No. 20A32

IN THE SUPREME COURT OF THE UNITED STATES

LEZMOND C. MITCHELL, APPLICANT

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The Acting Solicitor General, on behalf of the United States, respectfully submits this response to the application for a stay of execution pending disposition of a future petition for a writ of certiorari. The application effectively seeks an injunction under the All Writs Act, 28 U.S.C. 1651(a), to enjoin the United States from proceeding with applicant's rescheduled execution. The application lacks merit and should be denied.

Applicant is a federal death-row inmate who murdered and dismembered a nine-year-old girl and her grandmother in 2001 during a carjacking. He confessed on multiple occasions and led authorities to the remote area where he and an accomplice had buried the victims' severed heads and hands. Following a jury trial, applicant was convicted on two counts of first-degree murder, in violation of 18 U.S.C. 1111 and 1153 (2000); one count of carjacking

resulting in death, in violation of 18 U.S.C. 2119; and multiple other crimes. He received a capital sentence on the carjacking-resulting-in-death count. The district court and the court of appeals accorded him extensive review on direct appeal, collateral review under 28 U.S.C. 2255, and on his motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6). This Court has twice denied petitions for writs of certiorari in those proceedings, and applicant's certiorari petition (and stay application) in the Rule 60(b) proceeding are pending before this Court (Nos. 20-5398, 20A30).

The present application arises from applicant's last-minute effort to challenge the procedures that will be used to carry out his lawful execution. Specifically, applicant contends that the federal execution protocol conflicts with 18 U.S.C. 3596(a), a provision of the Federal Death Penalty Act of 1994 (FDPA), Pub. L. No. 103-322, Tit. VI, 108 Stat. 1959, which states that a United States Marshal "shall supervise implementation of [a federal death] sentence in the manner prescribed by the law of the State in which the sentence is imposed." In 2014, applicant joined a case in the District Court for the District of Columbia challenging the prior version of the government's execution protocol on FDPA grounds, but, in 2017, he withdrew his challenge. Then, in August 2019, after the government adopted its new protocol, applicant's counsel informed the district court that he anticipated that applicant would soon re-intervene in that protocol litigation. But applicant never did so. Instead, he waited until after the D.C. Circuit had rejected the FDPA challenge to the protocol and

this Court denied review, see In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 109 (D.C. Cir.) (per curiam) (Protocol Cases), cert. denied sub nom. Bourgeois v. Barr, No. 19-1348 (June 29, 2020), and then he filed a motion in his criminal case raising an FDPA claim on August 6, 2020 -- a mere 20 days before his rescheduled execution.

Applicant's FDPA claim in this case -- namely, that his execution under the federal protocol would be inconsistent with certain procedures used by the State of Arizona in carrying out executions -- originally implicated three legal questions previously addressed in other challenges to the federal execution protocol. First, does Section 3596(a)'s incorporation of the state-law "manner" of implementing a death sentence refer only to the top-line method of execution (e.g., lethal injection) or, in addition, to subsidiary procedures for carrying out that method? Second, if subsidiary procedures are covered, does Section 3596(a)'s use of the phrase "implementation of the sentence" of "death" require federal compliance with only those state-law procedures concerning how death is effectuated (e.g., choice and dosage of lethal substances) or, in addition, ancillary procedures (e.g., witness and notice requirements)? And third, does Section 3596(a)'s use of the phrase "prescribed by the law of the State" at most require compliance with state statutes and regulations with binding force of law or, in addition, with informal agency provisions?

The court of appeals, however, unanimously rejected applicant's FDPA claim without having to rest its judgment on any those legal questions concerning Section 3596(a). The court

assumed arguendo applicant's positions on the first and third questions and, under those favorable assumptions, it rejected his factbound contention that his execution under the federal protocol would violate six aspects of the state agency order specifying the Arizona lethal-injection protocol. Appl. App. 6, 12; see id. at 8-12. In addition, although the court rejected applicant's argument on the second question that Section 3596(a) requires federal compliance even with state procedures that "do not effectuate death," id. at 7, that was only an alternative ruling: the court primarily held that applicant had forfeited reliance on four other features of the Arizona process that implicated that question, id. at 8 n.6. As a result, the panel disposed of applicant's FDPA challenge without having to rely on any disputed legal question regarding the interpretation of Section 3596(a). Applicant petitioned the en banc Ninth Circuit for rehearing, raising the same issues presented to this Court, see C.A. Doc. 1, 7-11 (Aug. 20, 2020), and the court denied rehearing without any judge requesting a vote. Appl. App. 82.

Applicant has failed to show any reasonable probability that this Court will grant review. The Court declined to review the same legal questions earlier this summer in the Protocol Cases where the court of appeals actually resolved the legal questions on the merits, see Bourgeois v. Barr, No. 19-1348 (June 29, 2020), and indeed resolved them in a way that was less favorable to inmates than the court of appeals here assumed. Applicant provides no reason why review of this far inferior vehicle would be more likely. That failure, standing alone, warrants denying the

application. Moreover, in order to justify an injunction from this Court barring his execution, applicant would have to prevail on the merits of issues that the court of appeals assumed arguendo in his favor, yet applicant fails to show any sufficient likelihood of success on those issues. Finally, the balance of equities favors denying any equitable relief. The court of appeals correctly concluded that applicant has failed to show "that he will suffer any irreparable harm" from the procedural violations he asserts. Appl. App. 13. And his claim is profoundly untimely. Seventeen years after applicant's trial, the government is prepared to carry out his rescheduled execution on August 26, 2020. Applicant significantly delayed bringing his challenge to the federal execution protocol and any further delay would disserve the interests of the government, the victims' families, and the public. The application should be denied.

STATEMENT

1. In 2001, applicant and an accomplice were traveling from Arizona to New Mexico in search of a vehicle to use as part of a plan to rob a trading post on the Arizona side of the Navajo Indian Reservation. 502 F.3d 931, 942. While hitchhiking, they encountered a 63-year-old woman, Alyce Slim, driving in a pickup truck with her nine-year-old granddaughter. Id. at 942-943. Slim agreed to give them a ride. Id. at 943. When Slim stopped her truck to let the men out, applicant and the accomplice stabbed Slim 33 times -- killing her -- and pulled her dead body into the backseat next to her granddaughter. Ibid.

Applicant and the accomplice then drove Slim's truck into the mountains. 958 F.3d 775, 780. Applicant stopped the truck, dragged Slim's body out of it, and ordered the granddaughter to get out as well. Ibid. Applicant told the child "to lay down and die," cut her throat twice, and -- while she was on the ground bleeding -- applicant and his accomplice used large rocks to bludgeon her head until she was dead. Ibid.; see 502 F.3d at 943. The two men then retrieved an axe and shovel, and applicant dug a hole while his accomplice decapitated the victims and cut off their hands. 790 F.3d 881, 883. The men buried the severed body parts, pulled the victims' torsos into the woods, and burned their belongings. 502 F.3d at 943. Applicant and other accomplices then used Slim's truck to conduct an armed robbery of the trading post. 958 F.3d at 780; 502 F.3d at 943-944.

