No. 19A1050

IN THE SUPREME COURT OF THE UNITED STATES

IN RE FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

JAMES H. ROANE, JR., ET AL., APPLICANTS

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.

(CAPITAL CASE)

RESPONSE IN OPPOSITION TO APPLICATION FOR A STAY OF THE MANDATE PENDING DISPOSITION OF THE PETITION FOR A WRIT OF CERTIORARI AND FOR AN ADMINISTRATIVE STAY

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The Solicitor General, on behalf of respondents William P. Barr et al., respectfully submits this response to petitioners' application for a stay of the mandate pending disposition of their petition for a writ of certiorari, No. 19-1348 (filed June 5, 2020), and for an administrative stay. Petitioners -- each of whom was convicted more than 15 years ago of shockingly brutal murders of children in violation of federal law -- principally claim that the federal government can execute their federally imposed sentences for federal crimes only in keeping with the granular procedural details of state execution protocols. Petitioners' stay requests should both be denied.

First, an administrative stay to consider petitioners' stay application is not remotely warranted. The mandate has now issued, App., infra, 1a; Appl. App. 1a, and the government is no longer subject to the injunction barring petitioners' executions, C.A. App. A91.[1] The government will now begin preparing to carry out those sentences, including by shortly rescheduling dates for the executions. But as the rescheduled dates will indicate, the government will not seek to execute any of petitioners for at least four weeks. That approach will give this Court ample time to consider petitioners' stay application. In addition, petitioners have not acted with the "dispatch" this Court has indicated is warranted in this capital case. 140 S. Ct. 353, 353. Although the court of appeals denied rehearing en banc on May 15, petitioners took three weeks to file a petition for a writ of certiorari on June 5, have not sought expedited consideration of that petition, and did not ask this Court for a stay until June 10 -- 48 hours before the mandate was set to issue. Nevertheless, given the potential need for expedited resolution, the government will file a brief in opposition to the petition by this Friday, June 19 (or on any other schedule this Court directs), so that the Court may consider the petition at its June 25 conference if it wishes. This timing obviates any need for an administrative stay.

[1] Petitioners' application to stay the mandate is accordingly moot. The government, however, assumes petitioners will ask this Court to construe their application as a request to recall and stay the mandate. The government responds accordingly.

Second, petitioners have not made the showing required for a stay pending disposition of their petition for a writ of certiorari. Most significantly, petitioners cannot show "a fair prospect" that the Court will reverse the decision below. Maryland v. King, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (citation omitted). In denying the government's request for a stay or vacatur of the injunction last December, three Justices stated that the government "is very likely to prevail" on the central question in this case. 140 S. Ct. at 353 (statement of Alito, J.). Petitioners' prospect of persuading five of the remaining six Justices has only diminished since that time, because the court of appeals after a thorough review concluded that petitioners' claims fail even under a more generous interpretation of the controlling statute. See Pet. App. 10a-11a (per curiam).

The effect of granting petitioners' requested stay would thus likely be to delay their executions by a year or more, even though they have no substantial prospect of obtaining reversal on the merits. This Court has refused to permit such "unjustified delay" in light of the public's "'important interest in the timely enforcement of'" capital sentences. Bucklew v. Precythe, 139 S. Ct. 1112, 1133-1134 (2019) (citation omitted). Further delay would be especially unjustified here because petitioners do not contest their death sentences, but instead allege abstract injuries stemming from minor variations among humane execution

procedures. These lawful sentences should be promptly carried out. Petitioners' stay application should be denied.

STATEMENT

Petitioners are federal death-row inmates, each of whom was "convicted in federal court more than 15 years ago for exceptionally heinous murders" in violation of federal law. 140 S. Ct. at 353 (statement of Alito, J.). Petitioner Lee drowned a family, including an eight-year old girl, in a bayou during a robbery to fund a white-supremacist racketeering organization. Pet. App. 43a (Katsas, J., concurring). Petitioner Purkey kidnapped, raped, murdered, and dismembered a 16-year-old girl after transporting her across state lines. Id. at 44a. Petitioner Honken murdered two prospective federal witnesses, along with one of their girlfriends and her two daughters. Ibid. Petitioner Bourgeois abused, tortured, and murdered his two-year-old daughter on a military base. Id. at 45a. The federal government initially set their executions for dates in December 2019 and January 2020, but the district court entered a preliminary injunction. Id. at 101a-119a. The court of appeals reversed on the merits and denied rehearing en banc. Id. at 1a-100a, 127a-129a.

A. STATUTORY AND REGULATORY BACKGROUND

1. From its founding, the federal government has employed capital punishment to deter and punish the most serious federal crimes. The Crimes Act of 1790, passed by the First Congress and

signed by President Washington, "made a number of" federal offenses "punishable by death." Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019); see Act of Apr. 30, 1790, ch. 9, §§ 1, 3, 8-10, 1 Stat. 112-114. Congress has since expanded the range of federal crimes punishable by death to some 60 offenses. See U.S. Dep't of Justice, Criminal Resource Manual § 69, https://go.usa.gov/xwTXS (Jan. 17, 2020). The United States has used that authority to prosecute and execute the most notorious federal criminals throughout the Nation's history, from pirates and slave traders in the nineteenth century, to spies and murderers in the twentieth century, to Timothy McVeigh in the twenty-first century. See U.S. Marshals Service (USMS), History -- Historical Federal Executions, https://go.usa.gov/xwTnf (USMS History).

2. Just as federal statutes have long permitted capital punishment, they have long prescribed the means for imposing it.

a. The Crimes Act of 1790 provided that "the manner of inflicting the punishment of death[] shall be by hanging the person convicted by the neck until dead." § 33, 1 Stat. 119. It is undisputed that the "'manner'" provision of that statute -- which "governed federal executions for over 140 years" -- prescribed only the general method of execution ("'hanging'"), not subsidiary details like the length of the rope or the placement of the knot. Pet App. 3a (per curiam) (citation omitted); see id. at 16a-18a (Katsas, J., concurring); C.A. Oral Arg. 1:19:00.

b. In 1936, Attorney General Homer Cummings submitted a letter to Congress explaining that many States had "adopted more humane methods" of execution, "such as electrocution." H.R. Rep. No. 164, 75th Cong., 1st Sess. 2 (1937) (1937 Report). He proposed that the federal government "change its law in this respect." Ibid. Congress responded in 1937 by amending the longstanding provision that the "manner of inflicting the punishment of death shall be by hanging," 18 U.S.C. 542 (1934), to direct instead that the "manner of inflicting the punishment of death shall be 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. The statute further provided that "[i]f the laws of the State within which sentence is imposed make no provision for the infliction of the penalty of death," the sentencing court would "designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof." Ibid. Congress also authorized the federal government to pay to "use available State or local facilities and the services of an appropriate State or local official." Ibid.

c. Congress repealed the 1937 Act as part of broader sentencing reforms in 1984, but "left intact the underlying capital offenses." Pet. App. 4a (per curiam). The Department of Justice responded by issuing a rule providing that "[l]ethal injection will be the method of execution" for federal capital crimes. 57

Fed. Reg. 56,536, 56,536 (Nov. 30, 1992); see 58 Fed. Reg. 4898 (Jan. 19, 1993); 28 C.F.R. 26.3(a)(4). The Department explained that, under the 1937 Act, "executions in [f]ederal cases were to be conducted in the manner prescribed in the state in which the sentence was imposed," and lethal injection "increasingly is the method of execution in the states." 57 Fed. Reg. at 56,536.

