposition papers saying that Auer rule serves no purpose. But the purpose of the rules that promulgated -- that contain 26.3 and 26.4 is to ensure the, quote, orderly implementation of death sentences. That's the stated purpose in the notice of proposed rulemaking. And together 26.3 and 26.4 serve that purpose by ensuring that after a stay is lifted, there will be a 20-day period of daylight so that a plaintiff can consider and pursue appropriate legal remedies in the wake of a stay being lifted, so that appellate courts can review.

Now, in the Government's view, by contrast, it could schedule an execution for a minute after a stay expires, which would frustrate the ability of courts like your Honor to review their own decisions or reconsider

decisions; would frustrate judicial review; and would be a recipe for dysfunction as plaintiffs fearing an execution that could occur one minute after a stay expires would file rushed pleadings and perhaps even interlocutory appeals to try to head off that.

THE COURT: But that can happen in the circumstances in which the execution date has not been moved, right? So if the execution date is scheduled for December 8th, and there's a rush up to that execution date, and there is a stay that is lifted at 11:00 p.m. on December 8th, the execution can take place before midnight. And that actually often happens.

MR. SCHIERENBECK: It can, your Honor.

THE COURT: The disorder you're talking about does occur frequently. And in fact, it's probably more typical than not in the death penalty, right?

MR. SCHIERENBECK: Your Honor, it certainly can occur that way. Of course, in that context, all of the relevant parties and the court are aware of the date. So you don't have this situation where a notice happens after a lengthy stay with -- to designate a date that will occur quite shortly thereafter to frustrate review. But it's true that that does occur. I think the regulations, however, contemplate preventing a different kind of dysfunction where a lengthy stay has been in effect and no date has been

designated.

We also think that our reading of the statute is confirmed by the context here, your Honor, the background rule and the general practice that a stay suspends the Government's ability to designate a new date. Now, the Government recognized that general practice in 1993 when it promulgated these rules. It said that 26.3 would, "Obviate the practice which was common in state cases of seeking a new execution date from the sentencing court each time a higher court lifts a stay of execution that caused an earlier execution date to pass."

Now, the Government can't point to a single judicial decision, not a treatise or any other authority, not even internal guidance, which suggests that it has ever -- that a court or anything has properly -- has said that the Government may redesignate a date during the pendency of a stay. Rather, the only authority we've located says that the Government can't. And the only evidence of practice the Government can point to is from this year, in the last six months, in the Bourgeois and Mitchell cases which are factually distinct in the context that there had already been a judicial order which vacated a stay but a mandate hadn't passed.

But more importantly, no judicial authority in either of those contexts blessed the Government's action, it

simply went totally unchallenged. In the Bourgeois case, the plaintiffs simply filed a letter informing the court of a newly scheduled date. And in Mitchell, the defendant just vaguely referenced the, quote, Code of Federal Regulations with no specific arguments about 26.3 or the FDPA or any other authority.

We think that's why our reading of the regulation 26.3 is clear. And because it's clear, there's no basis for deference. Nevertheless, the agency asks for deference based on three litigation filings from the last six months. Again, those filings come in the Mitchell and Bourgeois cases, and not one of those filings even quotes 26.3's text, let alone analyzes it. All of the Government's prior interpretations placed in the record contemplate only that the Government will designate upon the lifting of the stay. That was true of the 1993 rule that we quoted in our papers, your Honor. It said that 26.3 would, quote, require the director to appoint a new execution date promptly upon the lifting of the stay.

The 2004, 2019 and 2020 protocols also say that if the date designated passes by reason of a stay of execution, then a new date will be promptly designated by the director when the stay is lifted. Not one of those authorities suggests that the director may do so before.

THE COURT: What about the amendments to the

Justice Manual which was filed this morning and was apparently made just a few days ago?

MR. SCHIERENBECK: Well, your Honor, in the limited time we've had to review that filing, it may support the Government's argument. But of course it's not in the administrative record, and we know from the date it was created that it was not guidance upon which the director could have relied in making his decision. So it's classic post hoc rationalization and it's entitled to zero weight. You cannot create an administrative record after the agency decision, that's sort of basic principles here.

It is also somewhat troubling that the Government is I think inventing post hoc rationales during the pendency of this case. If this section was completed on December 18th and then only brought to the attention of the Court five days later, it was only brought to the attention of all the parties and the Court after briefing on both motions and just before our scheduled hearing about an hour and a half ago. I think it's also telling, your Honor, that the Government feels the need to invent post hoc rationales.

And even on its face, the Justice Manual is expressly not a binding document. The Justice Manual is internal DOJ guidance. It says on its face, quote, it's not intended to and does not -- and may not be relied upon to create any rights, substantive or procedural. It's not

enforceable at law nor are any limitations hereby placed on otherwise lawful litigation prerogatives of the DOJ.

So this is a post hoc rationale, a guidance document that is on its face nonbinding.

THE COURT: You may not have had time to consider this issue, but do you know whether any court has ever accorded deference to the Justice Manual?

MR. SCHIERENBECK: Your Honor, I am not aware, because we haven't looked into it --

THE COURT: Fair enough.

MR. SCHIERENBECK: -- due to the timing here. But of course we'd be happy to brief the effect of this letter on the case.

THE COURT: I can look at that as well, but if you have anything on that, that may be worth providing to the Court promptly.

MR. SCHIERENBECK: Okay, we'll do that. Now, I also want to note that the Government has I suppose invoked its substantive expertise in executions as a grounds for Auer deference here. But that substantive expertise is inapposite for the legal interpretive question before your Honor. As Justice Kagan noted in Kaiser, sometimes legal questions do affect substantive expertise of an agency, but sometimes they're in a judge's bailiwick. And here we're talking about a provision that relates to timing and relates

to the effect of a judicial order. And that I think is in the judge's bailiwick, not within the province of the expertise of the director of the BOP.

So that is why --

THE COURT: Can I ask you a question just while you touched on the topic of interpreting a judicial order. One of the things that has puzzled be a little bit here is I asked that the district court's judgment be provided to the Court -- the judgment of conviction in this case. I just want to pull it up on the docket here. At docket 32, it was provided to me. I'm a little mystified by that order and whether there's been some substantive order following that order. Because that order says that, "The time, place and manner of execution are to be determined by the Attorney General, provided that the time shall be no sooner than 60 days nor later than 90 days after the date of this judgment." And then it says, "If an appeal is taken from the conviction and sentence, execution of the judgment shall be stayed pending order of this Court upon receipt of the mandate from the Court of Appeals."

I assume that the mandate from the Court of Appeals came down long ago, and certainly well more than 90 days has passed since that happened. And so just a literal reading of the judgment in this case leaves me scratching my head, because it sounds like the attorney general is not

allowed to set a date more than 90 days after the date the judgment became final upon issuance of the mandate from the Court of Appeals.

MR. SCHIERENBECK: That's a good point, your Honor. I'd be curious what the Government would make of that. We've taken so far the question to be that once a judgment like that is rendered, there's an order under the 26.2 provision of the regulations. And that order specifies that the director may set a date. And then that date setting authority is governed by 26.3 of the regulations, and so we've focused on 26.3. But of course, the 26.3 powers are subject to any court order otherwise.