2. A federal grand jury indicted applicant on numerous counts, including two counts of first-degree murder, in violation of 18 U.S.C. 1111 and 1153 (2000), and one count of carjacking resulting in death, in violation of 18 U.S.C. 2119. 502 F.3d at 945. Applicant was convicted at trial and, in 2003, sentenced to death. Am. Judgment 1-2. The amended judgment, tracking Section 3596(a), states in relevant part that the United States Marshal "shall supervise implementation of the sentence in the manner prescribed by the law of the State of Arizona." Id. at 2.

In 2007, the court of appeals affirmed, explaining that the evidence of applicant's guilt was "overwhelming," and that "the mitigating factors proffered by [applicant] were weak when compared to the gruesome nature of the crimes" and their impact

"on the victims' family." 502 F.3d at 996. This Court denied certiorari. 553 U.S. 1094.

In 2009, applicant filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, which the district court denied. 09-cv-8089 D. Ct. Doc. 56 (Sept. 30, 2010). In 2015, the court of appeals affirmed, 790 F.3d at 883-910, and, in 2016, this Court again denied certiorari. 137 S. Ct. 38.

3. Meanwhile, in 2014, applicant moved to intervene in a civil action in which death-row inmate Julius Robinson challenged the then-applicable federal execution protocol, representing that applicant "will be executed using the Lethal Injection Protocol [being] challenged" and was "effectively in the same position as Mr. Robinson." Doc. 11-4, at 2, 6, Robinson v. Barr, No. 07-cv-2145 (D.D.C. June 6, 2014). Applicant emphasized that his intervention was not "a last-minute attempt to stay his execution," which had yet to be scheduled. Id. at 2. The court granted applicant's unopposed motion, 7/8/14 Order, Robinson, supra, and filed applicant's 40-page complaint, which sought to enjoin applicant's execution on the ground that, as relevant here, the Federal Bureau of Prisons (BOP) protocol violated the FDPA, see Doc. 12, at 2, 35, 38, Robinson, supra (July 8, 2014).

Three years later, in 2017, applicant filed a pro se motion to withdraw his protocol challenge. Doc. 14, Robinson, supra (Sept. 15, 2017). The district court issued an order stating that it was "not inclined to grant the motion until it is certain that [applicant] is fully aware of the legal consequences attendant to his withdrawal from this lawsuit." 10/6/17 Order, Robinson, supra.

Applicant responded directly to that order in a pro se letter, reiterating in colorful language that he "want[ed] nothing to do" with his lawyers or the execution-protocol litigation. Doc. 18, Robinson, supra (Dec. 1, 2017). Applicant's counsel separately informed the court that applicant had refused to meet with counsel. Doc. 19, at 2, Robinson, supra (Feb. 1, 2018). In February 2018, the court granted applicant's motion to withdraw and dismissed his claims without prejudice. Doc. 20, at 2, Robinson, supra (Feb. 2, 2018). Robinson's challenge was then consolidated with others, see Doc. 27, Robinson, supra (Aug. 20, 2019) -- collectively styled as Protocol Cases -- and applicant's counsel continued to participate in those cases as counsel for Robinson. See, e.g., Doc. 77, Protocol Cases, No. 19-mc-145 (D.D.C. Feb. 10, 2020).

4. a. In March 2018, one month after he withdrew from Robinson, applicant moved under Rule 60(b)(6) for relief from the Arizona district court's 2010 judgment in his Section 2255 case on the theory that Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), cast doubt on the district court's 2009 denial of his request to interview the jurors who convicted him in 2003. 09-cv-8089 D. Ct. Doc. 71, at 3, 11 (Mar. 5, 2018). The district court denied that motion. 09-cv-8089 D. Ct. Doc. 80, at 2-8 (Sept. 18, 2018). The court of appeals granted a certificate of appealability (COA). See 18-17031 C.A. Doc. 10-1, at 1 (Apr. 25, 2019).

b. On July 25, 2019, the Department of Justice adopted, and publicly filed in Protocol Cases, its updated lethal-injection protocol that applicant now challenges. Appl. App. 83. That same

day, the United States delivered to applicant notice of its intent to carry out his sentence on December 11, 2019. Id. at 15.

Shortly thereafter, at an August 2019 status hearing, applicant's counsel informed the Arizona district court that he had just participated in a status conference in the D.C. execution-protocol litigation and "potentially s[aw] that case affecting this matter." 8/15/19 Tr. 8 (D. Ct. Doc. 606-6). Counsel explained that although applicant had previously withdrawn from the litigation, counsel "anticipate[d]" that applicant would "intervene again" and become "a party in that case before much longer." Id. at 9. Counsel added that the issue whether the government's lethal-injection protocol "violates the [FDPA]" had "been raised in a lethal injection suit" but declined to further "discuss[] [applicant's] litigation strategy." Id. at 12; see id. at 13-14 (discussing the litigation over the "new lethal injection protocol").

Turning to government counsel, the district court stated that "you may or may not be ready to answer" but asked whether applicant's execution "would follow Arizona State procedures." 8/15/19 Tr. 10-11. Government counsel offered to "file a status report" and asked "how would it be useful to respond to the Court's question?" Id. at 11. The court responded that its inquiry "was more a matter of curiosity" and did not "affect[] anything that's pending now." Ibid. Government counsel accordingly stated that the government would plan to "respond if that matter is raised by [applicant]." Id. at 11-12. Applicant, however, did not intervene in the Protocol Cases as counsel predicted and did not bring any

challenge to the federal execution protocol until another year later, just 20 days before his rescheduled execution date. See p. 11, infra. In the meanwhile, the D.C. Circuit rejected the FDPA challenge to the federal protocol in the Protocol Cases in a per curiam decision accompanied by three concurring and dissenting opinions adopting different interpretations of Section 3596(a), see Protocol Cases, 955 F.3d 106, and this Court denied review, No. 19-1348.

c. In October 2019, the court of appeals stayed applicant's December 2019 execution pending its resolution of his appeal from the denial of Rule 60(b)(6) relief. 18-17031 C.A. Doc. 26, at 1 (Oct. 4, 2019). On April 30, 2020, the court affirmed the district court's Rule 60(b) ruling. 958 F.3d at 779-792.

Applicant then made several serial filings in his Rule 60(b) appeal. First, on June 15, 2020, applicant petitioned for rehearing en banc, which was denied on July 8. 18-17031 C.A. Docs. 38 and 39. Later on July 8, applicant filed a motion to stay the appellate mandate, which, after briefing, was denied on July 15. 18-17031 C.A. Docs. 40 and 45. In a normal case, the mandate -- which terminates the appeal and thus dissolves a stay pending appeal -- should have issued seven days thereafter. See Fed. R. App. P. 41(b). But on July 15, applicant filed a second petition for en banc rehearing, this time seeking review of the court's order declining to stay its mandate. 18-17031 C.A. Doc. 46.