A year after the Department finalized its 1993 rule, Congress enacted the Federal Death Penalty Act of 1994 (FDPA), Pub. L. No. 103-322, Tit. VI, 108 Stat. 1959. As relevant here, the FDPA readopted the 1937 Act's framework for executing federal death sentences. Specifically, the FDPA provides 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." 18 U.S.C. 3596(a). Like the 1937 Act, the FDPA directs that "[i]f the law of the State does not provide for implementation of a sentence of death, the [sentencing] court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law." Ibid. Also like the 1937 Act, the FDPA gave the federal government the option to use (at its own expense) "appropriate State or local facilities" and "the services of an appropriate State or local official" in federal executions. 18 U.S.C. 3597(a).

The federal government has executed three inmates since the enactment of the FDPA: Timothy McVeigh and Juan Garza in 2001, and Louis Jones in 2003. See USMS History. Each execution occurred in the federal execution chamber at the U.S. Penitentiary in Terre Haute, Indiana, and was conducted by lethal injection under the 1993 regulation. Ibid. In each execution, the government used a combination of three drugs: sodium thiopental, pancuronium bromide, and potassium chloride. Pet. App. 132a-134a; see Baze v. Rees, 553 U.S. 35, 53 (2008) (plurality opinion).

3. The three-drug combination the federal government used in the 2001 and 2003 executions became unavailable after "anti-death-penalty advocates induced the company that manufactured sodium thiopental to stop supplying it for use in executions." Bucklew, 139 S. Ct. at 1120. The Federal Bureau of Prisons (BOP) then undertook an "extensive study" to identify an alternative. Pet. App. 6a (per curiam). After considering multiple options, BOP recommended an addendum to the federal execution protocol -- a lengthy document detailing many aspects of execution procedure, id. at 140a-202a -- to provide for use of a single drug, pentobarbital, id. at 132a-139a. BOP noted that pentobarbital is used in many state lethal-injection protocols that have collectively accounted for more than 100 executions in recent years, that numerous courts (including this Court in Bucklew) have upheld use of pentobarbital against Eighth Amendment and related

challenges, and that use of pentobarbital has not caused reported complications in state executions. Id. at 135a-136a.

In addition to specifying pentobarbital as the lethal agent, the protocol addendum provides details about the personnel conducting the execution, the arrangement of and dosages in the syringes, procedures for strapping the prisoner to the execution table, and instructions for accessing the prisoner's veins. Pet. App. 210a-213a. The addendum states that it may be "modified at the discretion of the" BOP Director "(1) [to] comply with specific judicial orders; (2) based on the recommendation of on-site medical personnel utilizing their clinical judgment; or (3) as may be required by other circumstances." Id. at 210a; see id. at 144a (similar language applicable to the rest of the protocol).

B. PRIOR PROCEEDINGS

1. After issuing the protocol addendum in July 2019, BOP scheduled petitioners' executions for dates in December 2019 and January 2020. Pet. App. 101a-102a. Petitioners sought to enjoin their executions on multiple grounds, including claims that the amended protocol violates the FDPA's "manner" of execution provision, 18 U.S.C. 3596(a); the notice-and-comment requirement of the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., 5 U.S.C. 701 et seq.; provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq., and Controlled Substances

Act, 21 U.S.C. 801 et seq.; and the First, Fifth, Sixth, and Eighth Amendments. Pet. App. 8a (per curiam).

On November 20, 2019, the district court granted a preliminary injunction prohibiting the government from executing petitioners. Pet. App. 101a-119a; see C.A. App. A91. The court held that petitioners had demonstrated a likelihood of success on a single ground: the federal protocol conflicts with the FDPA's requirement that federal executions be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a); see Pet. App. 108a. The court acknowledged that each of the relevant States in petitioners' cases "permit[s] or require[s]" execution by lethal injection. Pet. App. 113a.[2] But the court interpreted the FDPA to require the federal government not simply to use lethal injection as prescribed by the relevant States, but also to follow all "procedural details" employed by the relevant States in their executions, down to "how the intravenous catheter is to be inserted." Id. at 110a, 114a.

2. The government moved for an emergency stay or vacatur of the preliminary injunction in the court of appeals, which denied

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[2] Petitioners Lee, Purkey, and Bourgeois were convicted by federal district courts in Arkansas, Missouri, and Texas, respectively. Pet. App. 113a. Each of those States provides for execution by lethal injection. Ibid. Petitioner Honken was convicted by a federal district court in Iowa, a State that does not have a death penalty. Id. at 113a n.4. The sentencing court in his case designated Indiana -- which provides for execution by lethal injection -- as the "death penalty state" for purposes of Honken's execution. Ibid.; see 18 U.S.C. 3596(a).

the motion, Pet. App. 122a-123a, and then in this Court, 140 S. Ct. at 353. The Court denied the government's application on December 6, 2019, but expressed its expectation that the court of appeals would render its decision with "appropriate dispatch." Ibid.

Justice Alito, joined by Justices Gorsuch and Kavanaugh, issued a statement indicating that the government "has shown that it is very likely to prevail when" the FDPA "question is ultimately decided." 140 S. Ct. at 353. Justice Alito explained that "there is strong evidence that" the district court's "reading is not supported either by the ordinary meaning of" the terms "'manner'" or "'method,'" or "by the use of the term 'manner' in prior federal death penalty statutes." Ibid. He added that the district court's "interpretation would lead to results that Congress is unlikely to have intended." Ibid. In particular, he noted that the district court's 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); it would demand that the BOP pointlessly copy minor details of a State's protocol; and it could well make it impossible to carry out executions of prisoners sentenced in some States." Ibid. Justice Alito also stated that he saw "no reason why the Court of Appeals should not be able to decide this case, one way or the other, within the next 60 days." Ibid.

3. On April 7, 2020, the court of appeals vacated the preliminary injunction and directed entry of judgment for the

government on petitioners' FDPA and notice-and-comment claims. Pet. App. 1a-12a (per curiam). Judges Katsas and Rao issued concurring opinions explaining their reasoning for reaching that result. Id. at 13a-48a, 49a-85a. Judge Tatel dissented with respect to the FDPA claim but did not address the notice-and-comment claim. Id. at 86a-100a.[3]

a. Judges Katsas and Rao agreed that "the district court misconstrued the FDPA" by interpreting it to require "the federal government to follow all the subsidiary details set forth in state execution protocols." Pet. App. 2a (per curiam). In Judge Katsas's view, the FDPA's directive that the federal government implement a federal death sentence "in the manner prescribed by the law of the State," 18 U.S.C. 3596(a), means the federal government must "follow the method of execution provided by the law of the" relevant State, but "does not require federal executions to follow the 'additional procedural details' invoked by the district court," Pet. App. 15a (emphasis added). Because every State relevant to petitioners' cases provides for lethal injection as a method of execution, Judge Katsas concluded that the federal protocol complies with the FDPA. Id. at 14a, 38a.