So to the extent that the judgment does not provide for the director to have set a date after the 90 days, then that could be a limitation on the director's authority altogether here.

THE COURT: I was just wondering -- when I read that, I was wondering whether someone had to go back to the district court in Missouri to either clarify that or to get an order or something from them. But it may be -- let's see what the Justice Department has to say about this. I was just scratching my head about that. My apologies, I interrupted your line of argument.

MR. SCHIERENBECK: No, not at all. So based on that reading of 26.3, your Honor, the obvious remedy here is

vacatur. I can turn to the FDPA after this, but we're seeking vacatur. As such, we need only show prejudice. I think the Government's opposition understands that our case for prejudice is a slam dunk, because it conspicuously misconstrues the relief we're seeking as an injunction rather than vacatur, because they wish to impose a higher standard on Ms. Montgomery.

THE COURT: Well, let me ask you about that. I just want to make sure I understand what relief you are seeking here, because the final sentence -- or the conclusion of the motion for partial summary judgment does say in it that the request is that the Court vacate Mrs. Montgomery's January 12th, 2021 execution date, period. The proposed order, however, requests vacatur and requests that I enter an injunction, I think, directing that the director of the Bureau of Prisons not set a new execution date before January 1st, 2021. But then in your reply brief, you say pretty clearly that the only relief that we're seeking here is vacatur. So I want to make -- I guess I want to be clear about what relief you are seeking.

Are you seeking any type of injunctive relief or are you seeking purely vacatur here?

MR. SCHIERENBECK: Let me clarify, your Honor. The objection we have is to the designation of the date. And vacatur of that designation would be sufficient to give

Ms. Montgomery the relief she's seeking. If for some reason it wasn't sufficient because of some way in which your Honor interpreted the Government's authority, then potentially an injunction could be appropriate. But I think that the straight forward way of handling this case is the ordinary APA method, which is to say the Government didn't act in accordance with law and so their decision should be set aside and no further relief would be necessary.

And I think the Government is focusing on that injunctive requirement because they want the irreparable harm standard rather than prejudice. Because, of course, prejudice is not an onerous requirement, it's a much lesser showing than irreparable harm. And the prejudice here is obvious. It's measured in days of life. It's measured in less time for consideration of Ms. Montgomery's clemency petition, for a petition that may only be complete on December 1st -- December 31st. That timing is critical.

In Woodard, every member of the court agreed that a death sentenced prisoner has some continued life interest. Even the Chief Justice's opinion said that a death sentenced prisoner had a residual interest in clemency. Justice O'Connor said a continuing interest in life. Judge Wilkins in the statement respecting the most recent round of litigation in the execution protocols before the D.C. Circuit said that denying time for consideration of a

clemency petition would be irreparable harm. So it's a fortiori prejudice under the APA. Also Ms. Montgomery will suffer less time to seek legal relief in general, less time to spiritually and materially prepare for her death. Under the APA's flexible and minimal prejudice requirement, this easily satisfies and vacatur is the ordinary relief.

So on that basis alone, your Honor, on 26.3 on the prejudice, you can vacate the Government's decision. But we would urge you also to reach the FDPA issue in this case, one, because it would facilitate likely appellate review. And two, because it would obviate the potential for seriatim litigation before your Honor based on a very similar challenge were the Government to redesignate the date in accordance with the 26.3 requirements but not the FDPA requirements.

THE COURT: If I conclude that you're right on the regulation and that the order setting the date of execution has to be set aside or vacated, at that point in time, does Mrs. Montgomery even really have standing to challenge the FDPA or to make -- to raise the FDPA argument? Because at that point in time, it's contingent on the prospect that the director of the Bureau of Prisons will then reset a new execution date, which in your view would not be compliant with Missouri law. But we don't know what would happen until he acts. And in fact, there's not really -- there

wouldn't even be final agency action with respect to that until they act. There's really not anything to review until that decision is made.

MR. SCHIERENBECK: I think, your Honor, if you were to vacate the designation on the basis of 26.3 alone, and then before there was a designated date -- for example, if we were to file new papers before your Honor requesting some kind of declaratory relief with respect to the FDPA part of this puzzle, then there might be a standing issue. But of course here we have fully briefed two problems with the agency's action. So we would ask that you reach both issues, even though we win on either and the decision should be set aside, in order to facilitate appellate review and to avoid the possibility of seriatim litigation before your Honor for reasons of judicial economy.

Now on that FDPA point, your Honor is going to look of course to Judge Rao's controlling opinion in the execution protocols case. Judge Rao explained that the FDPA incorporates all procedures at, quote, whatever level of generality state law might be framed. She even noted that those state procedures might include, quote, granular procedures at 139. And she construed the term implementation to include the date, time and place.

Now, in construing --

THE COURT: Can I ask you a question about Judge

Rao's opinion?

MR. SCHIERENBECK: Yes.

THE COURT: In your view, is her opinion -- and in particular, the portion of her opinion that construes the word implementation to include the providing of notice, is that literally a controlling opinion in the sense that it is binding on me under Marks or some similar line of analysis? I'm curious as to whether it's just really informative to me or whether that analysis from her opinion is actually binding in that as a district court judge I'm duty bound to follow that.

If that's your theory, I'd like to understand why that's the case.

MR. SCHIERENBECK: I think, your Honor, if you need to look to the narrowest grounds of agreement for all of the Justices, then it's that overlap between Judge Rao's opinion and Judge Tatel's opinion.

THE COURT: But the agreement with respect to the judgment in some way? I mean, here it's not like -- it doesn't form the basis for the judgment in the case which actually went the other way. And as far as I can tell, I'm not sure whether it's fair to call this dicta or not, but the notice question wasn't before the court. I understand that the interpretation of the proper meaning of the statute was before the court.

But I'm really struggling with whether -- I don't know if you've gone back to look at Marks and the D.C. Circuit's precedent applying Marks, but I am struggling with whether this is actually binding.

MR. SCHIERENBECK: That's fair. And Marks is a vexing question, your Honor, every time I think about it. I haven't looked at the most recent D.C. Circuit precedent interpreting Marks. But you're right that that case didn't address -- it didn't concern a date, time and notice provision. At the very least, Judge Rao's opinion explicated on the meaning of implementation in a determining manner. She construed implementation to include date, time and place.

Judge Tatel did not elaborate on Judge Rao's reasoning in that respect. To the extent he did at all, it was when at the very end of his opinion he talked about the FDPA incorporating quote, unquote implementation procedures. And if we want to know what Judge Tatel thought that meant, you can of course look to his signing on to Judge Wilkins' statement in the most recent round of the D.C. Circuit where he agreed that implementation procedures includes procedures that prescribe the date and time.

Now, we think that flows from the dictionary definitions of implementation, which it means the act of putting a plan into action. Judge Wilkins noted that notice

and time are a critical part of carrying out a death sentence and so easily fall within implementation. I'll also note the Government's own construction of implementation in 1993 recognized as much. Because the very regs we're talking about, the notice and timing provisions in the federal regulations, those regs were entitled implementation of death sentences in federal cases. So now the Government has a different understanding of that word.

