Capital Case
Execution Scheduled Sept. 24, 2020

Case No. _____

In the Supreme Court of the United States

Christopher André Vialva,
Petitioner,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Execution Scheduled for Sept. 24, 2020 at 6:00 p.m.]

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**** CAPITAL CASE ****

QUESTION PRESENTED

Since the federal government resumed executions this year, after a 17-year hiatus, the Courts of Appeals have addressed challenges to federal methods and procedures. These challenges have alleged the federal government was obligated to apply various aspects of state methods while conducting execution procedures. These challenges were based on the Federal Death Penalty Act, 18 U.S.C. § 3596(a). This case presents a far more fundamental question: what law, if any, governs the *federal courts themselves* when implementing judgments imposing sentences of death.

Below, Mr. Vialva contended federal law requires a district court to follow the material and applicable law of the state in which the court issuing the judgment sits. He maintained either the Federal Death Penalty Act or judicially created federal law dating back to the founding of the nation requires this. The Government disagreed. Without identifying what law applies, the Government contended the Attorney General simply has the power to execute any federally death-sentenced individual without any further involvement of the court.

Thus, the questions presented are:

1. Does the Federal Death Penalty Act's requirement of implementation in the manner prescribed by state law govern a federal district court's implementation of its judgment imposing death?

2. If not, what law governs?

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all the parties.

LIST OF PROCEEDINGS

- *United States v. Vialva*, United States District Court for the Western District of Texas, No. 6:99-cr-00070 (June 16, 2000)
- *United States v. Bernard,* United States Court of Appeals for the Fifth Circuit, No. 00-50523 (July 19, 2002)
- *Vialva v. United States*, Supreme Court of the United States, No. 02-8448 (June 16, 2003)
- *United States v. Bernard,* United States Court of Appeals for the Fifth Circuit, No. 13-70013 (Aug. 11, 2014)
- *Vialva v. United States,* Supreme Court of the United States, No. 14-8112 (Feb. 29, 2016)
- *United States v. Vialva,* United States Court of Appeals for the Fifth Circuit, No. 18-70007 (Sept. 14, 2018)
- *Vialva v. United States,* Supreme Court of the United States, No. 18-1222 (Jan. 13, 2020)
- *Vialva v. Watson,* United States District Court for the Southern District of Indiana, No. 2:20-cv-00413 (Sept. 8, 2020)
- *Vialva v. Watson*, United States Court of Appeals for the Seventh Circuit, No. 20-2710 (Sept. 18, 2020)
- *United States v. Vialva,* United States Court of Appeals for the Fifth Circuit, No. 20-70019 (Sept. 18, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the United States Court of Appeals is Appendix 1 to this petition. The district court order denying Mr. Vialva's motion to enjoin and request to apply state law warrant and date-setting requirements is Appendix 2. The district court's September 11, 2020, order setting Mr. Vialva's execution date for September 24, 2020, is Appendix 3. The district court's original judgment of June 16, 2000, is Appendix 4.

JURISDICTION

The district court possessed jurisdiction pursuant to 18 U.S.C. § 3231 and 28 U.S.C. § 1651. The court of appeals had jurisdiction to review the orders pursuant to 18 U.S.C. §§ 3595, 3742(a) and 28 U.S.C. §§ 1291 & 1292(a). Its published opinion issued on September 18, 2020. This Court has jurisdiction to review the Fifth Circuit's opinion affirming the district court's judgment pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 3596(a) provides, in relevant part:

> A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the

> sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the 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.