Judge Rao agreed that the protocol "is consistent with the FDPA" on a different rationale. Pet. App. 49a. In her view, the FDPA requires the government to follow "execution procedures

[3] The court of appeals did not address petitioners' other claims. Pet. App. 12a (per curiam).

enacted or promulgated by states as part of their binding law," but not "aspects of a state execution procedure that were not formally enacted or promulgated." Id. at 57a-58a, 63a (emphasis added). Petitioners' claims fail under her reading, she explained, because "[f]ew of the procedural details" they identify as incorporated by the FDPA "carry the force of law," and, in any event, the federal protocol "allows departures as needed to comply with state law." Id. at 78a, 81a; see id. at 210a.

Judge Tatel agreed with petitioners that the FDPA "requires federal executions to be carried out using the same procedures that states use to execute their own prisoners -- procedures set forth not just in statutes and regulations, but also in protocols issued by state prison officials pursuant to state law." Pet. App. 87a. In his view, the state procedures that the federal government must follow in executing a federal inmate include "choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements" -- as well as, potentially, "color-coding syringes," although he acknowledged the latter could implicate "line-drawing challenges." Id. at 99a.

b. The court of appeals also rejected petitioners' claim that the APA required the government to conduct notice-and-comment rulemaking before adopting the protocol. Pet. App. 11a-12a (per curiam). Judges Katsas and Rao agreed that the protocol is a "rule[] of agency organization, procedure, or practice exempt from

the APA's requirements for notice-and-comment." Id. at 12a. Judge Katsas separately concluded that the protocol was also exempt from those requirements as a general policy statement. Id. at 40a-42a. Judge Tatel did not address the notice-and-comment claim.

c. Judge Katsas concluded that the preliminary injunction should be vacated for the additional reason that "the district court's equitable balancing constituted an abuse of discretion." Pet. App. 42a. He emphasized that "there is no dispute that [petitioners] may be executed by lethal injection, nor any colorable dispute that pentobarbital will cause anything but a swift and painless death." Id. at 47a. Petitioners' claims, he concluded, are "designed neither to prevent unnecessary suffering nor to ensure that needles are properly inserted into veins," but rather "to delay lawful executions indefinitely" -- an objective federal courts "should not assist." Id. at 48a.

4. The court of appeals denied petitioners' request for rehearing en banc on May 15, 2020. Pet. App. 127a-128a. Although no judge called for a vote, Judge Tatel noted that he would have supported en banc review but for this Court's expectation that the appeal would be resolved with dispatch. Id. at 129a.

Petitioners asked the court of appeals to stay the mandate for fourteen days pending the filing and disposition of a petition for a writ of certiorari. C.A. Mot. to Stay Mandate 1. Rather than granting that request, the court ordered on May 22, 2020,

"that the Clerk is directed to issue the mandate on June 8, 2020." Pet. App. 121a.

Petitioners waited until June 5 to file a petition for a writ of certiorari (No. 19-1348), which they neither moved to expedite nor accompanied with a stay application. Instead, on June 7, petitioners asserted in the court of appeals that it should "continue[] the stay" of the mandate "'until the Supreme Court's final disposition'" of their petition. Rule 41 Status Report 2 (quoting Fed. R. App. P. 41(d)(2)(B)(ii)). The government opposed, noting that the court had not granted a stay of the mandate pending disposition of a petition for certiorari, but had simply extended the date of the mandate's issuance. The court of appeals rejected petitioners' position without dissent, explaining that its "May 22 order was clear: it stayed issuance of the mandate until June 8, 2020, and it did not state that the mandate was stayed 'pending the filing of a petition for a writ of certiorari.'" Appl. App. 1a (quoting Fed. R. App. P. 41(d)(1)). The court nevertheless extended the time for issuance of the mandate by four days, to "June 12, 2020, at 5:00 p.m." Ibid.

5. Petitioners filed their application in this Court on June 10, 2020. The court of appeals, pursuant to its order, issued the mandate on June 12, 2020. App., infra, 1a; see Appl. App. 1a.

ARGUMENT

Petitioners request (Appl. 4, 36) a stay pending this Court's disposition of their petition for a writ of certiorari and an administrative stay pending disposition of that stay request. Both requests should be denied. As petitioners emphasized to this Court last December, stay relief "is granted only in 'extraordinary cases.'" Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation omitted); see 19A615 Opp. 1-2, 13. To obtain a stay pending disposition of their petition for a writ of certiorari, petitioners "must demonstrate (1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." Maryland v. King, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (brackets, citation, and internal quotation marks omitted). "Even when [all those conditions] exist," a stay remains a matter of "sound equitable discretion" that "'requires * * * a clear case and a decided balance of convenience.'" Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302, 1304-1305 (1991) (Scalia, J., in chambers) (citation omitted).

Petitioners fall far short of satisfying those factors here. As an initial matter, an administrative stay is unnecessary and unwarranted. The court of appeals has issued the mandate, see

App., infra, 1a, and the government will shortly reschedule petitioners' executions. But the government will not execute petitioners for at least four weeks. That schedule reflects operational constraints and will allow this Court ample time to review petitioners' stay application. In addition, the government will file its brief in opposition to the petition for a writ of certiorari by this Friday, June 19 (or on any other schedule this Court directs), so that the Court may consider the petition at its June 25 conference if it wishes. There is accordingly no basis for an administrative stay. Indeed, petitioners offer no substantive argument in support of an administrative stay, and their delay of nearly three weeks before filing their application weighs heavily against such equitable relief.

A stay pending disposition of the petition for a writ of certiorari is likewise unwarranted. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. And there is no realistic possibility that this Court will reverse the court of appeals. Three Justices have already indicated that the government "is very likely to prevail" on the FDPA question, 140 S. Ct. at 353 (statement of Alito, J.), and Judge Rao's opinion confirms that petitioners cannot prevail even under a more favorable interpretation of that statute, Pet. App. 78a-82a. Petitioners' other questions presented involve only case-specific objections to the application of settled

administrative-law doctrines and plainly do not warrant either review or reversal. The effect of granting a stay would thus likely be to delay petitioners' executions by another year or more when they have no significant prospect of success on the merits. Such "unjustified delay" is irreconcilable with the public's "'important interest in the timely enforcement of'" capital sentences, Bucklew v. Precythe, 139 S. Ct. 1112, 1133-1134 (2019) (citation omitted), particularly given that petitioners have been on death row for more than 15 years and here raise only procedural objections to their executions. Both the merits and the equities weigh heavily in favor of allowing these lawful capital sentences to now be enforced. The stay application should be denied.