Now, even if you were to construe the FDPA as only requiring those procedures that quote, unquote effectuate death -- and that's incorrect, and I think that's been based on a misconstruction of Judge Tatel's opinion which I'd be happy to get into. Judge Wilkins also explained that it's clear that prescribing the date and time of execution is a necessary element of effectuating death.

The other circuit cases that the Government has cited are plainly inapposite. Vialva is the only one that concerned a notice provision, and it is frankly, your Honor, very short on reasoning. It's death effectuation holding or reasoning is ipse dixit. The rest of those circuit opinions are inapposite for a variety of reasons that I'd be happy to get into if you'd like.

THE COURT: Can I ask you about the statutory text? Because I have been really puzzling over the statutory text. As Judge Katsas points out in his

concurring opinion respecting the denial of the stay in the protocol litigation, the duty of the U.S. Marshal is triggered first when the sentence is to be implemented. And I think he makes the point in saying -- and he reads that to say in other words when a date has been sent, and therefore the date has already been set before the Marshal's duty to supervise the implementation of the sentence comes into play.

But in any event, what the provision deals with is an obligation of the Marshal who has custody over the death sentenced individual to supervise implementation of the sentence in the manner prescribed by state law. And it's a little odd to think about the Marshal, for example, as being the one who sets the execution date. That's particularly odd in circumstances in which one has to go to a court to get the court to set the execution date.

So I'm curious as to sort of how you understand or conceive of this provision, how you sort of conceive of the role of the Marshal. In your view, is the Marshal -- as soon as the direct appeals are complete, at that point in time is the Marshal in charge of everything that happens after that? When does the Marshal step in? What is the scope of the Marshal's role? Am I right in thinking that all that's at issue here is what the Marshal needs to do and not what the attorney general or the director of the Bureau

of Prisons or others do?

MR. SCHIERENBECK: Yes, so there's a few pieces there. So as to Judge Katsas' opinion, his observation was that the statute speaks to transference of the Marshal who will supervise implementation. And he deduced that that means only those parts of procedures that follows transference. I think that that makes sense with respect to Judge Katsas' view that the statute only includes the top line method, but not with the view that's been adopted by -- in the wake of that view being rejected about the effectuation of death, because it's dramatically underinclusive with respect to the effectuation of death.

There are state laws that, for instance, clearly talk about the components of a process that effectuate death but would happen well before transference to a Marshal. For example, the compounding of the chemicals that will be used in a lethal injection. That process of creating the drugs that will be used to perform the sentence itself, that's not happening after transference to the Marshal.

Now, capital counsel could maybe inform better about sort of the factual background of sort of when exactly custody of the United States Marshal occurs. But the statute of course has to be read against the context that any delegation to an officer under the purview of the attorney general is in some ways a delegation to the

attorney general itself. I think that was a predicate part of the reasoning of the execution protocols panel. So that might help to explain what's going on here. The Marshal is supervising implementation of course, but that's simply a part of the Department of Justice's responsibilities.

As to how to think about state provisions that sort of reference state officials or state institutions, you know, that's always going to be a problem under the FDPA's scheme because state laws are written with state executions in mind. And so it's little surprise that they will talk about a state court or a state official. But if that were an insurmountable problem to those state laws being incorporated into the FDPA, then the scheme of the FDPA -- which I think is the decision of the execution protocols panel one, would be totally eviscerated.

Also, the Government here is pointing to some of the practical problems that might arise if the federal government is made to follow state rules. But of course, those practical problems were rejected by the D.C. Circuit in Judge Rao's opinion. She said that those kinds of policy and practical concerns were really for Congress to work out.

THE COURT: Can I ask you -- I'm sorry to interrupt you, Mr. Schierenbeck. It may be that one of the law professors who's on the telephone has studied this and knows the answer to this question. But I am curious about

historically what role the Marshal played in the process. It's my understanding that most death row inmates are housed at Terre Haute, and that Mrs. Montgomery isn't there because she's a woman and that the facility is principally for male offenders.

But I am curious as to just sort of the -- both how this currently works, and how it worked historically. So, for example, your argument would be stronger if either as a matter of -- let's start with current. Your argument would be stronger if currently what happens is as soon as the direct appeals are complete, the individual is transferred to Terra Haute. And it may be that the Bureau of Prisons has day-to-day management authority over Terra Haute, but that in some sense that individual is then -- as soon as the direct review process is complete, is in some sense in the custody of the U.S. Marshal.

And in fact, there are lots of times where people are I think technically in the custody of the U.S. Marshal but they're at a prison or a jail that is not run by the Marshals Service. For example, here in D.C., people who are awaiting trial I think probably -- or people who have been subpoenaed from other jurisdictions are probably technically in the custody of the U.S. Marshal even though they're held at the D.C. jail under contract I would assume with the Marshals Service. So sort of understanding what happens

once someone has a final judgment of death after direct appeals, what happens, and whether that person in some sense is at least arguably in the custody of the Marshals Service, that would be helpful to know.

And then related to that, it would be helpful to know is what happened historically either in the '50s or '60s where there was a federal death penalty that was in operation or even much earlier. I think during the earliest days of the republic, it was the Marshal -- I mean, there wasn't a Justice Department back in the early days, and the U.S. Marshals existed before there was a Justice Department. You know, when you watch an old western, it was the Marshals that were enforcing federal law, and it was the Marshals who were overseeing the executions and setting up the gallows and doing all of that.

So I don't know if there's anybody on the line now who knows something about the history of the role of the Marshals Service in executions or whether that's something that could be very quickly provided to me. But with respect to understanding how 3596 works, it's hard to do that without understanding what the current role and historical role has been of the Marshals Service.

MR. SCHIERENBECK: I understand your question, your Honor. And from chatting with my co-counsel, it does not appear that anyone on the line can speak with the kind

of authority we would like to on the record here today before you. But we can look into that question, and we would be happy to provide a letter on that subject.

THE COURT: When do you think you can do that by?

MR. SCHIERENBECK: Perhaps by tomorrow, your Honor. We can also look into it today, we'd just need time to fire up Westlaw, your Honor.

THE COURT: I mean, this may be more than a Westlaw question I'm afraid.

MR. SCHIERENBECK: It may be.

THE COURT: It may be you need to be looking at historical materials, and also looking if there are any histories of the death penalty or histories of the Marshals Service that talks about how that worked so we can try and understand what Congress was thinking in -- was it 1994 when 3596 was adopted?

MR. SCHIERENBECK: Yes, your Honor.

THE COURT: Well, that is something that is on my mind. If anyone has any thoughts on it, it would be helpful to me. If there's anything you can provide me on that by the end of the day today, that would be very helpful.

MR. SCHIERENBECK: Okay. We'll do our best, your Honor.

THE COURT: Okay, thank you.

MR. SCHIERENBECK: And so I think I was saying

that the practical problems were rejected by the D.C. Circuit, the same practical problems that the Government is raising now. And so that's why I think it's rather clear that Missouri's timing and its number of execution requirements, which are in 30.30(f) and have the binding force and effect of law under the Missouri constitution, are incorporated into the FDPA.