On July 29, while applicant's second rehearing petition was pending, the government notified the court of appeals that applicant's execution had been rescheduled for August 26, 2020,

but that BOP would not execute applicant while the court of appeals' stay remained in place. 18-17031 C.A. Doc. 47, at 2.

On August 11, the court of appeals denied applicant's second rehearing petition, and, on August 18, issued its mandate, 18-17031 C.A. Docs. 52, 55, dissolving its stay of execution. Applicant filed a petition for a writ of certiorari and stay application, which are pending with this Court. Nos. 20-5398, 20A30.

5. On August 6 -- one week after the government reset his execution date but two and a half years after applicant withdrew from the D.C. protocol litigation and one year after his counsel anticipated that he would soon rejoin that case -- applicant filed a motion in his criminal case challenging the federal execution protocol. D. Ct. Doc. 606. In that motion, applicant sought an order to set aside his "August 26, 2020 execution date" and "enjoin the Government from attempting to execute [him]" on the ground that the federal protocol violates the FDPA and his judgment of conviction, which tracks Section 3596(a). Id. at 1, 4. One day later -- 19 days before his execution date -- applicant moved to stay his execution until his newly filed protocol challenge was resolved. D. Ct. Doc. 609.

The district court denied both motions. Appl. App. 14-29; see id. at 14, 29. The court noted that although applicant had argued that "his execution would violate both the FDPA and the [district c]ourt's Judgment [of conviction]," applicant's "analysis relies entirely on the meaning of the FDPA" and does not "argue[] that the Judgment has a different meaning." Id. at 18 n.5. In analyzing the merits of applicant's FDPA arguments, the

court looked to the D.C. Circuit's interpretation of 18 U.S.C. 3596(a) in Protocol Cases. See Appl. App. 18-20. The district court recognized that Judge Katsas's reading of Section 3596(a), under which the federal government must follow only the top-line choice of execution method (e.g., lethal injection) specified by state law, "has some merit." Ibid. But the court ultimately adopted the broader reading articulated by Judge Rao, concluding that "execution procedures" that are "prescribed by state law -- state statutes and regulations that have the force and effect of law -- must be applied in a federal execution." Id. at 25; see id. at 20-25. The court thus determined that the FDPA does not require the federal government to follow "[p]rocedures contained in less formal state protocols." Id. at 25. And the court determined that the FDPA does not require compliance with state procedures that are "unrelated to the procedures for effectuating death" -- a position that "even Judge Tatel" accepted in his Protocol Cases dissent and that also had been unanimously endorsed by the Seventh Circuit. Id. at 29; see Peterson v. Barr, 965 F.3d 549, 554 (7th Cir. 2020), stay denied, No. 20A6 (July 14, 2020).

Applying that reading of the FDPA, the district court, as relevant here, rejected applicant's reliance on the execution protocol set out in Arizona Department of Corrections' Department Order 710 (2017),[1] reasoning that the agency order does not constitute a "law of the State," 18 U.S.C. 3596(a), that the FDPA requires the federal government to follow. Appl. App. 25; see id.

[1] https://corrections.az.gov/sites/default/files/policies/700/0710_032519.pdf.

at 25-28. The court reasoned that such "procedures adopted by [the state agency]" do not "have the force of law," id. at 25, and that a settlement agreement entered by and binding upon that agency merely reflects an enforceable contract obligation, not an Arizona "law" that the FDPA might require the federal government to follow, id. at 26-28.

6. On August 19, the court of appeals unanimously denied applicant's motion to stay his execution pending appeal and affirmed the district court's denial of his underlying motion to enjoin his execution on FDPA grounds. Appl. App. 1-13, see id. at 13. The court concluded that neither a stay nor the "underlying injunctive relief" that applicant sought was warranted because applicant had failed to "carr[y] his burden of demonstrating a likelihood of success on the merits" or that equitable considerations warranted relief. Id. at 13.

a. With respect to the merits, the court of appeals emphasized that its decision did not require it to "comprehensively delineate the scope of the FDPA." Appl. App. 6. The court first determined that applicant had forfeited any contention that the federal protocol was inconsistent with several provisions of Arizona statutory law and certain aspects of Department of Corrections' Order 710, because applicant had failed to assert those grounds in district court or in his appellate briefing. Id. at 8 n.6, 12 n.8. In the alternative, the court also concluded that four of applicant's forfeited arguments "fall outside the scope of 18 U.S.C. § 3596(a), because they are not pertinent to effectuating death." Appl. App. 8 n.6. Agreeing with the Seventh Circuit and

all three of the D.C. Circuit judges, the court explained that Section 3596(a) "incorporates only those state laws that prescribe the manner for 'implementation' of a death sentence," which, "at most," includes "state laws that set forth procedures for giving practical effect to a sentence of death." Id. at 7. The court thus alternatively concluded that applicant's (forfeited) contentions about the "presence of witnesses and spiritual advisers," "notice of an execution date," "judicial postponement of execution dates," and "accommodations for defense counsel during the execution" would fail on their merits. Id. at 8 n.6.

The court of appeals then focused on the "six purported inconsistencies" between the federal execution protocol and Order 710 that applicant presented on appeal. Appl. App. 8; see id. at 8-12. But rather than determine whether the district court had correctly held that the state agency order itself does not "constitute[] 'law of the State' for purposes of the FDPA," the court "assume[d] without deciding" that the Order constituted such a state "'law'" that might apply to federal executions. Id. at 6.

Under that assumption, the court of appeals held that none of the six purported inconsistencies with Order 710 could warrant relief. Appl. App. 12; see id. at 8-12. The court determined that the federal protocol and the six "procedures on which [applicant] relies are largely indistinguishable." Id. at 12. In addition, with respect to the first four alleged inconsistencies (concerning the qualifications of personnel who place intravenous lines and the use of chemicals before their expiration date), the court concluded that "[t]o the extent there is any difference

between the federal and Arizona procedures," the government had provided "a declaration certifying that it will comply with [the state] procedures." Ibid.; see id. at 8-10. With respect to the last two alleged inconsistencies (concerning notification of the chemical to be used and disclosure upon request of an analysis of that chemical), the court concluded that the government had already "complied with the Department Order." Id. at 12; see id. at 11-12. The court ultimately found that applicant had failed to "carr[y] his burden of proving a 'reasonable probability' that his execution will be carried out in a manner inconsistent with Arizona law (assuming that the Department Order Manual is state law)." Id. at 12 (citation omitted).

b. In light of its analysis of the six purported inconsistencies between the federal protocol and Order 710, the court of appeals also determined that the equities counseled against the "extraordinary remedy" that applicant requested. Appl. App. 12-13 (citation omitted). More specifically, the court concluded that applicant had failed to "carr[y] his burden of showing that it is more probable than not that he will suffer any irreparable harm" without the requested relief. Id. at 13 (citation omitted). The court further indicated that this Court's instruction that "last-minute stays of execution 'should be the extreme exception, not the norm,'" confirmed that applicant "is not entitled to a stay or to the underlying injunctive relief he seeks." Ibid. (citation omitted).