I. AN ADMINISTRATIVE STAY IS UNNECESSARY AND UNWARRANTED

Petitioners caption their application as an "emergency" request, but they have not treated the need for relief as such. The panel decision in this case came more than two months ago. Pet. App. 1a. The court of appeals denied rehearing en banc one month ago. Id. at 127a-128a. The court extended the date for issuance of the mandate in response to petitioner's stay motion more than three weeks ago. Id. at 121a. Petitioners then waited 19 days to file a stay application in this Court, submitting it roughly 48 hours before the mandate was set to issue this past Friday after a last-minute re-extension by the court of appeals. Appl. App. 1a. Having allowed all of that time to elapse,

petitioners ask (Appl. 4, 36) for an administrative stay to allow more time for consideration of their application. Yet petitioners offer no explanation for their delay and no substantive argument for an administrative stay. Their request should be denied.

A. A single Justice or the Court may enter an administrative stay to preserve the status quo while reviewing a stay application. See, e.g., Department of Justice v. House Comm. on the Judiciary, No. 19A1035 (May 8, 2020) (granting unopposed administrative stay to review stay application in dispute over grand-jury materials). But, as petitioners' failure to make any substantive argument in support of an administrative stay suggests, there is no need for an administrative stay here to preserve the Court's ability to review their stay application. Although the government is no longer enjoined "from executing" petitioners, C.A. App. A91, the government has explained that it will not seek to execute petitioners for at least four weeks, thereby affording the Court ample time to review petitioners' stay application. See pp. 2, 17, supra. The government will also file an expedited opposition to the petition for a writ of certiorari, allowing the Court the option to consider the petition at its June 25 conference -- well in advance of the first rescheduled execution. Ibid.

To be clear, the government will shortly begin preparing to conduct the executions, including by setting new execution dates. Conducting an execution is a logistically complex undertaking, and

all parties benefit from comprehensive planning. See, e.g., Pet. App. 149a-173a (pre-execution procedures in federal protocol). But the government's planning for executions will neither obstruct this Court's review nor harm petitioners in any way, given that the Court will have nearly a month to review petitioners' filings and block the executions if it were to conclude such a step is required. There is accordingly no need for an administrative stay. See, e.g., Rodriguez v. Texas, 515 U.S. 1307, 1307 (1995) (Scalia, J., in chambers) (denying stay where petition for a writ of certiorari would "be disposed of well before" execution date).

B. In any event, an administrative stay is unwarranted in light of petitioners' delay in seeking it. Petitioners declined to file a stay application in this Court for the entire 17-day extension of the mandate-issuance period that the court of appeals granted in response to their stay motion. See pp. 14-15, supra. Petitioners appear (Appl. 11) to blame the court of appeals for purportedly not ruling on their motion. But as the court explained without dissent, its earlier "order was clear: it stayed issuance of the mandate until June 8, 2020, and it did not state that the mandate was stayed 'pending the filing of a petition for a writ of certiorari.'" Appl. App. 1a (quoting Fed. R. App. P. 41(d)(1)).

Petitioners were of course not required to seek a stay, but their delay in doing so weighs heavily against granting one. Like other stays, an administrative stay "is not a matter of right"; it

is "an exercise of judicial discretion," and "the propriety of its issue is dependent upon the circumstances of the particular case." Nken v. Holder, 556 U.S. 418, 433 (2009) (brackets and citations omitted). Justices have long recognized that an applicant's "failure to act with greater dispatch * * * counsels against the grant of a stay." Ruckleshaus v. Monsanto, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers). There is no death-penalty exception to that principle. To the contrary, this Court has repeatedly repudiated attempts by death-row inmates to "interpose unjustified delay," stating expressly that "'the last-minute nature of an application' that 'could have been brought' earlier * * * 'may be grounds for denial of a stay.'" Bucklew, 139 S. Ct. at 1134 (citation omitted). Petitioners' delay provides strong grounds for denial of an administrative stay. Ibid.

II. THE COURT SHOULD NOT GRANT A STAY PENDING DISPOSITION OF THE PETITION FOR A WRIT OF CERTIORARI

The Court likewise should not grant a full stay. Petitioners fail to satisfy the key criteria for that "extraordinary" relief. Conkright, 556 U.S. at 1402 (Ginsburg, J., in chambers) (citation omitted). They cannot demonstrate "a reasonable probability that this Court will grant certiorari" and "a fair prospect that the Court will then reverse the decision below." King, 567 U.S. at 1302 (Roberts, C.J., in chambers) (citation and internal quotation marks omitted). To the contrary, three Justices have already indicated that the government is likely to prevail on the central

question under the FDPA, and Judge Rao's concurrence demonstrates that petitioners' argument fails even on a more generous interpretation of the statute. Petitioners' other two questions presented are plainly not worthy of certiorari, and the court of appeals' case-specific application of settled administrative-law principles was correct regardless. In addition, apart from the merits, petitioners cannot show "a likelihood that irreparable harm will result from the denial of a stay." Ibid. (brackets and citation omitted). In this respect, it bears emphasis that petitioners' claim is not that subjecting them to the death penalty would be unlawful. To the contrary, for purposes of this application, it is uncontested that they may lawfully be executed. Instead, the harm petitioners claim is purely procedural -- that they must be executed in compliance with "all the subsidiary details set forth in state execution protocols." Pet. App. 2a (per curiam). And the equities on that issue weigh overwhelmingly against granting them in effect a yearlong stay.

A. THERE IS NO REASONABLE PROSPECT THAT THE COURT WILL GRANT CERTIORARI AND REVERSE THE DECISION BELOW

1. Petitioners' principal claim (Appl. 17) is that the federal government must execute federal prisoners convicted in federal court of federal crimes in compliance with "all execution procedures a State has deemed necessary to the implementation of a death sentence," including procedures that are not binding on the State itself. That assertion is irreconcilable with the FDPA's

text, structure, history, and purpose -- as well as practice and common sense. See 140 S. Ct. at 353 (statement of Alito, J.). Indeed, no federal execution in the history of the United States -- from the hanging of Thomas Bird in 1790 to the lethal injection of Louis Jones in 2003 under the FDPA -- has been conducted in accordance with petitioners' theory. See USMS History.

And for good reason: petitioners' suggestion that criminals convicted of federal crimes must be executed in compliance with state procedural minutiae like "how the intravenous catheter is to be inserted," Pet. App. 114a, contemplates a radical surrender of federal authority that Congress never required. Indeed, petitioners' reading "could well" enable States to "make it impossible to carry out executions of prisoners sentenced" by federal courts within their borders. 140 S. Ct. at 353 (statement of Alito, J.). Petitioners' view could thus empower governors or even mid-level state prison officials to decide whether the federal government can actually execute, for example, a federal criminal who murdered a federal immigration agent, perpetrated a race-inspired massacre, or sold nuclear secrets to a foreign power. That is not the law Congress enacted at the behest of President Franklin Roosevelt's Attorney General in 1937 or readopted in 1994.

a. As three Justices recognized last December, the government "is very likely to prevail" on petitioners' FDPA claim. 140 S. Ct. at 353 (statement of Alito, J.). The key provision of

the FDPA requires "implementation of" 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). In petitioners' view (Appl. 20), that provision requires federal compliance with all state execution procedures, even minor and nonbinding ones, that state "officials are directed by state law to implement or establish." But that reading "is not supported either by the ordinary meaning of" the word "'manner'" or "by the use of the term 'manner' in prior federal death penalty statutes." 140 S. Ct. at 353 (statement of Alito, J.); see Pet. App. 15a-38a (Katsas, J., concurring).