STATEMENT OF THE CASE

On June 16, 2000, the United States District Court for the Western District of Texas entered a judgment sentencing Mr. Vialva to death. The judgment contained various orders: (1) "[t]he time, place and manner of execution are to be determined by the Attorney General, provided the time shall not be sooner than 61 days nor later than 90 days after the date of this judgment;" (2) "[i]f an appeal is taken from this conviction and sentence, execution of the sentence shall be stayed pending further order of this Court upon receipt of the mandate of the Court of Appeals;" and, (3) Mr. Vialva was to be "committed to the custody of the Bureau of Prisons and shall be confined until the sentence of execution is carried out." App. 4 at 2. Mr. Vialva appealed. Per its terms, judgment was stayed pending further order of the district court. Mr. Vialva's judgment became final on direct review June 16, 2003. *Vialva v. United States*, 539 U.S. 928 (2003). The district court's denial of his motion to vacate his judgment under 28 U.S.C. § 2255 became final February 29, 2016.[1] *Vialva v. United States*, 136 S. Ct. 1155 (2016).

[1] On August 10, 2020, Mr. Vialva filed a habeas corpus application pursuant to 28 U.S.C. § 2241. The denial of that application was affirmed by the United States Court of Appeals for the Seventh Circuit. *See Vialva v. United States,* Case Number 20-2710, Dkt. 22 (7th Cir. Sept. 18, 2020).

No further order of the district court lifting the stay of its judgment issued. On July 31, 2020, Federal Correctional Complex, Terre Haute, Warden T.J. Watson conveyed a letter to Mr. Vialva informing him "a date has been set for the implementation of your death sentence, pursuant the Judgment and Order issued on June 16, 2000." App. 5. The letter stated the Director of the Federal Bureau of Prisons ("BOP") determined Mr. Vialva should be executed September 24, 2020. At the time, no court had issued any execution warrant directing the Director of the BOP or anyone else to execute Mr. Vialva.

On the same day, the Government filed a "Notice Regarding Execution Date" in the district court case stating, "The United States hereby notifies the Court that the Director of the Federal Bureau of Prisons, upon the direction of the Attorney General, has scheduled the execution of Christopher Andre Vialva, in accordance with 28 C.F.R. Part 26, to take place on September 24, 2020." App. 6 (Notice Regarding Execution Date, *United States v. Vialva*, No. 6:99-cr-00070 (W.D. Tex. July 31, 2020) (Doc. 673)). The Government's threatened actions violated the Department of Justice's ("DOJ") own regulations. Those regulations require the Government to obtain a court order setting the date of execution and directing it to occur. *See* 28 C.F.R. 26.2(a) ("Whenever this part becomes applicable, the attorney for the government shall promptly file with the sentencing court a proposed Judgment and Order."). The Government never requested any such order; it simply declared it was going to execute Mr. Vialva.

On August 14, 2020, Mr. Vialva moved the district court to enjoin the Government from carrying out his execution in the absence of a warrant and valid court order. Mr. Vialva raised multiple grounds in support of his request for injunctive relief. He contended the judgment was stayed by its own terms and the court had not issued any order lifting that stay. He argued any orders within the judgment delegating the power to the Attorney General to determine the time, place, and manner of execution had long expired.[2] Mr. Vialva argued that no Congressional or other authority endowed the Director of the BOP, the Attorney General, or the United States Marshal with the power to execute him without a warrant on September 24, 2020. Mr. Vialva argued federal law requires the court to implement its judgment imposing death consistent with the laws governing implementation of death sentences in the state in which the court sits.

Because the district court imposing Mr. Vialva's death sentence sits in Texas, he contended the material aspects of Texas law governing the setting of execution dates and the issuance of execution warrants controlled. Texas law requires courts to issue orders setting execution dates and warrants directing relevant executive officers to carry out the executions. Tex. Code Crim. Proc. art. 43.141. Texas law requires a minimum of 91 days between the order setting the date and the execution. *Id*. art. 43.141(c). Mr. Vialva requested that, if the district court was inclined to issue

[2] Mr. Vialva believes an order by a district court that purports to delegate all authority for fixing the time, place, and manner of execution to the Attorney General is not a lawful way for a federal court sitting in Texas to implement a death sentence. This issue became moot by the district court's September 11, 2020 order setting Mr. Vialva's execution for September 24, 2020.

an order lifting the stay of its judgment and fixing a date of execution, then the court do so in compliance with Texas law by setting an execution date no earlier than the 91st day after the date the order is entered.