7. On August 21, the court of appeals denied applicant's petition for en banc rehearing. Appl. App. 82. No judge called for an en banc vote. Ibid.[2]

ARGUMENT

The application for a stay of execution should be denied. Applicant does not challenge the validity of his death sentence or seek to stay the district court judgment embodying that sentence. Thus, although applicant purports to seek a stay pending disposition of a future certiorari petition (Appl. 1, 8), he is in fact seeking an injunction from this Court under the All Writs Act, 28 U.S.C. 1651(a), to bar his execution pending review. Applicant has failed to show that such relief is warranted under standards applicable to stays of court orders, much less under the considerably higher standard for obtaining an injunction from this Court.

A movant seeking a stay pending review must establish "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" in addition to "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). The movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted). And once the movant satisfies those prerequisites, the Court considers whether

[2] On August 20, after close of business, applicant filed a new Section 2255 action raising new claims. See Mitchell v. United States, No. 20-cv-8217 (D. Ariz.). The next day, the district court denied that motion and denied a COA. 20-cv-8217 D. Ct. Doc. 8, at 11. On August 23, 2020, the Ninth Circuit denied a COA. See No. 20-99010 (9th Cir.).

a stay is appropriate in light of the "harm to the opposing party" and "the public interest." Nken v. Holder, 556 U.S. 418, 435 (2009). In addition to those typical stay standards, when a movant seeks an injunction pending review, the requisite merits showing is not just a reasonable probability of reversal, but "legal rights" that are "indisputably clear." Hobby Lobby Stores, Inc. v. Sebelius, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) (quoting Wisconsin Right to Life, Inc. v. Federal Election Comm'n, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers)); see South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). That "'demands a significantly higher justification' than a request for a stay" pending review. Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (per curiam) (quoting Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

Applicant cannot satisfy those standards. First and foremost, he has failed to establish a reasonable probability that this Court will grant certiorari and a significant possibility of reversal, let alone an "indisputably clear" right on the merits. Applicant contends (Appl. 8-11, 13-17) that it is reasonably probable that this Court will grant certiorari to review his arguments about the meaning of Section 3596(a) in light of a purported circuit conflict, and a "fair prospect" that this Court would reverse the court of appeals on those grounds. Applicant further contends (Appl. 11-12) that a reasonable probability exists that the Court would grant certiorari to review the

determination that the federal protocol and Order 710 are "largely indistinguishable" with respect to the six areas that applicant litigated on appeal and the court of appeals' consideration of a government declaration. Those contentions lack merit.

First, there is no realistic prospect that this Court will grant certiorari to examine questions about the scope of Section 3596(a), because the court of appeals' judgment does not rest on such questions and, even if it did, no relevant division of authority would warrant review. Less than two months ago, this Court, with two Justices dissenting, denied a stay application and certiorari petition from the D.C. Circuit's decision in In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106 (2020) (per curiam), cert. denied sub nom. Bourgeois v. Barr, No. 19-1348 (June 29, 2020), and applicant's basis for review is substantially weaker. Second, there is no reasonable probability that the Court would grant review on the second question because the court of appeals merely determined (correctly) that applicant had failed to carry his burden of showing that his execution would be inconsistent with any relevant provision of Order 710. Furthermore, to obtain an interim injunction from this Court, applicant would at least need to show likely success -- based on an indisputably clear right -- on multiple legal issues that the court of appeals assumed arguendo in his favor. Applicant fails to do so. The balance of equities also counsels strongly against injunctive relief in light of applicant's excessive delay in bringing his FDPA challenge and the government's and the public's

interest in the timely enforcement of applicant's lawful sentence. The application should be denied.

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

Applicant contends that this Court should enjoin his execution to allow the Court to consider a future certiorari petition raising two questions on which he contends there exists a "reasonable probability" that Court will grant review and a "fair prospect" that it will reverse. Appl. 8 (quoting Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam)); see id. at 8-18. But that standard applies where an applicant seeks to stay a court order, see Hollingsworth, 558 U.S. at 199 (granting "stay of the District Court's order"), not where, as here, the applicant seeks an injunction against a party. Unlike a "stay," which "operates upon the judicial proceeding itself" either "by halting or postponing some portion of the proceeding" or "by temporarily divesting an order of enforceability," the injunction that applicant seeks against the government is an order "directed at someone" that "governs that party's conduct." Nken, 556 U.S. at 428; see Respect Maine PAC, 562 U.S. at 996 (distinguishing stays from injunctions). To obtain the injunctive relief he seeks, applicant must thus satisfy an exceedingly high standard under which relief is warranted only if "the legal rights at issue are indisputably clear." Hobby Lobby Stores, Inc., 568 U.S. at 1403 (Sotomayor, J., in chambers); see p. 17, supra. Neither of applicant's two potential bases for review even satisfies this Court's stay standards, much less the stringent standards for an injunction.

A. The Court Of Appeals' Judgment Does Not Rest On The FDPA Issues On Which Applicant Will Seek Review

Applicant first contends (Appl. 9-11) that an injunction is warranted to allow future consideration of legal questions concerning the proper interpretation of Section 3596(a), for which he asserts a circuit conflict exists. No injunction is warranted because the court of appeals' judgment does not depend on any of those questions and, moreover, no such conflict exists.

1. The court of appeals correctly resolved two narrow categories of contentions against applicant. First, it determined that applicant had failed to establish that his execution would be inconsistent with six aspects of the state agency order (Order 710) that sets out the Arizona protocol. Appl. App. 8-12. Second, it determined that applicant had forfeited other contentions and, in the alternative, concluded that four of them would fail on the merits because they involved procedures other than those "effectuating death." Id. at 8 n.6, 12 n.8. The appellate judgment embracing those largely fact-bound rulings thus does not depend on any legal interpretation of Section 3596(a), let alone one warranting this Court's intervention.

With respect to applicant's contention that his execution would conflict with six provisions in Order 710, the court of appeals simply "assum[ed] without deciding" that applicant's own interpretation of Section 3596(a) was correct in two respects. See Appl. App. 6. First, it explicitly "assume[d] without deciding that the Department Order Manual [containing Order 710] constitutes 'law of the State' for purposes of the FDPA and [applicant's]

Judgment [of Conviction]." Ibid. Second, the court implicitly assumed arguendo that Section 3596(a)'s reference to the "manner" of implementing a sentence requires that the federal government follow not only the top-line method of execution specified in state law but also certain subsidiary procedures. And because the court assumed both legal issues in applicant's favor yet still rejected applicant's Order 710-based arguments on other (factbound) grounds, id. at 8-12, no resolution of those legal issues by this Court could result in a better outcome for applicant. As such, they provide no plausible basis for this Court's review.