Indeed, petitioners concede that the First Congress's use of "manner" in the Crimes Act of 1790 -- providing that "the manner of inflicting the punishment of death[] shall be by hanging the person convicted by the neck until dead," § 33, 1 Stat. 119 -- referred only to the general method of execution ("hanging"), not any subsidiary details. See p. 5, supra. After nearly 150 years of federal executions consistent with that understanding of the term "manner," petitioners maintain that in 1937 Congress dramatically broadened the scope of the same statutory term to include subsidiary procedural details by providing that the "manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed." 50 Stat. 304. This Court typically presumes the opposite: that "if a word is obviously transplanted from another

legal source, whether the common law or other legislation, it brings the old soil with it." Hall v. Hall, 138 S. Ct. 1118, 1128 (2018) (citation omitted). When Congress retained the term "manner" in the 1937 Act, it "carried forward" the meaning that term had in the Crimes Act of 1790 -- namely, a reference to the general method of execution (e.g., "hanging"), not to all "subsidiary procedural details" (e.g., the length of the rope). Pet. App. 20a-21a (Katsas, J., concurring).

That presumption is reinforced by the statutory context and history. When Attorney General Cummings proposed the 1937 Act, his reason was that States had adopted "more humane methods" of execution, "such as electrocution." 1937 Report 2 (emphasis added). He proposed that the federal government "change its law in this respect." Ibid. (emphasis added). Petitioners identify nothing to suggest that, in adopting the Attorney General's proposal, Congress changed the law in other respects -- e.g., by discarding the long-settled understanding that "manner" in the federal execution context is synonymous with "method," or by outsourcing the choice of subsidiary execution procedures to States by using a statutory term that had never before encompassed such details. Nor do petitioners provide any support for their speculation that President Roosevelt and the 1937 Congress sub silentio acceded to a massive transfer of authority over federal

executions to the States, including for quintessentially federal crimes such as espionage or treason against the United States.

To be sure, the 1937 Act can be said to reflect a "federalist" structure, Appl. 2, 6, in the limited sense that Congress directed federal executions to be conducted under "the local mode of execution" chosen by the State of conviction, Andres v. United States, 333 U.S. 740, 745 n.6 (1948) -- with the "local mode" understood as the general method of execution (e.g., "death by hanging"), id. at 745 & n.6. But Congress did so not to increase States' authority with respect to those executions, but because of the federal government's own interest in using humane methods in its own executions by taking advantage of States' innovations. 1937 Report 2. Petitioners' assertion (Appl. 18) that the 1937 Act embodies broader notions of "federalism" is therefore fundamentally misguided. While States have federalism interests in areas of reserved sovereignty, see, e.g., Gregory v. Ashcroft, 501 U.S. 452, 457-459 (1991), States have no reserved sovereignty over federal punishment of federal crimes. Indeed, petitioners' theory of federalism (Appl. 17-20) is particularly bizarre, because it would require federal officials to adhere to state procedures that lack the force and effect of binding law and thus could be disregarded by their state counterparts.

Historical practice under the 1937 Act further undermines petitioners' interpretation. Petitioners do not point to a single

federal execution in which the federal government considered itself obligated to conform its execution procedures to subsidiary state procedures. That is unsurprising. BOP explained in a 1942 manual 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." App., infra, 3a (emphases added). Thus, while the federal government often chose to carry out executions under the 1937 Act in state facilities in cooperation with state personnel -- steps Congress expressly permitted, see 50 Stat. 304 -- the federal government never considered itself legally obligated to follow subsidiary details of state execution protocols. Indeed, in the first federal execution in a state facility under the 1937 Act, the federal "government's supervision over the execution" was "so strict" that the local sheriff "was forced to obtain special permission from Washington to be present." United Press, Seadlund Will Die Tonight, July 13, 1938.[4]

Petitioners do not dispute that the FDPA "carries forward th[e] language and purpose" of the 1937 Act. Appl. 21. Nor do they dispute that every State now "prescribe[s]" lethal injection as a method of execution. 18 U.S.C. 3596(a); see Pet. App. 134a. The 1993 regulation requiring federal execution by lethal injection is accordingly consistent with the FDPA if the statutory

[4] https://access.newspaperarchive.com/us/iowa/fort-madison/fort-madison-evening-democrat/1938/07-13.

reference to "manner" corresponds to the general method of execution. 18 U.S.C. 3596(a). Federal practice under the FDPA further reinforces that understanding. In 2001, for example, the federal government executed Timothy McVeigh under the FDPA for bombing the Oklahoma City federal building. That execution, perhaps the most high-profile federal execution in American history, undisputedly did not rely on subsidiary details of Oklahoma execution procedure.

In addition, petitioners' "interpretation would lead to results that Congress is unlikely to have intended." 140 S. Ct. at 353 (statement of Alito, J.). It "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. And as noted above, "individual states could effectively obstruct the federal death penalty." Pet. App. 29a (Katsas, J., concurring). That could occur intentionally, as in States like California that have imposed moratoria on carrying out their laws providing for implementation of the death penalty. Ibid.[5] Or it could happen inadvertently, if a State fails to update an outdated protocol or keeps some execution procedures secret. Ibid. Congress did not turn federalism upside down in that self-defeating way.

[5] Two federal death-row inmates were convicted by federal courts in California. United States v. Mikhel, 889 F.3d 1003 (9th Cir. 2018), cert. denied, 140 S. Ct. 157 (2019).

b. Rather than attempting to rebut the reading suggested by three Justices and Judge Katsas, petitioners devote (Appl. 18-20) much of their attention to disputing Judge Rao's opinion. But Judge Rao's opinion only underscores how unlikely petitioners are to prevail on their FDPA claim. Even under Judge Rao's interpretation of the statute, which is more favorable to petitioners, their claim still fails. Pet. App. 78a-82a. Indeed, as a practical matter, Judge Rao's position will rarely require the government to follow state procedures beyond the method of execution that they must follow under Judge Katsas's position. As Judge Rao explained, the "[s]tate execution statutes" that the government must follow under her view "tend to be rather brief, specifying lethal injection without adding further details," while "[m]ore specific details are generally found in informal state policies and protocols" that Judge Rao concluded the federal government need not follow. Id. at 78a-79a.