So, your Honor, I could stop there. I think both the 26.3 and the FDPA arguments are grounds to vacate the agency's decision. Ms. Montgomery has clearly demonstrated prejudice.

THE COURT: Give me just a moment here, I want to look back at my notes.

If you're right about 3596 incorporating Missouri's timing requirements, what does that do with respect to your 26.3 argument? Is 26.3 invalid because Congress has provided that Missouri law should set the date -- or provides the notice period? What's your view on how 3596 and 26.3 interact?

MR. SCHIERENBECK: I think, your Honor, you can read 26.3 and the FDPA together, and in this instance there's no conflict. Missouri simply provides for a longer notice period than the federal regulations. But if you satisfied the Missouri notice period, you'd be satisfying at least the 20-day period in 26.4. And if there were a

situation where there were a conflict, then I do think there would be a problem. Because the FDPA, having incorporated a state law, would have to take supremacy over the regulation. And to the extent those kinds of things would happen in some cases, that's simply the consequence of I think these regulations having been promulgated prior to the FDPA.

THE COURT: Okay. Well, I'll give you a chance to respond after I hear from Mr. Simpson. Thank you.

MR. SCHIERENBECK: Thank you.

THE COURT: Mr. Simpson.

MR. SIMPSON: Good morning, your Honor. Alan Simpson for defendants William P. Barr and others. The scheduling of plaintiff's execution complies with every provision of applicable law. On November 19th, this Court enjoined defendants from executing Lisa Montgomery until December 31st. And four days later, the defendants rescheduled Ms. Montgomery's execution for a date permissible under the plain terms of this Court's order. The rescheduling complies with each and every federal regulation, statute and order of this Court.

First, the scheduling complies with the text of the federal regulation plaintiff cites, which is section 26.3. That regulation, as was detailed at length in the brief, requires the director of the Bureau of Prisons to designate a new execution date if a date needs to be set

upon the expiration of a stay. Nothing in the regulation contains an express prohibition on the director from scheduling an execution date more promptly whenever possible. The provision is unambiguous, it is mandatory and not prohibitory.

And even if the regulation did contain a prohibition, as Ms. Montgomery's counsel posits, the prohibition here was never triggered. I haven't heard anything or seen anything in a brief that explains how there could be more than one V date designated for execution. Here, the relevant condition in the prohibition that Ms. Montgomery has identified simply never occurred, because a new date was designated before the old date passed. There's only one date designated for execution at any particular time. And since rescheduling, that date has been January 12th, 2021.

Plaintiff's construction is simply not reasonable. I believe Mr. Schierenbeck several times used the construction only if. And I'd note that that construction does not appear in the regulation. They attempt to rewrite it to prohibit the director from setting a new date until a stay of execution or injunction is lifted. But the shall language in the regulation does not indicate that, it does not mean that, and it cannot be reasonably interpreted to say it. The purpose --

THE COURT: I'm sorry, you have a regulation that says -- or a statute that says that every citizen of the United States shall promptly register for the draft when they turn 18.

Would that mean that people could go in when they're 16 and 17 and register for the draft?

MR. SIMPSON: Your Honor, you're referring to the canon of expressio unius. And I think that that -- it's an unexceptional canon, all right. And I probably butchered the Latin which is embarrassing because it is so unexceptional. However, here there is no limitation that is a predicate for application of the canon. What the canon states is that whenever there is a limitation in a particular statute or a regulation, it's to be presumed that that is in fact the only situation. But here there is no limit, it's simply a mandatory instruction.

THE COURT: Why is the language in there then? Why is the language "when the stay is lifted" in the provision? Why not just simply say if the date passes by reason of a stay of execution or if the date -- if the execution cannot be implemented for some reason, a new date shall be set as promptly as possible?

MR. SIMPSON: Your Honor, I think that reading the entire section of 26.3(a), it contemplates both an initial date being set, and then it also contemplates -- or it

directs, it mandates action in that circumstance. And I'm not aware of any situation that's beyond the -- I'm not aware of any situation in which there is a stay, there is an injunction or there would otherwise be any issue in applying the plain language.

As to why it's phrased in the language of a stay of execution, I think that practical considerations over the years have shown that open ended, long term stays can be difficult to manage. It's difficult for the defendants to understand when those stays might be lifted. And quite simply, sometimes injunctions or -- injunctions may expressly prohibit the scheduling of executions. So I think it's logical for there to be a direction to the director. This regulation governs his conduct, it doesn't necessarily -- and it need not necessarily, impart any protection to a defendant or to a criminal -- to a prisoner under a sentence of death. It simply directs that in this instance, as soon as the director is able to, then he shall designate a new date.

THE COURT: You would be right if that's what it said, but that's just not what it said. It would have been pretty simple to write what you said. I mean, that is a pretty simple sentence to write, but that's not what the drafters of this regulation wrote.

MR. SIMPSON: I understand, your Honor. I don't

believe that the stay language itself is in fact imposing any limit. I don't understand -- I don't think that it's logical to view that whenever the language is simply the shall language. And by the same token, it would be very easy for the drafters to have said if a stay is granted, only if the stay is lifted shall the director set a new date. But that's not the language that appears either.

And in this instance, I think that reading the entire provision in context, it simply denotes that there is a requirement or an instruction for prompt action.

THE COURT: So let me ask you about the interaction with 26.3 and 26.4. Because 26.4 provides that the warden shall notify the prisoner of the date at least 20 days in advance except when there's been a postponement of fewer than 20 days. So presumably what this means is that both when the initial date is set and if there is a need to set a subsequent date, that in each case the warden has to give the prisoner 20 days notice to prepare themselves for whatever purposes, litigation, whatever it might be. There's an exception to that rule, though, where it's just a short postponement. So if there's a stay that's in effect just for a couple of days, there's not a need to -- or things get put off for a couple of days, there's not a need to do it again.

But it seems to me that your construction of 26.3

would at least allow the director of the Bureau of Prisons to undercut that rule by simply setting new dates seriatim as long as each new date is set the day before the date was to come. And so if the director of the Bureau of Prisons didn't want to provide somebody with 20 days notice, then -- and there was a stay in effect, even perhaps an indefinite stay, then just every 10 days the director of the Bureau of Prisons could say the day before the execution was supposed to take place, okay, 10 more days, okay, 10 more days, okay, 10 more days, and that could go on forever.

Is that fair? And if so, why isn't that a problem with your reading of the regulation?

MR. SIMPSON: Your Honor, I want to think about it for just one second.

THE COURT: Yes, please.

MR. SIMPSON: I believe that your Honor is correct that that is a necessary implication. However, I don't think that there's any issue with that. As your Honor mentioned previously, oftentimes whenever there's a stay in effect, there would be -- there's lots of last minute litigation attempting to get the stay lifted. And there's always going to be lots of litigation or a lack of comfort whenever the sole reason a person is not being executed imminently is in light of a court stay, unless of course it's the Supreme Court that has stayed such execution. So I

don't think that it's a unique feature or a unique disadvantage to defendants' construction.