The court of appeals separately determined that applicant is not entitled to relief based on various contentions that he forfeited, Appl. App. 8 n.6, 12 n.8, and applicant does not contest that forfeiture holding in this Court.[3] The court of appeals

[3] The court of appeals permissibly declined to consider matters insufficiently briefed on review, particularly given how applicant chose to conduct the appellate litigation. Applicant began his protocol challenge in district court on August 6 with a motion seeking to "enjoin the Government from attempting to execute [him]," D. Ct. Doc. 606, at 1; and filed a separate motion for an interim stay to allow adjudication of his merits challenge, D. Ct. Doc. 609. After the district court denied both motions in expedited proceedings, applicant appealed to the Ninth Circuit on August 13, just 13 days before his rescheduled execution. See D. Ct. Docs. 611-613, 618-619. But on appeal, applicant did not follow the simultaneous merits-and-stay course that he followed in district court. Applicant instead informed the court of appeals that he would "file an emergency motion," and the court accordingly ordered expedited briefing for his emergency motion to stay his execution. 8/13/20 C.A. Order. Applicant never filed a freestanding brief as appellant, nor did he move the court to expedite merits briefing, which, absent expedition, could not have completed in the 13 days before his execution date. See Fed. R. App. P. 31(a)(1) (briefing schedule). As a result, applicant put all his appellate eggs in one basket: his motion to stay his execution. In that context, the court of appeals permissibly

additionally determined, in the alternative, that four of those forfeited contentions would also fail on the merits because they involved state procedures that "are not pertinent to effectuating death" and thus "fall outside the scope of 18 U.S.C. § 3596(a)." Id. at 8 n.6. Section 3596(a), the court concluded, "incorporates only those state laws that prescribe the manner for 'implementation' of a death sentence," which, "at most," includes "state laws that set forth procedures for giving practical effect to a sentence of death." Id. at 7. There is no realistic prospect that this Court would grant review on that Section 3596(a) issue, because no resolution by this Court of that alternative ruling could alter the judgment below, which independently rests on applicant's litigation forfeiture.

2. Even if the meaning of Section 3596(a) were properly presented in this case, there is no reasonable probability that the Court would grant review. Less than two months ago, in a case that actually presented the FDPA issues that applicant invokes, this Court (with two Justices dissenting) denied a stay application and certiorari petition from the Protocol Cases decision in which the D.C. Circuit had divided three ways on those issues. See Bourgeois v. Barr, No. 19-1348 (June 29, 2020).

Applicant bases (Appl. 9) his contrary contention on his assertion that "the circuit courts are now split" on two questions: (1) "what constitutes 'state law' under the FDPA" and (2) "which

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treated the only adversarial briefing that could be timely completed as the briefing for applicant's appeal.

provisions of state protocols the Government is bound to follow." No such conflict exists.

First, applicant incorrectly invokes (Appl. 9-10) the D.C. Circuit's decision in Protocol Cases to demonstrate a division of authority over what constitutes the "law of the State," 18 U.S.C. 3596(a). The Protocol Cases majority (Judges Katsas and Rao) did not agree on the grounds for rejecting the inmates' claim that Section 3596(a) requires the government to "implement federal executions in the manner provided by state law." Protocol Cases, 955 F.3d at 112 (per curiam). Judge Rao concluded that the phrase "law of the State" requires compliance with state "statutes and formal regulations" having the "force of law." Id. at 129, 132 (Rao, J., concurring). Judge Kastas's interpretation did not require him to address that issue, id. at 113-122, but he agreed with Judge Rao that "the FDPA's reference to 'law of the State' covers only state statutes and binding regulations,'" id. at 124 n.10 (Katsas, J., concurring). Applicant asserts (Appl. 10) that the Ninth Circuit in this case "effectively endorsed an interpretation broader than that of the D.C. Circuit" by treating "portions of Arizona's protocol" in Order 710 as "law of the state." But as explained above, the court of appeals simply "assume[d] without deciding" that Order 710 "constitutes 'law of the State." Appl. App. 6. Such an "assum[ption]" plainly fails to give rise to a division of authority. And even if it had, this case would be an unsuitable vehicle to review that issue because applicant could not obtain a reversal by re-determining an assumption that was wholly in his favor.

Likewise, no conflict of authority is implicated by the court of appeals' alternative ruling (with respect to four forfeited contentions) that Section 3596(a) "at most" requires the federal government to follow "'only those [state] procedures that effectuate the death, including choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements,'" Appl. App. 7 (quoting Peterson v. Barr, 965 F.3d 549, 554 (7th Cir. 2020) (brackets in original), stay denied, No. 20A6 (July 14, 2020)). Section 3596(a)'s text governing the manner of "implementation of the sentence" of "death," 18 U.S.C. 3596(a), itself demonstrates that the provision applies only to matters that actually "implement[]" that "death." The district court and every other appellate judge to consider the question, including a unanimous panel of the Seventh Circuit and Judge Tatel in his D.C. Circuit dissent, thus agree with the court of appeals here that Section 3596(a) does not apply to procedures that do not effectuate death. See Peterson, 965 F.3d at 554; Protocol Cases, 955 F.3d at 151 (Tatel, J., dissenting).

B. The Court Of Appeals' Factbound Determination That Applicant Failed To Carry His Burden Of Showing That Equitable Relief Was Warranted Presents No Issue That Might Warrant Review

Applicant additionally contends (Appl. 11-12) that an injunction is warranted to allow future consideration of his contention that the court of appeals erroneously made adverse "factual findings" against him and considered a government declaration instead of "remand[ing] for factual development." The court of appeals simply determined that applicant had failed to carry his

own burden of establishing that the equitable relief he requested was warranted. Applicant has failed to show that that ruling deprived him of an "indisputably clear" right, and no reasonable probability exists that the Court will grant review on the question.

1. As the party who sought injunctive relief in district court, it was applicant's burden to show, at the very least, that he was "likely to succeed on the merits" of his FDPA claim. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (preliminary injunction); see Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam) ("clear showing" is required) (citation and emphasis omitted). But as the court of appeals held with respect to the issues properly presented on appeal, applicant failed to "carr[y] his burden of proving a 'reasonable probability' that his execution will be carried out in a manner inconsistent with Arizona law (assuming that the Department Order Manual is state law)." Appl. App. 12 (citation omitted). That failure was twofold. First, applicant failed to establish that the federal protocol itself is inherently inconsistent with Order 710. Even in this Court, applicant still fails to point to any pertinent provision of the federal protocol that requires action prohibited by Order 710, such that conducting his execution under the federal protocol would necessarily be inconsistent with Order 710. Second, applicant failed to show, as a factual matter, that the government's conduct of his execution under the federal protocol would be reasonably likely to result in actions inconsistent with Order 710. Those failures doom his request for an injunction.