Petitioners suggest (Appl. 13-14) that the interpretive disagreement between Judges Katsas and Rao counsels in favor of this Court's review. But Judges Katsas and Rao agreed that, "[o]n either of their views, [petitioners'] FDPA claim is without merit." Pet. App. 11a (per curiam). No basis exists for this Court to review their theoretical differences, particularly where doing so would substantially delay executions that would be lawful under either Judge Katsas's or Judge Rao's position. See ibid.

Petitioners offer several other theories why this Court might grant certiorari, but those further undermine their position. Petitioners suggest (Appl. 13-14), for example, that Judge Rao's position may create questions in future cases about which aspects of other state protocols must be followed by the federal government. But if so, those later cases would be the appropriate vehicle for this Court to address the issue. Petitioners similarly acknowledge (Appl. 14) that "future challenges may be filed outside the D.C. Circuit" -- for example, by another federal death-row inmate in Indiana suing "a BOP warden" there. The possibility of a future circuit conflict only underscores the absence of one now, and the lack of any basis for review given that Judges Katsas and Rao both reached the correct result.

2. Neither of petitioners' other questions presented is a credible candidate for certiorari or reversal. Both questions merely seek review of case-specific applications of settled administrative-law principles. The court of appeals was correct in both applications. And even if the underlying administrative-law issues could be worthy of review in some case despite the correct resolution below, this time-sensitive capital case is not an appropriate vehicle to review issues that arise in many other cases lacking exigencies comparable to impending execution dates.

a. Petitioners first contend (Appl. 14-15, 23-26) that Judge Rao misread the federal protocol and that her reading cannot

support a decision in the government's favor under SEC v. Chenery Corp., 318 U.S. 80 (1943). Both contentions are mistaken.

At the outset, petitioners' argument (Appl. 25) that BOP did not "design[] the [p]rotocol to yield when it conflicts with state procedures" cannot be squared with the text of the protocol itself. The protocol states that its procedures "should be observed * * * unless deviation or adjustment is required," and may be "modified at the discretion of the Director or his/her designee" in order to "comply with specific judicial orders" or "as may be required by other circumstances." Pet. App. 144a, 210a. Judge Rao was thus plainly correct that the protocol "allows departures as needed to comply with state law" and is therefore "consistent with the FDPA." Id. at 81a; accord id. at 42a n.12 (Katsas, J., concurring).

Petitioners nevertheless assert (Appl. 25) that "[t]here is no indication in the Protocol or the Administrative Record that" government officials "ordered that the Protocol be modified to accommodate conflicting state law." This is unsurprising; the government does not read the FDPA to incorporate state law beyond the means of execution. But the government's interpretation of the statute is separate from its interpretation of the protocol. The unequivocal language of the protocol shows that BOP did contemplate the possibility that aspects of the protocol could become impracticable or be deemed unlawful, and expressly designed the protocol to yield to the degree necessary -- not fall entirely

-- if such a circumstance precluded adherence to every procedure contained therein. Pet. App. 144a, 210a. Even if there were some doubt on that score, this Court does not typically grant certiorari to address the proper reading of a non-binding agency policy.

For similar reasons, the court of appeals' reliance on the protocol's plain text does not "defy" Chenery and its progeny. Appl. 25. Those cases instruct that courts may not rely on post hoc rationalizations of agency action by agency counsel. See Chenery, 318 U.S. at 92-94. Far from precluding courts from looking to the language of the agency's own rule or decision, Chenery principles require such scrutiny of the agency's own words. See id. at 95. That is precisely what the court of appeals did by relying on the words of the protocol itself. See Pet. App. 81a (Rao, J., concurring). Petitioners do not cite any contrary decision by any other court of appeals, which makes this Court's review and reversal even more implausible.

Indeed, petitioners turn Chenery on its head by asserting (Appl. 15) that the court of appeals could not interpret the protocol differently than (in petitioners' view) the government did in litigation. Chenery teaches precisely that statements by litigators cannot change the meaning of an agency's action. 318 U.S. at 92-93. And in any event, petitioners misstate the government's litigating position. The government never argued that the protocol "displace[s] any conflicting state-law

requirements," Appl. 26, or precludes deviation to comply with judicial interpretations of the FDPA. Quite the contrary, the government read the protocol to be open to adaption if needed, but urged that it should not be needed. See Gov't C.A. Br. 32-34 (arguing that if an injunction issued at all, it should be limited to "prohibit[ing] executions that did not proceed in conformance with particular procedures that the court considered required").

b. Petitioners fare no better in challenging (Appl. 15-16, 26-31) the court of appeals' unremarkable application of its long-existing jurisprudence regarding the procedural-rule exception to the APA's notice-and-comment requirement. 5 U.S.C. 553(b)(2)(A).

Petitioners do not dispute that "[t]he critical feature of a procedural rule is that it covers agency actions that do not themselves alter the rights or interests of parties." National Mining Ass'n v. McCarthy, 758 F.3d 243, 250 (D.C. Cir. 2014) (Kavanaugh, J.) (citation and internal quotation marks omitted). That readily describes the federal execution protocol, which outlines in great detail the procedures for conducting an execution, see Pet. App. 140a-213a, but alters nothing about petitioners' sentences, the FDPA requirements regarding the "manner" of execution, or the federal regulation requiring use of lethal injection. Indeed, the protocol states specifically that it "explains internal government procedures and does not create any legally enforceable rights or obligations." Id. at 144a

(emphasis added); see id. at 210a (permitting modifications at BOP Director's discretion). The protocol thus bears "all the hallmarks of 'internal house-keeping measures organizing [BOP's] activities' with respect to preparing for and conducting executions," and falls squarely within the definition of a procedural rule. Id. at 84a (Rao, J., concurring) (citation omitted).

Focusing on the court of appeals' observation that the "'substantive burden[]'" of death by lethal injection "'derive[s] from the FDPA and the state laws it incorporates,'" petitioners deem that tantamount to "say[ing] that every action an agency takes is procedural," since all federal agency action "is derived from federal law." Appl. 30 (citation and internal quotation marks omitted). But the court did not suggest that the burdens imposed by any rule undergirded by federal law are procedural. It simply applied the oft-recognized principle that where a rule governing an agency's internal operations does not add to the burdens imposed by existing law, it is procedural rather than substantive. See, e.g., James V. Hurson Assocs., Inc. v. Glickman, 229 F.3d 277, 281 (D.C. Cir. 2000) (explaining that "an otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it" has a "'substantial impact on the rights of individuals'") (citation omitted).

Petitioners' approach, by contrast, would seemingly require notice-and-comment rulemaking for any procedural directive that

"operates" in the "field" of the death penalty. Appl. 28. Under that sweeping theory, even the smallest change to execution procedures could be subject to time-consuming notice-and-comment rulemaking requirements. Thus, any amendment to the detailed federal execution protocol (which has never been subject to notice-and-comment procedures) would freeze all executions for months or more. While such a doctrine would no doubt prove a fruitful source of litigation-related delay, it has no footing in existing procedural-rule jurisprudence.