I'd note that in fact sometimes delays are very short. Sometimes delays, as has occurred I believe earlier this year -- and I apologize if it was in -- I believe it was earlier this year, that there was a stay of only a few hours. And obviously the notification provision was not -- under 26.4 was not triggered because it was a postponement of fewer than 20 days. I don't think that there are particular reliance concerns that are uniquely affected by --

THE COURT: I'm sorry, why wouldn't there be a reliance concern that if you got a stay that was longer than 20 days, you knew that you would at least get the 20 days notice after the stay expired? Why isn't there some reliance interest in that? People may be planning what their litigation strategy is, their clemency strategy is, planning on when relatives are going to come say goodbye to them or whatever else it might be.

MR. SIMPSON: Because, your Honor, there's no guarantee that that stay itself would stay in effect in a general sense; that the underlying action itself, if it is a stay, it is subject to -- a stay or an injunction, it is subject to reconsideration, it's subject to any number of issues. And these regulations are governing defendants'

conduct and simply how they go about their business in terms of trying to timely and promptly execute and implement the capital sentences.

THE COURT: I think in general -- I'm sorry, Mr. Simpson. I think in general that may be a little bit of a problem with your argument here. Because you construe the regulations in general as really being purely about internal management in a way that doesn't confer any rights or interests on capital inmates or others; and that it's really just about the efficient means by which the Department of Justice can go about doing what it's doing. But there clearly are some portions of the rule that are designed to provide substantive rights to capital inmates. You know, no sooner than 60 days from the entry of the judgment of death, that's not presumably just for purposes of benefitting the Justice Department or for efficient administration of the death penalty. There's the 20-day notice rule.

So the rules are not just about -- I mean, they may be in part about facilitating how the Department of Justice goes about doing its business, but they're not solely about that.

MR. SIMPSON: Correct, your Honor, and I did not intend to paint all of the rules with such a broad brush. I'd further note that in your Honor's hypothetical, where the stay is a date certain, there would naturally be --

where the injunction terminates on a date certain, there would naturally be an end to the sort of serial renotices that your Honor had identified. And in practice, although defendants have renoticed for a period that could have possibly been subject to a stay, they have never executed anyone during a stay, and have never scheduled anyone for execution during a time in which they believed that a stay was likely to be in effect. And I think that that covers the rule of the Mitchell and Bourgeois cases.

THE COURT: Can I ask you, do you agree with plaintiff's counsel that the stated purpose of the regulations was to provide for an orderly process for implementing executions or death sentences?

MR. SIMPSON: Your Honor, I believe that the -- so the Federal Register notice that was identified contains many different sentences and statements, and I believe that that is certainly a purpose.

THE COURT: Isn't it fair to say that that is the purpose? I mean, I'd have to go back and look at it again, but I thought that it said that that was the purpose and not just sort of one of many purposes.

MR. SIMPSON: Your Honor may be correct, I can't say for sure. I know that the Federal Register, for example, goes on to say that the director -- you know, the director's unique knowledge in the institutional resources

and circumstances of setting execution dates is one reason why the director was given the task of setting execution dates. And that is directly applicable I believe as well to defendants' deference argument, that the regulations recognize a substantive expertise of the director of the Bureau of Prisons in scheduling executions and in understanding when it may be possible in light of logistics, in light of the people who are on federal death row and so on. So I --

THE COURT: Can I ask you another question? I'm sorry.

MR. SIMPSON: Please.

THE COURT: What is your view with respect to the language that I read from the judgment from the Western District of Missouri?

MR. SIMPSON: Your Honor, defendants do not believe that any stay is in effect. After the conclusion of direct appeal, there was a 2255 proceeding. At the end of that proceeding, we believe that the 2255 order denying the certificate of appealability was an order as contemplated by Judge Fenner's judgment. And I would just add, your Honor, that this is not a novel or particularly unique issue in judgments. Prior to this particular case, both Keith Nelson, who was sentenced in the Western District of Missouri, had a similar judgment as well as defendants

Brandon Bernard and Mr. Vialva. And in each of those instances, the parties understood that there was no stay in effect. I have not heard any argument from Ms. Montgomery or her counsel that --

THE COURT: I guess -- yeah, I'm not asking whether there's a stay in effect, I'm just puzzled by what the authority is of the Marshal or the Justice Department to carry out an execution without going back to Judge Fenner to seek modification of his order unless there's some other order out there or else I'm not understanding something. Because the order says that the time, place and manner of the execution are to be determined by the attorney general, fine. Provided that -- here's a limit, the attorney general cannot, may not order the execution any sooner than 60 days. Fine, not an issue here. Nor later than 90 days later after the date of this judgment.

In other words, has the time run so it's too late under Judge Fenner's order for the attorney general or the director of the Bureau of Prisons to set an execution date? I mean, I'm just not clear also that the department actually has authority given his order to carry out an execution. It's only tangentially related to what is before me, but it is related in the sense that I'm being asked to consider -- I mean, one of the arguments that's presented to me is that the director of the Bureau of Prisons didn't have any

authority to set a new execution date while my stay was in effect, to which I'm wondering is that even the first question. Because Judge Fenner's authorization to allow the attorney general to set an execution date expired 90 days after the mandate issued from the Court of Appeals.

MR. SIMPSON: Thank you, your Honor. I know that this issue has come up several times, and the 90-day language is not a limit on the defendants' ability to conduct an execution. We could submit additional paper on that if your Honor would like. I'd note that we've filed now two notices regarding the execution date in the underlying criminal case in front of Judge Fenner. And to the extent the parties have any concern over whether or not there is a valid execution scheduled or that Judge Fenner's judgment as stated permits execution, I think that that would be the appropriate venue for that dispute. But I'm sympathetic to your Honor's point as well. I'm sympathetic to your Honor's point.

THE COURT: All I'm saying is I think this is something that someone should look at. You're probably right that this isn't in front of me. But I have to say, I would not want to be the one who orders an execution to take place if there was a doubt about whether it was actually authorized by the court's order. So I think it's just something that somebody better look at.

MR. SIMPSON: I appreciate it, your Honor. I'm aware of other issues in which capital defendants have raised these arguments, and I believe that courts have unanimously concluded the matters by entering an order stating something to the effect that they didn't believe the order was necessary, however they otherwise set an execution date. Those are types of potential things that I think could be done if the parties had any concerns. But as of today, I'm not aware the defendants have any concerns regarding the --

THE COURT: And the issue's not in front of me, so I have flagged it and I'll leave it to you all to do whatever you think is appropriate with that issue.

Let me ask you another thing about the judgment. This relates to the questions that I was asking about the meaning of 3596 and the role of the Marshal. I am noticing that the judgment actually does remand the defendant to the custody of the U.S. Marshal. It provides that execution of the judgment shall be stayed pending a mandate from the Court of Appeals. But I'm sort of wondering what your view is as to whether either after Judge Fenner issued his order or at least after the time in which the Court of Appeals sustained the conviction and sentence and issued its mandate, whether from that point forward -- at least in some technical sense, Mrs. Montgomery was in the custody of the

U.S. Marshal?