The court of appeals did not engage in appellate factfinding, Appl. 11, in concluding that the federal protocol and the "procedures [in Order 710] on which [applicant] relies are largely indistinguishable," Appl. App. 12. The "four specific portions of Arizona's protocol" that applicant invokes, Appl. 12, concern the qualifications of personnel who place intravenous lines and the use of chemicals before their expiration date. Appl. App. 8-10. The court simply compared the written federal protocol and Order 710, identified "little difference" between the qualification requirements, id. at 8-9, and explained that the expiration-date requirements are "substantially the same," id. at 10. Failing to identify anything in the federal protocol that requires actions prohibited by Order 710, applicant instead speculated that "it is possible" that complying with the federal protocol could, in fact, permit action that would be inconsistent with the state provisions. Id. at 9; see id. at 10 (applicant "focus[es] on [such] possibility"); ibid. (noting applicant's argument that "it is possible" that government might not, in fact, "comply with its protocol"). But applicant's speculation was entirely unsupported by any evidentiary submissions. His district-court motion to enjoin his execution, like his request for a stay pending resolution of that motion, contained no relevant evidence to show such bare possibilities were reasonably probable. See D. Ct. Docs. 606 & Exs. A-F, 609. And because it was applicant's burden to make that factual showing to justify his request for injunctive relief, the court of appeals correctly determined that applicant had failed to "carr[y] his burden of proving a 'reasonable probability' that his execution

will be carried out in a manner inconsistent with Arizona law." Appl. App. 12 (citation omitted). That determination required no factual findings; applicant's empty evidentiary record left nothing specific to resolve.

Applicant appears to fault (Appl. 11) the court of appeals for considering a BOP declaration, which the government filed (as ordered by the court) to "confirm[] that [BOP] will adhere to [certain] requirements" as "counsel for the government [had already] represented" "[a]t oral argument." Appl. App. 32-33 (order). The court's opinion states that "[t]o the extent there is any difference between the federal and Arizona procedures with respect to the first four [matters above], [BOP] has provided a declaration certifying that it will comply with those procedures." Id. at 12. Applicant shows no error warranting review.

As the government explained when it filed the BOP declaration as ordered by the court of appeals, the dispositive point is that "[applicant] failed to carry his burden of establishing a clear entitlement to equitable relief by * * * failing to proffer evidence in either the district court or [even the court of appeals] clearly showing a likelihood of non-speculative, significant irreparable harm warranting an injunction." Appl. App. 34 (emphasis added). Having failed to show that the federal protocol is itself inconsistent with the relevant portions of Order 710 and having failed to submit any evidence to suggest that the BOP's actual application of the federal protocol would be reasonably likely to result in actions inconsistent with Order 710, there is no reason for this Court to review the court of appeals' holding

that applicant failed to "carr[y] his burden" in that regard. Id. at 12.[4]

And to the extent applicant suggests (Appl. 11-12) that a "remand for factual development" was needed to allow him to develop the factual record, applicant has only himself to blame for his factual deficiencies. Applicant withdrew his earlier protocol challenge years ago and delayed filing his current challenge until August 6, 2020, a mere 20 days before his rescheduled execution. See pp. 7-11, supra; cf. 8/15/19 Tr. 9, 13 (D. Ct. Doc. 606-6) (counsel's August 2019 description of "discovery" over the then-"new lethal injection protocol" in "the DC [protocol] case" that applicant was supposedly rejoining "before much longer").

II. IN ADDITION, APPLICANT FAILS TO ESTABLISH AN ENTITLEMENT TO EQUITABLE RELIEF WITH RESPECT TO THE LEGAL ISSUES THAT THE COURT OF APPEALS ASSUMED IN HIS FAVOR

An injunction barring applicant's execution would not be warranted for the independent reason that he has failed to show any reasonable likelihood that he will prevail on at least two additional legal questions necessary to his FDPA claim, much less the required "indisputably clear" right needed to justify that relief. Although the court of appeals assumed those questions in his favor in denying his request for relief below, this Court would

[4] The government's opposition to applicant's en banc rehearing petition explained that the BOP declaration confirming the government's prior representations did not "introduce new evidence" and, even if it did, such submissions may be considered in contexts such as those presented here. C.A. Doc. 23, at 16-17 (Aug. 21, 2020). The application provides no basis to question those contentions.

need to resolve them to justify an affirmative grant of equitable relief.

A. First, as the government has outlined at length in this Court in prior briefing, the FDPA's directive to implement a federal death "sentence in the manner prescribed by the law of the State in which the sentence is imposed," 18 U.S.C. 3596(a), requires the federal government to follow only a state's general, top-line method of execution, not additional procedural details. See, e.g., Gov't Br. in Opp. at 14-24, Bourgeois v. Barr, No. 19-1348 (June 19, 2020). Judge Katsas's concurring opinion in Protocol Cases explains thoroughly that "[a]ll indicators of the FDPA's meaning -- statutory text, history, context, and design -- point to [this] conclusion." 955 F.3d at 114; see id. at 114-124. And the three Justices who have addressed the issue have indicated that the government's position is "likely to prevail when this question is ultimately decided." Barr v. Roane, 140 S. Ct. 353, 353 (2019) (statement of Alito, J.).

1. The "manner" provision of the FDPA traces its roots to the Crimes Act of 1790, which provided that "the manner of inflicting the punishment of death[] shall be by hanging." Act of Apr. 30, 1790, Ch. 9, § 33, 1 Stat. 119. All agree that "'[m]anner' as used in this phrase clearly means only the general method of execution -- hanging." Appl. App. 19 (emphasis added).

After more than 140 years under the Crimes Act of 1790, Congress in 1937 changed the prescribed "manner" of federal executions from hanging to the "the manner prescribed by the laws of the State within which the sentence is imposed." Act of June

19, 1937 (1937 Act), Ch. 367, 50 Stat. 304. No indication exists that Congress, by retaining the statutory term "manner," broadened its scope beyond its long-settled meaning in the federal execution context -- i.e., as a reference to "the general method of execution." Appl. App. 19. To the contrary, "if a word is obviously transplanted from another legal source," this Court presumes that it "brings the old soil with it." Hall v. Hall, 138 S. Ct. 1118, 1128 (2018) (citation omitted).

The history and context of the 1937 Act confirm that presumption. The Act was "prompted by the fact that" States had adopted "more humane methods of execution, such as electrocution, or gas," and the Attorney General proposed that Congress "change its law in this respect." Andres v. United States, 333 U.S. 740, 745 n.6 (1948) (emphases added; citation omitted). Accordingly, BOP's contemporaneous understanding was that the 1937 Act's "'manner'" provision "refers to the method of imposing death, whether by hanging, electrocution, or otherwise, and not to other procedures incident to the execution prescribed by the State law." D. Ct. Doc. 611-6, at 3 (emphases added). And this Court has described the 1937 Act as adopting "the local mode of execution," which it equated with the general method of execution -- e.g., "death by hanging." Andres, 333 U.S. at 745 & n.6.