The Government opposed Mr. Vialva's motion in totality. Although the Government denied federal law required the application of state law, it did not posit what federal law *does* apply to the implementation of judgments imposing sentences of death. Its position was simply that the Attorney General has the power to command the BOP to execute any person sentenced to death by the judgment of a federal district court by virtue of the judgment alone.

On September 11, 2020, the district court issued an order denying Mr. Vialva's motion to enjoin the Government from executing him September 24, 2020. The order contained three predicate findings: (1) there was no stay in place; (2) the authority delegated to the Attorney General within the judgment had not expired; and, (3) the Attorney General had the asserted powers. *See* App. 2. It also denied any law existed governing how federal district courts implement death sentences. *See* App. 2 at 7. The import of this finding is the Attorney General has unfettered discretion to determine when appeals are exhausted and, concomitantly, when the condemned should be executed. *See* App. 2 at 7. Nevertheless, the district court issued a separate order setting Mr. Vialva's execution date for September 24, 2020, just twelve days from the day after the order was issued. The district court's order violates Texas law applicable to the setting of execution dates.

Mr. Vialva asked the Fifth Circuit to hold the material aspects of Texas law governing the implementation of death sentences, including date-setting and warrant requirements, govern the implementation of his death sentence in this case. The Fifth Circuit held § 3596(a) "is at least limited to procedures effectuating death and excludes pre-execution process requirements such as date-setting and issuing warrants." App. 1 at 5. It explicitly held "[t]he FDPA simply does not reach warrant and date-setting provisions." *Id*. at 6. It concluded "we do not recognize the existence of any . . . 'judicially created law'" governing a federal court's implementation of judgment imposing death. *Id*. at 6. Thus, the Fifth Circuit held no federal law constrains the federal courts' implementation of its death sentences.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT: WHETHER THE FEDERAL DEATH PENALTY ACT OR OTHER LAW REQUIRES A FEDERAL COURT TO IMPLEMENT A DEATH SENTENCE IN THE MANNER PRESCRIBED BY THE LAW OF THE STATE IN WHICH IT SITS.

The judgment of any court sentencing a person to death requires implementation. Presumably, such implementation by the court and executive officers occurs pursuant to law. The Federal Death Penalty Act of 1994 ("FDPA"), which governs this case, contains a provision for "implementation":

> A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the

> sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the 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.[3]

18 U.S.C. § 3596(a). The statute distinguishes between the "imposition" of a sentence and its "implementation." *United States v. Hammer*, 121 F. Supp. 2d 794, 798 (M.D. Pa. 2000). The imposition of a sentence is the court's adjudication and judgment sentencing an individual to death. *Id*. The implementation of a sentence is the process of bringing that death sentence to fruition. *Id*. Whether and how execution dates get set (date-setting) and whether and how executive officers become empowered to execute (execution warrants) are not part of the imposition of a sentence. They are part of its implementation. *See id*. ("The implementation of the death sentence involves a process which includes more than just the method of execution utilized."). Although § 3596(a) purports to provide for the implementation of death sentences, this Court has never decided its scope and what it requires of district courts and other actors.

Mr. Vialva contends this provision requires district courts to follow material and applicable aspects of state laws when setting execution dates and issuing execution warrants. The Fifth Circuit simply concluded § 3596(a) does not control the district courts' setting of execution dates and issuance of warrants. The Fifth Circuit's conclusion that a court's setting an execution date and issuing an execution warrant

[3] Two additional subsections bar the execution of persons who are pregnant, intellectually disabled, or incompetent for execution. *Id*. § 3596(b) & (c).

is not "implementation" of a death sentence is incorrect. App. 1 at 5. If these acts do not implement death sentences, it is difficult to discern how else they should be characterized, because "[t]he order designating the day of execution is, strictly speaking, no part of the judgment, unless made so by statute." *Holden v. Minnesota*, 137 U.S. 483, 495 (1890).