MR. SIMPSON: Thank you, your Honor. I believe the answer is an emphatic no. She was only in the custody of the U.S. Marshal for the period of time in which she was being transferred to the Bureau of Prisons facility. In the same way --

THE COURT: I'm sorry, but don't you -- I mean, maybe she was -- I guess maybe was she standing in court -- I mean, she wasn't in court presumably when Judge Fenner issued this order, although it may be this order is just reflecting what he did when she was standing in court.

MR. SIMPSON: Yes, your Honor, he did in fact read the judgment. I have reviewed enough of the transcript to be able to state that, that the judgment was read aloud in court.

THE COURT: I see, okay. Before I turn to 3596, let me let you finish up with the regs and see if you have anything else you wanted to add with respect to the regulations.

MR. SIMPSON: Thank you, your Honor. I believe that the statute is unambiguous, and I don't dispute any of the canons that exist and that have been cited. However, we don't believe that they apply here, and I think that we've laid that out in great detail in the brief. The provision is not superfluous, as I think that was my last point. It

has this unique effect. There is no other provision which requires the director of the Bureau of Prisons to promptly act to designate a new date in the circumstances where a capital inmate's sentence or even the scheduling of his or her sentence may be delayed for years. And to avoid the situation that your Honor may posit, I think it makes sense where it otherwise cannot be practicably done to set that general baseline rule.

In terms of the -- now, your Honor, I'd like to turn to -- I think I'd like to finish up on deference. I wanted to say a couple of things that I didn't say previously. I apologize for the late hour of the Justice Manual provision submission. It was not my intent to submit it quite so soon. But as soon as I became aware of it, we submitted it to your Honor out of an abundance of caution. And given your Honor's prior statements in this case, we don't believe that it's necessary to decide the case and we don't make any arguments for deference based off of the Justice Manual provision. However, because it relates to the initial scheduling of executions, we thought that it ought to be included consistent with your Honor's prior order.

THE COURT: I appreciate that, thank you.

MR. SIMPSON: With that, your Honor, I think I've concluded my argument on the regulation itself and I'd turn

to the Federal Death Penalty Act.

THE COURT: Okay.

MR. SIMPSON: The selected provision of Missouri Supreme Court Rule 30.30 relates to the practice, procedure and pleading in state courts. It simply does not relate to the implementation of Ms. Montgomery's sentence as that term was used either in the April execution protocol cases or in the most recent en banc concurrence. The fact that the particular rule goes to the Missouri Supreme Court's scheduling authority demonstrates that the rule does not concern the implementation of the sentence by the Marshal or the type of thing that happens after the state equivalent of release of the person sentenced to death to the custody of the United States Marshal. Those are the only types of state law incorporated into federal law by the Federal Death Penalty Act.

And incidentally --

THE COURT: That leads to the question that I was just asking Mr. Schierenbeck about, what historically was the role of the Marshal; historically when were people released to the custody of the Marshal. Because there's a sort of glaring gap in the statute here. And if you look at the structure of the Federal Death Penalty Act, you start off with the types of crimes where a sentence of death can be imposed. And then you deal with mitigating and

aggravating factors relating to the imposition of sentence of death. And then how the death sentence actually is imposed with a special hearing and the role of security in that process. There's precautions to ensure against discrimination.

Then you get to a sentence on the imposition of the sentence of death. And then there's review of the sentence of death and how that goes up to the Court of Appeals and how that process takes place. And then the next provision after that just jumps to implementation of the sentence of death. The lead in sentence is, okay, after you've done all that I've just discussed and the review process is complete, then at that point in time -- or the person is committed to the attorney general until the review process is complete. And then the next thing after that is when the sentence is to be implemented, the attorney general shall transfer the person to the Marshal.

Under your view of the statute -- where as I understand it the Marshal's role is pretty limited and only really comes into play during the actual administration of the drugs that may cause death or something along those lines, but it's that very final step in the process. That leaves a big gap in the statute, because the person is in the custody of the attorney general until the direct review is done and then it doesn't say what happens to the person

at that point in time. It doesn't say anything about who sets the execution date. It doesn't say anything about where the person goes. If the person's only in the custody of the attorney general until that's all done, what happens after that's all done. Is the person then automatically -- is the expectation the person would then be transferred to the Marshal immediately at that point in time.

So anything you can do to help me understand how this historically was understood, what the history was, it would be very helpful.

MR. SIMPSON: Thank you, your Honor. I don't have the relevant backdrop as to what Congress would have been thinking about in 1994. Whenever I hear the words United States Marshal, I think about perhaps westerns or things like that. And I think that the law had moved far beyond that point in time in that in 1994, there was both the understanding that the person would be at the Bureau of Prisons facility as well as --

THE COURT: The Marshals Service doesn't have any facilities. They either rent them from the federal government or enter into a contract with the federal government or with the states. But as far as I know, there are no U.S. Marshals Service facilities, jails that the Marshals Service runs.

MR. SIMPSON: So we've quickly exhausted my

knowledge of the history, your Honor. We'd be happy to try to get you something else by the end of today, to the extent that we can. I'd note that there is a discussion of -- in the Federal Register of very old history related to the executive's authority to act, but it simply does not address the point that your Honor is getting at.

THE COURT: That would be helpful. If you want to file something on that, I would appreciate it.

MR. SIMPSON: I can say that currently, the Marshal only takes custody in the execution facility in the immediate lead up to death. There's no de facto control, there's no agreement that the Bureau of Prisons shall hold a person for the Marshal for some period of time before execution or anything of that sort. And I think that that makes sense for a couple of reasons.

First, as Judge Katsas' recent concurrence recognized, and as Justice Alito's dissent recognized, the Federal Death Penalty Act was designed to make the death penalty more workable. It was designed to eliminate issues. And so I don't think that it's necessary that it envisioned some comprehensive scheme to go about that.

THE COURT: Just to back up for a second. I agree with you and with Judge Katsas and with Justice Alito about that understanding of the Federal Death Penalty Act, and that it was designed to make the federal death penalty more

workable. But as I understand it, what Congress sensibly did and said to itself is look, there has been a huge amount of litigation with respect to what types of procedures relating to the death penalty are constitutional and which are not. And if we were to specify a bunch of procedures here, there would be another 10 years of litigation about whether those procedures are permissible or not. And to avoid all of that, what we're going to do is we're just going to let the Justice Department rely on the procedures from the states. Because those have already been tested in the courts, and there's already been a great deal of litigation about those. And they've been refined and tested in ways by the courts that are much more likely to be upheld and to be satisfactory. And so to streamline things, we're just going to rely on the state procedures. But the question is how far -- exactly what that encompasses within the concept of the state procedures that were being adopted.

But it is a little odd that the statute -- either Judge Rao is correct and these procedures encompass a great deal or Congress left a huge lacuna and just didn't specify anything about what sorts of procedures would apply up until the actual administration of death.

MR. SIMPSON: Thank you, your Honor. For the reasons Judge Katsas identified, we believe that Judge Rao's broad understanding of the word implementation was -- is not

binding precedent on this Court. We'd note that there's a textual issue within the Federal Death Penalty Act with any construction of implementation that is broad. It's that the Marshal would be tasked with supervising these broad implementation procedures, and that is very unlike anything that ever has occurred with the federal death penalty as far as I can say.