In any event, this case would be a particularly unsuitable vehicle to consider the scope of the procedural-rule exception. Debates about the proper classification of particular agency actions come up routinely in a wide variety of cases, and have for decades. See Appl. 28 (noting cases involving railroad tariffs, food-stamp approval processes, and motor carrier payments to shippers). Even if this Court might someday grant review to clarify this issue, it is difficult to imagine a more inappropriate vehicle than this time-sensitive capital case. Moreover, the issue provoked no disagreement within the panel. Judge Tatel did not address the notice-and-comment claim in his dissent. And Judge Katsas agreed with Judge Rao that the protocol is a procedural rule, Pet. App. 40a-41a, while adding that it is also a general statement of policy independently exempt from the notice-and-comment requirement, id. at 41a; see 5 U.S.C. 553(b)(3)(A).

B. EQUITABLE CONSIDERATIONS WEIGH HEAVILY AGAINST A STAY

Apart from the merits, the remaining stay factors weigh heavily against petitioners. In arguing that "irreparable harm will result from the denial of a stay," King, 567 U.S. at 1302 (Roberts, C.J., in chambers) (brackets and citation omitted), petitioners focus primarily on "the harm of being executed," Appl. 31. That harm is irreparable -- but it is not the harm at issue in this case, because petitioners "do not challenge the federal government's authority to execute them." Pet. App. 86a (Tatel, J., dissenting). Indeed, they could not do so in this APA suit. See Hill v. McDonough, 547 U.S. 573, 580 (2006) (permitting challenge to execution method outside habeas only where there was no "challenge to the fact of the sentence itself").

The harm petitioners actually allege is far narrower and less compelling. They contend that they must be executed pursuant to "procedural details" -- such as "how the intravenous catheter is to be inserted" -- specified by the State rather than the federal government. Pet. App. 110a, 114a. Critically, however, they do not rest their stay request on any assertion that the federally prescribed execution procedures cause any actual harm as compared to the state-prescribed execution procedures. If anything, the opposite is true. For example, the federal protocol directs the use of pentobarbital, which "does not carry the risks [of other drugs used in lethal injections, because it] is widely conceded to

be able to render a person fully insensate." Zagorski v. Parker, 139 S. Ct. 11, 11-12 (2018) (Sotomayor, J., dissenting from denial of certiorari and denial of a stay); see Bucklew, 139 S. Ct. at 1130-1133. By contrast, some States use three-drug combinations that death-row inmates have long contended are more likely to cause pain -- and that some inmates have urged courts to order States to replace with pentobarbital. See, e.g., Glossip v. Gross, 135 S. Ct. 2726, 2738-2740 (2015); id. at 2781 (Sotomayor, J., dissenting) (suggesting that one State's alternative to pentobarbital could be the "chemical equivalent of being burned at the stake").

Petitioners' alleged harms are thus not actually harmful in any real-world sense related to their executions. Cf. Appl. 31 (suggesting that BOP's adoption of the protocol without notice-and-comment rulemaking will cause them harm). As Judge Katsas explained, petitioners' claims are "designed neither to prevent unnecessary suffering nor to ensure that needles are properly inserted into veins," but rather "to delay lawful executions indefinitely" -- an objective federal courts "should not assist." Pet. App. 48a. Indeed, if the kind of procedural harm petitioners assert -- in their phrasing, being "executed pursuant to an unlawful [p]rotocol," Appl. 31 -- were cognizable as irreparable harm for purposes of a stay, every death-row inmate who alleges any legal violation before an execution would have shown irreparable harm. That is not the law.

To the contrary, this Court has emphasized that "[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a [death] sentence." Bucklew, 139 S. Ct. at 1133 (citation omitted); see Calderon v. Thompson, 523 U.S. 538, 556 (1998) (explaining that once post-conviction proceedings "have run their course * * * finality acquires an added moral dimension"). "Only with an assurance of real finality can the [government] execute its moral judgment in a case" and "the victims of crime move forward knowing the moral judgment will be carried out." Calderon, 523 U.S. at 556. Indeed, unduly delaying executions can frustrate the death penalty by undermining its retributive and deterrent functions. See Bucklew, 139 S. Ct. at 1134; id. at 1144 (Breyer, J., dissenting). The harm of further delay is particularly evident here, where more than 15 years have passed since petitioners were sentenced -- far longer than in earlier federal executions, including those in this century.[6]

Petitioners suggest (Appl. 32-33) that a stay is justified because their petition for certiorari might otherwise become moot. As an initial matter, if petitioners wanted to minimize the chances of their petition being mooted, they would presumably have asked this Court to expedite consideration of it. Yet they have not

[6] Death Penalty Information Center, Executions Under the Federal Death Penalty, https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty (showing that the 2001 and 2003 federal executions occurred six to eight years after the respective crimes).

done so, even though the government has made clear that it does "not oppose a reasonable proposal for such expedition." C.A. Resp. to Rule 41 Status Report 6. In any event, this Court routinely denies stay applications in capital cases despite the prospect of -- indeed, the certainty of -- mooting a pending petition by executing the petitioner. Any other rule would create a roadmap for indefinite delay. Of particular relevance here, the Court has denied stay applications despite pending or forthcoming petitions challenging newly adopted lethal-injection protocols that use pentobarbital. See, e.g., Franklin v. Lombardi, 571 U.S. 1066 (2013). And the Court has denied stays and allowed executions to proceed even when four Justices supported certiorari on the underlying question. See, e.g., Warner v. Gross, 135 S. Ct. 824 (2015) (denying stay before granting certiorari and affirming in Glossip); Hamilton v. Texas, 497 U.S. 1016 (1990) (denying a stay even though four Justices voted to grant certiorari). As petitioners acknowledge (Appl. 13-14), moreover, granting a stay here is not necessary to preserve the possibility of this Court's reviewing the questions presented at some point, because another federal death-row inmate could raise the same claims.

Finally, to the extent the equities play a role in the stay analysis, see Appl. 33-36, the balance is not close. Petitioners murdered children and others with a brutality staggering even in the realm of capital offenses. Petitioner Lee and his co-

defendant, for example, "shot the three victims with a stun gun, placed plastic bags over their heads, and sealed the bags with duct tape, * * * then drove the family to a bayou, taped rocks to their bodies, and threw them into the water to suffocate or drown," all after a robbery to fund a white-supremacist racketeering organization. Pet. App. 43a (Katsas, J., concurring) (citations omitted); see id. at 43a-46a. Petitioners each received fair trials and extensive appellate and collateral-review proceedings, as required by law. They have now been litigating their challenge to the amended protocol for nearly a year -- six months beyond their initial execution dates -- and have received a thorough review from the D.C. Circuit. Their claim that they should be permitted to continue litigating for another year or more in the hopes of dictating the precise details of their deaths -- an opportunity they denied to the victims of their crimes, cf. Bucklew, 139 S. Ct. at 1124; Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Thomas, J., concurring) -- lacks support in equity.

CONCLUSION

The application for a stay pending disposition of the petition for a writ of certiorari and for an administrative stay should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JUNE 2020

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5322 **September Term, 2019**

1:19-mc-00145-TSC

Filed On: June 12, 2020 [1847088]

In re: In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

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James H. Roane, Jr., et al.,

Appellees

v.