Even if the Fifth Circuit is correct, the question still remains what law *does* govern date-setting and warrant issuance. Mr. Vialva argued longstanding judicially created law required federal courts to apply state law date-setting and warrant requirements. The Fifth Circuit rejected this argument but did not identify what law does govern. This is inexplicable. Every state that enforces the death penalty has law governing the implementation of death sentences. *See* App. 7 (Survey of State Date-Setting and Execution Warrant Laws). The Circuit's decision raises the question whether *any* law governs a federal court's implementation of a death sentence.

Even if the FDPA does not govern date-setting and execution warrants, longstanding judicially created law does. Shortly after the nation's founding, confusion arose about how federal death sentences were to be implemented. Congress had only specified "the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead." Crimes Act of 1790, ch. 9, § 33, 1 Stat. 112, 119. The question was whether the court or the President would issue a warrant or order fixing a date of execution and directing a marshal to conduct it.[4]

[4] Although who issued the warrant was disputed, what was never in dispute was that a warrant was required to empower a marshal to execute. Warrants have historically been required. In the case of Thomas Bird, the first federal execution

In 1818, United States Attorney General William Wirt wrote to Secretary of State John Quincy Adams asking him to bring to President James Monroe's attention the need to issue a warrant of execution for individuals sentenced to death by a federal court in Maryland. 1 U.S. Op. Att'y. Gen. 228 (1818). Attorney General Wirt's opinion was prompted by a letter from Supreme Court Justice Duvall. Justice Duvall, who was a former Maryland state court judge, had written to Attorney General Wirt because he had heard President Monroe believed it was the court's duty "to fix the day for the execution." *Id*. Justice Duvall thought it was the President's duty to issue a warrant because the law of Maryland required its Governor, rather than its courts, to issue execution warrants and fix the dates. *Id*. ("But [Justice Duvall] says there is no law which gives the court such authority; and that the practice of the State of Maryland has been uniformly, and from time immemorial, otherwise.").

Noting "no positive act of Congress" existed on the subject, Attorney General Wirt concluded "that the courts of the United States have adopted, in this particular, the practice of the State courts in which they hold their sessions, and these are various: death-warrants from the governor being required in several of the States;

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since the establishment of the federal courts, the Honorable David Sewall issued a "Writ or Warrant of Execution from the District Court to the Marshall" to carry out Thomas Bird's death sentence "at the Time mentioned in the Judgment;" Mr. Bird was executed June 25, 1790. *See* "To George Washington from Thomas Bird, 5 June 1790," n.1, Founders Online, National Archives, available at https://founders.archives.gov/documents/Washington/05-05-02-0299. (last visited Aug. 1, 2020) [Original source: The Papers of George Washington, Presidential Series, vol. 5, 16 January 1790–30 June 1790, ed. Dorothy Twohig, Mark A. Mastromarino, and Jack D. Warren. Charlottesville: University Press of Virginia, 1996, pp. 478–481].

and in others the courts fixing the day." *Id*. Attorney General Wirt explained while it would be "desirable that there should be a uniform rule," only Congress could prescribe such a rule. *Id*. Near the founding of the nation the judicially developed rule for implementing federal executions emerged: when Congress is silent, executions are to be implemented in the manner prescribed by state law, including that state's warrant requirements.

The circumstances prompting Justice Duvall to inquire of the Attorney General were dire. Attorney General Wirt reported "the case has become one of great emergency; for the convicts, finding that they are not to be pardoned, have become desperate, and have once actually broken the prison and made their escape: but they have been retaken. They will, however, unquestionably attempt it again, and probably with more success, unless they should be guarded at an enormous expense to the United States." 1 U.S. Op. Att'y. Gen. 228 (1818). Despite the dire circumstances, the judiciary adhered to the warrant requirements of Maryland law, causing Attorney General Wirt to convey to the Secretary of State "the necessity of drawing the President's immediate attention to this subject."[5] *Id*. at 229.