THE COURT: I mean, as far as you can say that's a good point, but that's what my question is, right. I don't know whether in the 19th century when the Marshals were involved in administering death sentences or involved in implementing death sentences, what their role was. I don't know what their role was before there even was a Department of Justice. And I don't really understand entirely what their role historically has been, so that's why I think that's an important question.

MR. SIMPSON: Thank you, your Honor. And we'll supplement that. We believe that Congress didn't anticipate any translation problems between state court rules or rules governing other branches of government. Because what Congress did was incorporate that narrow manner of implementing death. And in every state, it is the executive that actually implements death. So the fact that we're arguing about scheduling or the provision relates to scheduling and it may be done by a trial court, or as here

an appellate court, reveals that it's not the type of implementation that the Marshal would be tasked with supervising. There are many --

THE COURT: How would the date get set according to Congress? I mean, how were all the procedures that would take place from the date of final review of the -- on direct review until the individual is taken to the death chamber, how were all those rules to be defined? What was going to fill that lacuna?

MR. SIMPSON: Your Honor, what fills it is 28 C.F.R. 26.3. I think that that's the justification for the regulation to prescribe that there ought be -- that the director of the federal Bureau of Prisons ought do the date setting. And there was debate amongst the capital bar community as described in the Federal Register as to whether or not trial courts should ordinarily have the discretion to either -- to sit back and not do that or whether the director of the Bureau of Prisons should have the affirmative ability to do so. The regulation was adopted that said that that was what the director would do. So I do believe that the regulation is important to that extent.

THE COURT: Although the regulation was before the statute was adopted. So unless you think that Congress just intended -- understood the regulation was there and intended to sort of codify the regulation or to defer the regulation,

then I still have my same question. If your argument is that they intended to defer to the regulation, I guess I'd love to see some evidence of that.

MR. SIMPSON: Thank you, your Honor. I don't have any direct evidence of that. I think that Congress is generally aware both of court decisions as well as regulations that are in effect. I think it's just on its face some level of evidence that they didn't -- you know, assuming that they did not overrule it, that they did not overrule it. But moreover, I think that the regulation makes sense because it codifies historical practice. It recognizes that courts play a role in scheduling executions, as they have for a very long time. But that history is well set out in the regulation -- Federal Register itself.

THE COURT: Okay, I hear you.

MR. SIMPSON: I'm sorry, I'm trying to not repeat myself. The last thing I would say, your Honor, on the Federal Death Penalty Act is even if this rule did relate to implementation of Ms. Montgomery's sentence, even if you went -- if your Honor decided that it did, the rule is simply not translatable to federal law given the structure of 3596. There's a picking and choosing of the preferred provisions within the rules, but such selective incorporation is not reflective of any rule that Missouri has actually adopted.

I think it's notable that Judge Rao referred both to the Missouri execution protocol as well as I believe -- or one of the judges at that time referred to the state statute governing executions. But no person contemplated -- no judge contemplated under the reading that I can divine from those -- from the separate opinions that court rules would additionally be adopted, and that we would simply substitute or translate the executive or the U.S. Marshal for another subsidiary state branch.

THE COURT: But picking up on -- I mean, if you look at Judge Rao's opinion and Judge Tatel's opinion, Judge Tatel would be more expansive and not even require that the rules at issue have independent legal force. Judge Rao would draw the line at those rules that have legal force to them. I take it you would agree that the 30.30 rule that plaintiff relies upon here does have the force of law?

MR. SIMPSON: The rule as stated does, yes, your Honor, because it is a rule of pleading, practice or procedure in Missouri state court.

THE COURT: It's more than state court, right? It's more than a court rule, because it actually deals with setting of an execution date or when an execution can actually occur, right?

MR. SIMPSON: Your Honor, the only legal effect that the rule is entitled to under the Missouri constitution

is to the extent it is a rule -- a court rule, a pleading, practice or procedure. The Court does not have the authority to adopt rules that could grant substantive rights or the sort, it's only a court rule. And I think that that is -- I think that that's telling. I think it's problematic whenever we try to translate it to other contexts.

And moreover, I'd note that for the reasons we stated at length in the brief, that the apparent -- that the rule is actually designed to govern the Missouri Supreme Court and how it interacts with another coequal branch of Missouri state government. And that is simply a unique consideration that we don't believe is applicable here. But it's one of the furthest afield types of rules that the FDPA might incorporate. It's sufficient to state that the FDPA does not incorporate court rules of pleading, practice or procedure.

THE COURT: Okay.

MR. SIMPSON: And finally, your Honor, I would just indicate that we believe that we've complied with your court's -- with your Honor's order. I don't have anything further unless your Honor has any further questions for myself.

Actually, I apologize, your Honor, I take it back. The last thing I would say just briefly is that on the question of vacatur and irreparable harm, we believe that to

set aside or to -- does not indicate or does not mean that defendants' plans can simply be quashed. We think that it's telling that Ms. Montgomery has sought precisely the same relief both under the label of a preliminary injunction as well as under the label of vacatur. And we don't think that anything in the APA permits her to do so absent a showing of irreparable harm. Your Honor, thank you for your time.

THE COURT: With respect to that argument, what I don't get about it is sitting on a court that hears a heck of a lot more APA cases than we hear death penalty cases, it's just really common that this issue comes up. I have on multiple occasions respected requests from the United States Government and from the Justice Department not to enter an injunction in an APA case, and doing the narrower thing and simply vacating the agency action at issue where the United States has said, you know, Judge, you're overstepping if you actually enter an injunction because you should assume that we'll abide by either your declaratory judgment or by your order setting aside the agency action and nothing more is required. So in all these APA cases, I hear the Government arguing exactly the opposite of what you're arguing today in this case.

MR. SIMPSON: I don't dispute your Honor's recollection.

THE COURT: The Government would not be very happy

if I started entering injunctions in all of my APA cases.

MR. SIMPSON: I'm sure that that's correct, your Honor. The Government doesn't believe that anything in the APA displaces the requirement -- or there's no special review statute here, right. And so the question is what is the form of proceeding, and what does vacatur actually practically mean here where the thing sought to be vacated is an execution date. And in this instance, we believe that doing so -- you know, for reasons identified for example in the LeCroy case, that a stay of execution regardless of how it's characterized has to meet this heightened standard -- or the ordinary standard for injunctive relief, which is both a showing of irreparable harm as well as the balance of the equities favors the injunction or vacatur.

And equitable considerations are similarly part of the Court's calculation under vacatur. And we believe just as a matter of law that the types of APA challenges raised here cannot overcome the public's significant interest in the timely enforcement of Ms. Montgomery's capital sentence.

THE COURT: With respect to the timely enforcement here, assuming if I were to agree with the plaintiff on the regulation and disagree on the statute, we're not talking about a very lengthy delay. You're talking about I think to reset the execution date 20 days out from the end of the stay period. But it's not -- this is not the sort of

endless cycles of delay that raise legitimate concerns in cases of this type.