In enacting the FDPA, Congress "carried forward the relevant language and" substance of the 1937 Act. Protocol Cases, 955 F.3d at 117 (Katsas, J., concurring); accord id. at 148 (Tatel, J., dissenting) ("By using virtually identical language in FDPA section 3596(a), Congress signaled its intent to continue the same

system" as the 1937 Act). The FDPA therefore requires what the 1937 Act required: compliance with "the local mode of execution" -- such as "hanging" or lethal injection -- but not all procedural details of state law. Andres, 333 U.S. at 745 & n.6. Because Arizona's prescribed method of execution is lethal injection, Ariz. Rev. Stat. Ann. § 13-757(A) (2009), and the federal government plans to execute applicant in that manner, 28 C.F.R. 26.3(a)(4), his execution is entirely consistent with the FDPA.

2. In advocating for a broader reading, applicant relies (Appl. 13-14) on other terms in the FDPA, including "implementation" and "prescribe." But those words cannot alter the meaning of the critical term they modify, "manner," which (as explained above) has referred only to the general method of execution in this statutory context for 230 years. See Protocol Cases, 955 F.3d at 122-123 (Katsas, J., concurring).

Applicant also points (Appl. 17) to statements by Attorney General Janet Reno at the time of the FDPA's enactment indicating that the statute would restore the system under the 1937 Act. But that does not undermine the government's position. As noted above, the 1937 Act required only compliance with a State's top-line method of execution. And the federal regulation prescribing execution by lethal injection, 28 C.F.R. 26.3(a)(4), allows the federal government to comply with the top-line method of execution currently prescribed by every State, see Baze v. Rees, 553 U.S. 35, 42 n.1 (2008) (plurality opinion).

Applicant notes (Appl. 17-18) that the Department of Justice sought to amend the FDPA to codify a single federal method of

execution. But those proposals say nothing about the procedures that must be applied in a federal execution; they reflected the fact that, until about a decade ago, some States prescribed top-line methods of execution other than lethal injection. See, e.g., Office of Justice Programs, U.S. Dep't of Justice, Capital Punishment 1994, at 5 tbl.2 (Feb. 1996), https://www.bjs.gov/content/pub/pdf/cp94.pdf (noting that 10 States required execution by electrocution in 1994). Now that all States that authorize the death penalty, including Arizona, provide for execution by lethal injection, the Department has stopped proposing amendments to the FDPA to address this concern.

Finally, applicant has no answer to the fact that his "interpretation would lead to results that Congress is unlikely to have intended." Roane, 140 S. Ct. at 353 (statement of Alito, J.). He does not dispute that his reading "would require the BOP to follow procedures that have been attacked as less safe than the ones the BOP has devised (after extensive study)." Ibid. Nor does he dispute that "individual states could effectively obstruct the federal death penalty." Protocol Cases, 955 F.3d at 120 (Katsas, J., concurring). In addition to his failure to provide a tenable account of the FDPA's text and history, he provides no reason to conclude that Congress would have subjected federal executions to de facto vetoes by States in this area of sensitive federal authority.

In sum, because the government's reading of the FDPA is "likely to prevail when this question is ultimately decided," Roane, 140 S. Ct. at 353 (statement of Alito, J.), applicant falls

far short of the high showing required to obtain the extraordinary relief he seeks here.

B. Moreover, even assuming "manner" encompasses some subsidiary state-law procedures, applicant's request for injunctive relief would turn on whether Order 710, which specifies the Arizona protocol, qualifies as a "law of the State" that the federal government must follow. See 18 U.S.C. 3596(a). Notably, applicant does not challenge the district court's holding that only state statutory law and formal state regulations having the force of law could qualify, Appl. App. 23-25 (citing Protocol Cases, 955 F.3d at 129, 134 (Rao, J., concurring)). See Appl. 13-18. But the district court determined that Order 710 does not so qualify, Appl. App. 25-28; applicant cannot obtain injunctive relief on the mere "assum[ption]" that it does, id. at 6; and yet applicant provides this Court with no argument to show that Order 710 constitutes a "law of the State." That failure alone is sufficient reason to deny his request for an injunction.

In any event, the district court correctly determined that Order 710 is not a "law of the State" that might govern petitioner's execution. Appl. App. 28. The Arizona Administrative Procedure Act, Ariz. Rev. Stat. Ann. §§ 41-1001 et seq. (2018), defines a "rule" governed by its provisions as an agency statement that can, among other things, "prescribe[] law," § 41-1001(19), but it expressly excludes from its provisions "[r]ules made by the state department of corrections," § 41-1005(22). Arizona Department of Correction orders like Order 710 thus "are not included in the Arizona Administrative Code" and simply provide

instructions, developed in an "entirely internal" process, to the Department's employees. Appl. App. 26 n.7. Indeed, before 2017, Order 710 expressly said that its provisions did not "create any enforceable legal rights or obligations." Id. at 26.

Applicant's only argument for concluding that Order 710 is a state "law" rests on the fact that a federal district court in June 2017 entered a consent decree (D. Ct. Doc. 606-4, at 17-20) based on a stipulated agreement (id. at 2-11) that the Arizona Department of Corrections had entered to resolve claims alleging that it had violated the Eighth and Fourteenth Amendments by reserving "excessive discretion in its execution procedures," id. at 3. The state agency agreed in the settlement contract not to take certain actions in connection with state executions, id. at 8-10, and the district court dismissed the plaintiffs' settled claims in an order providing that "an injunction shall immediately issue" if any of the plaintiffs or "any other current or future prisoner sentenced to death in the State of Arizona" shows that the agency intended to engage or had engaged in conduct prohibited by the settlement. Id. at 18-19. The agency's 2017 revision to Order 710 thus incorporated provisions to "satisf[y]" that contractual obligation. Id. at 7. And in the face of the enforceable agreement, the agency removed language from Order 710 that had "disclaim[ed] the creation of rights or obligations," id. at 18.

As the district court recognized, the fact that the state agency entered a "contract" enforceable by all state death-row inmates that limited the agency's discretion in conducting

executions does not show that Order 710 is "law of the State." Appl. App. 27-28. It simply reflects that its settlement contract is enforceable. Likewise, if the federal court had entered the settlement contract as a consent decree that could directly be enforced by the court, such a federal court order would plainly not create "law of the State." Order 710 did not constitute "law of the State" before the 2017 settlement agreement, and the existence of such an enforceable contract cannot alter the fundamental nature of the agency Order. Cf. id. at 27 (noting that applicant cites "no authority for the proposition that a settlement agreement between litigants creates Arizona law").