William P. Barr, Attorney General, et al.,

Appellants

MANDATE

In accordance with the judgment of April 7, 2020, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Link to the judgment filed April 7, 2020

MANUAL

of

POLICIES AND PROCEDURES

for the

ADMINISTRATION

of the

FEDERAL PENAL

AND CORRECTIONAL SERVICE

James V. Bennett, Director
Bureau of Prisons
Department of Justice
Washington, D. C.

1942

c. **Where a person on parole is brought before the court on a new charge and sentenced, and is also faced with the prospect of serving the balance of a sentence from which paroled.**

It is important in these cases that the court clearly state both in the sentence and the commitment whether the later sentence is to be served consecutively or concurrently.

14. **Subsequent Sentences for Parole Violators.** In cases where a court directs that a subsequent sentence shall be served consecutively or concurrently with an original sentence from which a prisoner had been paroled or conditionally released and the warrant of the United States Board of Parole has not been issued or when warrant has not been executed, the institution officials should refer the sentence to the Bureau of Prisons for interpretation.

15. **Committing Court Must Specify Order of Service.** The case of *United States* v. *Patterson,* decided by the Supreme Court in 1887, holds that the committing court must specify the order in which consecutive sentences are to be served. The clerks of courts have been instructed in this respect.

Unless it is clearly indicated in what manner the sentences are to be served and the order in which they are to be served, the record clerk should immediately get in touch with the clerk of court. (Memo 1-30-34) If a prompt response clarifying the matter is not received, a copy of the sentence and judgment should be forwarded to the Bureau of Prisons for construction.

16. **Reports on Sentences.** The record of court commitment (Record Form No. 1) and other institution reports sent to the Bureau setting forth a prisoner's sentences should clearly state the exact expression of the court as indicated in the judgment. In the absence of specific instructions in the judgment the words "Without specifications" should follow the term of sentence on all reports of plural sentences submitted to the Bureau of Prisons. (Memo 9-8-33)

17. **Date When Original Sentence Resumes Running.** Service of the remainder of the original sentence of any parole violator who is returned to a Federal institution or any other institution will be regarded as having started from the date when he was first in custody exclusively under authority of

a Parole Board warrant. This date must be entered by the marshal on the warrant. Institution officials are cautioned to see that the marshal's entries on the warrant are complete at the time of the prisoner's delivery. (Cir 2831)

18. **Date When Sentence of Returned Escapee Resumes Running.** When a prisoner who escapes is recaptured and lodged in a jail or other institution under Federal custody, his sentence shall be computed as having resumed running on the day on which he was taken into Federal custody. When the prisoner's sentence has been recomputed, a corrected record showing the new dates should be sent to the Bureau of Prisons. (Memo 3-15-33)

19. **Death Penalty Sentence.** The Act of June 19, 1937 (c. 367, 50 Stat. 304; U.S.C., Title 18, Sec. 542) provides that "the manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed." The statute also provides that "if the laws of the State within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof." Since it seems clear that the "manner of inflicting the punishment" 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, the following regulations are prescribed for the guidance of all concerned:

a. **United States Marshal in Charge of Executions.** The United States marshal in the district in which the sentence of death is to be executed shall be in direct charge of the conduct of executions, subject to the procedures herein set forth and to any supplemental instructions issued by the Department of Justice.

b. **Date of Execution.** The day upon which the execution shall take place shall be that fixed in the judgment or order of the court which imposed the sentence. If only the week is designated the marshal shall fix the day of the week. If the court order does not fix the time of day, the execution shall take place at "about sunrise" on the day fixed.

c. **Place of Execution.** The execution shall be carried out at the place fixed in the judgment or order of the court which

imposed the sentence. If no such designation is made by the court, the execution shall be carried out at the place designated by the Department of Justice.

d. **Official and Other Witnesses.** The following persons and no others shall be present at the execution:

(1) The United States marshal charged with the execution of the sentence, or in his absence, the chief deputy marshal.

(2) If the execution is held at a Federal or local penal institution, the warden of that institution.

(3) Not more than eight assistants, including executioner, guards, and so forth.

(4) At least one and not more than three physicians to be designated by the marshal; provided that, if the execution is held at a penal institution one of the number shall be the chief physician of the institution or a member of his staff.

(5) The chaplain of the prison or such other spiritual advisers, not exceeding three in number, as may be requested by the prisoner.

(6) Adult friends and relatives of the prisoner, whom he may request to be present, not exceeding three in number.

(7) Not more than five respectable citizens, to be selected by the marshal, in addition to the above mentioned persons.

(8) Not more than one representative from each of the following press associations: Associated Press, International News Service, and United Press. No other member of the press will be permitted to attend the execution, either as a representative of the press or in any other capacity. No photographs of the execution will be permitted.

(9) The marshal shall give three (3) days' notice to those who are to be present.

e. **Prisoner's Visitors.** Immediately prior to his execution the prisoner shall be permitted access only to the officers of the prison, spiritual advisers, the prisoner's defense attorney, and members of his family. Upon special approval of the Department of Justice, the chief executive officer may be authorized to admit such other proper persons as the prisoner may request to see. (Cir 3125)

20. **Imprisonment for Nonpayment of Fine or Fine and Costs.** The question of detaining a prisoner for nonpayment of fine or fine and costs depends upon the specification by the court in his sentence. If there is nothing in the prisoner's sentence directing that he be held for nonpayment, he should not be held beyond his imprisonment term. When the sentence directs commitment for nonpayment, the prisoner should be held for 30 days solely for nonpayment beyond the date of his regular release before being permitted to appear before the United States commissioner to take the poor debtor's oath. (Cir 2388)

In the case of *Hill* v. *Wampler*, the Supreme Court of the United States held that imprisonment under a commitment solely for failure to pay a fine is unauthorized in any case unless the sentence pronounced by the court and entered in the court's minutes or docket directs such imprisonment.

When any prisoner in custody in a Federal penal or correctional institution, whose sentence includes a fine and whose commitment specifies imprisonment for nonpayment, asserts that the sentence of the court did not provide that he should stand committed for failure to pay such fine, immediate request shall be made by the warden or superintendent upon the proper clerk of court for a certified copy of the sentence. The language of the sentence will be regarded as controlling on this point and the records should conform thereto, irrespective of contrary language written or printed in the commitment. In case of doubt a copy of the sentence should be forwarded to the Bureau of Prisons for instructions. (Bu 252)

21. **Computation of Thirty Days.** The 30 days which a prisoner is required to serve solely for nonpayment of fine should begin on the same day on which the prisoner would have been released if the court had not directed that he stand committed for nonpayment of the fine; for example, if a prisoner becomes eligible for release on January 7, he may be lawfully released at 12:01 a. m. on January 7. If he has an unpaid committed fine, service of the 30-day period would start on January 7, even though he might otherwise not have been released until late on the same date through lack of transportation facilities or other natural causes.