MR. SIMPSON: Your Honor, by the same token, we believe that that counts against any finding of prejudice; that there ought not be sort of a categorical rule that any delay any day is enough to demonstrate prejudice under the APA. But your point is well taken that it's not the kind of -- a shorter delay is not the kind of unending delay that would yield the most significant irreparable harm. However, Ms. Montgomery committed her crime over 16 years ago. She was sentenced to death over 12 years ago. She's had sufficient time, and we believe that there is a strong interest in the date that has been set by federal officials.

THE COURT: So let me ask you this, one final question. With respect to whether -- if I agree with plaintiff on the regulation, I then need to decide whether I should reach the question of whether the Federal Death Penalty Act requires that I incorporate Missouri rules and direct that no execution date shall be set for at least 90 days.

The question I have for you is do you know -- so if the Court were to agree with plaintiff on the regulation, has the Department of Justice made a decision about when it would set the next execution date to occur or is that something that would be subject to further consideration

after considering the Court's opinion?

MR. SIMPSON: I can't really speak to that, your Honor, I just don't know. I think that in cases like this, it's very difficult to make plans when -- as in Ms. Montgomery's case, right, she has brought an FDPA claim that was ripe at a minimum, at the absolute minimum, on October 16th. And she delayed almost two months in bringing it. So it's difficult for us to formulate plans in those sorts of circumstances. I think that we would have to -- that the relevant officials would have to consider it, some of whom I may not know.

THE COURT: Right. And I take it that there's likely to be a different attorney general by the time that occurs as well.

MR. SIMPSON: Well, I think that there will be a different one by the end of date, but that is --

THE COURT: By the end of the day today, is today Attorney General Barr's final day?

MR. SIMPSON: I believe so, your Honor.

THE COURT: Okay, thank you. Let me give Mr. Schierenbeck an opportunity to respond.

MR. SCHIERENBECK: Thank you, your Honor. Alec Schierenbeck. I don't have much to respond to, your Honor, although I'd be happy to answer any of your Honor's questions. Three quick points occur to me. The first is

that I heard the Government concede that these rules have the force and effect of law under the Missouri constitution. I take the Government's argument to be that the rules are only binding on courts and litigants and counsel of course. The Government in a proceeding to effectuate death is a litigant. I don't understand how they would step outside the force and effect of those rules.

The Government's argument that LeCroy somehow suggests that the ordinary standard for vacatur under the APA doesn't apply is just wrong. LeCroy didn't present an APA claim. The plaintiff in that case identified no source of authority to grant the relief sought, and so the court sensibly understood their request for what it was. But if they had brought an APA vacatur claim in the appropriate course, then I think the ordinary APA vacatur standard would have applied.

And lastly, on the notion that we've delayed, your Honor, these APA claims were brought within two weeks of the Government designating a new date. My understanding is that after the Government designated the date, there was surprise. Of course, the Government doesn't do this sort of thing as we've pointed out, so people were mystified. Ms. Montgomery's counsel retained APA counsel to aid in this part of the proceeding. We filed our motion for clarification and leave to file a supplemental complaint

within two weeks, which was quite expeditious. And of course, as your Honor knows, we've been attempting to proceed as expeditiously as possible since that time.

So those are the three points I wanted to raise.

THE COURT: And I appreciate the efforts of everyone involved in this case to move this quickly as they can. Let me ask you a question about 30.30, which is, is this arguably outside the scope of 3596 because it deals with what a court should do, and it deals with the court setting an execution date? It says that a court should set a date that is at least 90 days, but not more than 120 days, out from the date that the order is entered.

To the extent the 3596 may incorporate state law, the state law that it incorporates should be state law that governs not how courts operate, because that would raise perhaps Article III problems, but to adopt rules with respect to how Executive Branch actors proceed. And that as a result, even if you're right about the meaning of 3596, it doesn't apply to a rule like 30.30 which addresses how courts should act.

MR. SCHIERENBECK: Your Honor, I think I'd go back to the answer I gave you earlier, that state statutes necessarily are going to reference state institutions and state officials. And that can't be an insurmountable problem to the incorporation of state law in the FDPA or

else the scheme envisioned by Congress in the FDPA would be eviscerated.

THE COURT: Right, but there's a difference between state judicial officers and state executive officers. So to the extent that state law says how the State department of corrections should behave, yes, you're right. But to the extent it's a rule defining how state courts should behave, it's more difficult to import through 3596.

MR. SCHIERENBECK: I take your point, your Honor. I think the FDPA at a minimum requires an effort to harmonize the rules. I would contend here, your Honor, that the rules can be harmonized to -- in this respect and in respect of the notice and timing provisions. So I think that's the answer. Now, there's also another possibility which is that the FDPA actually does expressly contemplate that the United States Marshal may use appropriate state or local facilities or appropriate state or local officials in implementing a sentence.

So it's possible that Congress expressly authorized the federal government to go -- to reach in and avail itself of state facilities and state officials, and that that is the sort of thing that would harmonize the 3596 language and these very state procedures. Of course, we're not arguing --

THE COURT: I'm not following that. You're not suggesting that the Marshals Service is supposed to go to a Missouri state court to set the date, so I'm not following your argument.

MR. SCHIERENBECK: I'm not, your Honor, I'm just suggesting that to the extent that -- because we're not raising that claim. But my point is to the extent there's a disjuncture in some of these state procedures that reference state institutions and state officials, that it may be that Congress expressly provided in 3597 a way to comply.

THE COURT: All right. Anything further?

MR. SCHIERENBECK: No, your Honor.

THE COURT: You know, I don't want to be unreasonable with the parties in trying to get me additional materials, particularly as we're approaching a holiday. On the other hand, I want to make sure I'm able to get my opinion out quickly for everyone involved and for the other courts that are going to have to look at these issues.

I guess it would be helpful to me if you can get me anything on the historical question I have about the Marshals by midnight tonight, and the same goes for the Government. If in the course of that the parties are of the view that they need more time, you can jointly request more time from me to respond to that. But I do want to move this as fast as I can. I'm not sure I would say yes to that, but

if both sides sought the additional time, I would at least give that some thought. But I guess I hope that you just do your best to get back to me on that tonight and see where we stand.

MR. SCHIERENBECK: Yes, your Honor. This is Alec Schierenbeck, and we'll do our best. I think that's realistic.

THE COURT: Okay. Mr. Simpson.

MR. SIMPSON: Yes, your Honor, nothing further from defendants. Thank you for your time.

THE COURT: Okay. Well, thank you all, this was very helpful. The briefing was excellent in this case, so I do appreciate all of your help. I'm going to do my best to get you an opinion as fast as I possibly can.

Well, thank you all, and hopefully you'll all get a chance to at least take some time off for the holidays.

(Proceedings adjourned at 12:46 p.m.)

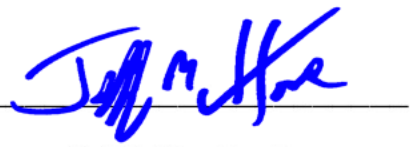
C E R T I F I C A T E

I, **Jeff Hook, Official Court Reporter**, certify that the foregoing is a true and correct transcript of the remotely reported proceedings in the above-entitled matter.

PLEASE NOTE: This hearing occurred during the COVID-19 pandemic and is therefore subject to the technological limitations of court reporting remotely.

December 28, 2020

DATE



Jeff M. Hook