III. EQUITABLE CONSIDERATIONS WEIGH HEAVILY AGAINST INJUNCTIVE RELIEF

In all events, the application should be denied because the balance of equities weighs in favor of permitting the government to carry out applicant's lawful sentence.

A. This Court has repeatedly emphasized that "[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)). Once post-conviction proceedings "have run their course," "an assurance of real finality" is necessary for the government to "execute its moral judgment." Calderon v. Thompson, 523 U.S. 538, 556 (1998). That interest in carrying out applicant's sentence is magnified by the heinous nature of his crimes and the length of time that has passed since his sentence. Delaying applicant's execution "would frustrate the [federal government's]

legitimate interest in carrying out a sentence of death in a timely manner." Baze, 553 U.S. at 61 (plurality opinion).

B. The last-minute nature of applicant's challenge also counsels strongly against injunctive relief. This Court has explained that "[a] court considering a stay must * * * apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" Hill, 547 U.S. at 584 (quoting Nelson v. Campbell, 541 U.S. 637, 650 (2004)). "Last-minute stays should be the extreme exception, not the norm." Bucklew, 139 S. Ct. at 1134 (noting that this Court has reversed as an abuse of discretion a stay of execution where the inmate "waited to bring an available claim until just 10 days before his scheduled execution"). Yet applicant filed his protocol challenge a mere 20 days before his rescheduled execution, after withdrawing his earlier challenge and delaying for years. See pp. 7-11, supra. At the very least, petitioner had no reason for delay after the government released its current amended protocol in July 2019.[5]

Applicant contends (Appl. 20) that, as the district court concluded, he did not unduly delay. But he errs in contending he

[5] A further factor counseling against a stay is the questionable procedural mechanism through which applicant is challenging the procedures for carrying out his execution. His motion to enforce his criminal judgment before the sentencing court has no basis in precedent, is contrary to the procedural limits on Administrative Procedure Act and habeas actions, and allowed him to avoid the substantive holdings of the D.C. and Seventh Circuits (which would have governed his original challenge in Robinson or a habeas action, respectively).

did not need to bring his challenge while a court order stayed his execution pending consideration of another claim. Appl. App. 17. A litigant, of course, is able simultaneously to pursue multiple claims in parallel, and any rule that a death-row inmate may present claims in a serial fashion would be an invitation to extensive litigation delay. That is particularly true in this context, where allowing an inmate to begin a new challenge only after a stay of execution based on another claim has lifted would result in last-minute emergency litigation of the sort that this Court has repeatedly discouraged. Likewise, there is no merit to the suggestion that petitioner's challenge was previously "[un]ripe" because government counsel stated (in a 2019 hearing about other matters) that he was not prepared to discuss whether applicant's execution would "follow Arizona state procedures." Ibid. The district court itself recognized that nothing in applicant's case then raised the issue, and government counsel stated that the government would respond if the matter were raised by applicant. See p. 9, supra.

C. Applicant's other timing contentions are unavailing. He contends simultaneously that the government scheduled his execution too quickly yet too slowly. First, he complains (Appl. 20) that the government rescheduled his execution "with just 28 days' notice," but he does not dispute that the relevant regulation requires only 20 days' notice, 28 C.F.R. 26.4(a). His allegation (Appl. 21) of a "rush toward an execution," moreover, is difficult to credit given that the government first scheduled his execution more than 13 months ago, more than 16 years after his death

sentence. See Appl. App. 2-3. To the extent applicant desires more time to litigate his FDPA claim, he has only himself to blame. See pp. 7-11, 28, supra. Notwithstanding his profound delay, applicant received extensive review in the weeks since he brought his claim, including oral argument in both the district court and the court of appeals, with both courts issuing thorough and well-reasoned written opinions rejecting his contentions.

Reversing course, applicant accuses (Appl. 20-21) the government of "delay" while it developed the lethal-injection protocol it plans to use this week. But the government "can hardly be faulted for proceeding with caution" in selecting a new protocol after a "long and successful campaign of obstruction by opponents of capital punishment" resulted in the unavailability of the lethal agent it had previously employed. Protocol Cases, 955 F.3d at 128 (Katsas, J., concurring). Now that BOP has adopted a protocol designed to result in a humane and dignified execution, the "government's care in selecting an available and effective execution substance does not diminish the importance of carrying out" applicant's lawfully imposed sentence promptly. Ibid.

D. Finally, applicant makes (Appl. 21-22) several meritless allegations that have nothing to do with the claims in his application. He first suggests (Appl. 21) that the July 2020 executions of Daniel Lee and Wesley Purkey were "chaotic" in part because they were scheduled for 4:00 p.m. on July 13 and 15, respectively, but were not conducted until around 8:00 a.m. on the next mornings. As this Court is aware, however, that timing was driven primarily by the fact that the district court in both cases

did not rule on the key preliminary-injunction motions until the morning of the executions, thereby requiring the parties, the court of appeals, and this Court to address the issues on an expedited basis late into the night. See Barr v. Lee, No. 20A8 (July 14, 2020) (per curiam), slip op. 1.

Applicant also suggests (Appl. 21) that the government "cut corners" and did not "follow[] court orders" in the Lee and Purkey executions. That is flatly untrue. With respect to Lee, the government has previously explained, see Reply Br. at 13-14 n.*, Barr v. Purkey, No. 20A10 (filed July 15, 2020), that the Eighth Circuit vacated a stay in Lee's case nearly six weeks before the scheduled execution. See United States v. Lee, No. 19-3618 (June 1, 2020). That stay was therefore no longer operative, and Lee himself represented to this Court that an injunction on his protocol claim was necessary to prevent his imminent execution. See Br. in Opp. at 1, Lee, supra, No. 20A8 (filed July 13, 2020). Nevertheless, after this Court had cleared the way and the execution process had begun, Lee's counsel claimed for the first time that it was necessary to obtain the Eighth Circuit's mandate. Out of an abundance of caution, the government did so. Contrary to applicant's assertion (Appl. 21), that careful step was in fact the antithesis of "cut[ting] corners" or defying "court orders."

The government exercised similar care in Purkey's case. Shortly after this Court cleared the way for his execution by vacating, inter alia, a preliminary injunction that had been entered on his competence claim, see Barr v. Purkey, No. 20A9 (July 16, 2020), Purkey's counsel filed suit in the Southern District of

Indiana reasserting the same claim and seeking a stay of execution, see Purkey v. Warden, No. 20-cv-365 (July 16, 2020), slip op. 1. The government briefly paused the execution process to respond, as directed by the district court. The court denied the stay motion, explaining that Purkey's claim constituted "an abuse of the writ," and lamenting his "counsel's procedural gamesmanship." Id. at 2. The government then resumed the execution process, which was completed shortly after Purkey -- in his final words -- expressed regret to the family of his murder victim, thereby undermining his counsel's central claim that he did not understand the reason he was being executed.

CONCLUSION

The application for a stay of execution should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

AUGUST 2020