This is the judicial background against which Congress has legislated on the death penalty, including when it enacted the FDPA's implementation provision. The

[5] In 1830, President Jackson determined to leave "the execution of the sentence of the law to the direction of the court" in all cases. *See* Pardoning Power, 7 U.S. Op. Att'y. Gen. 561, 562 (1855). By 1855, this had become "the established practice." *Id*. at 563. Although the federal practice may have evolved to leave to the courts the duty to fix the date and issue an execution warrant in all cases, this did not obviate the more general rule that the court implement the sentence otherwise in conformity with state law in the absence of Congressional directive.

provision clearly contemplates the court's involvement in the implementation of a death sentence. The FDPA explicitly references the court's involvement, directing it to designate a state's law pursuant to which its death sentence will be implemented when the court sits in a state without the death penalty. The provision identifies the Attorney General's only role in implementation as maintaining custody of the condemned during appellate review and releasing him to the U.S. Marshal "[w]hen the sentence is to be implemented." The provision contemplates the execution will occur sometime after exhaustion of appellate and post-conviction review. The provision does not designate any entity to determine when, specifically, the sentence is to be implemented. The provision does not direct how execution dates are to be set or warrants are to be issued. It is a reasonable conclusion that Congress assumed a court imposing a sentence of death would determine when review of that judgment was exhausted. It is a reasonable conclusion the court would resort to state law to implement the sentence of death consistent with the judicial practice.[6] The historical practice of applying state law is the framework underpinning § 3596(a).

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[6] The DOJ's regulations support this understanding. The regulations were adopted in 1993, prior to the enactment of the FDPA. Those regulations were conditioned upon the entry of an order by the court of judgment commanding a United States Marshal to carry it out. *See* 28 C.F.R. § 26.2(a). The regulations also contemplate the filing of a "return," implying the existence of a warrant. *Id*. § 26.2(b). Moreover, although the regulation provides certain requisites for the content of the proposed order in general, it is clear the DOJ understood the need to tailor the proposed orders to incorporate "any other matters required by law." Thus, the DOJ considered that law beyond its regulation existed and was relevant.

The DOJ also understood its authority to execute to flow from the judicial power. During the rulemaking process, the DOJ responded to comments challenging the DOJ's authority to make the rules by explaining that its power to execute derived from a court ordering it subsequent to judgment:

There must be some law governing how a district court orders an execution to occur. If Congress has not supplied the law, then judicially created law fills the gap. Historically, the federal courts resorted to state law to fill this gap. There is no reason to think federal courts should deviate from historical practice in identical circumstances.

The federal judiciary's recent implementation of death sentences following a 17-year hiatus has been chaotic. The Government has been refusing to obtain warrants authorizing executive officials to execute death-sentenced individuals. Courts, for their part, have struggled with the meaning of § 3596(a) when presented challenges to various execution-chamber protocols that the BOP contemplated using. *See, e.g., In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020) (sharply divided panel denying challenge to various execution-chamber procedures). Justice Sotomayor has noted "[c]onsiderable uncertainty" exists about "the scope of this provision." *Mitchell v. United States*, __ U.S. __, No. 20A32, 2020 WL 5016766, at *1 (Aug. 25, 2020) (Sotomayor, J., statement respecting the denial of the application for stay). The uncertainty about the provision's scope in the context of execution-chamber requirements is substantial. Far more concerning is the

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> As for the Justice Department's "delegated authority," the Department does not need explicit authority to issue regulations establishing death penalty procedures. The Department is authorized *to rely on the authority of the federal courts, acting pursuant to the All Writs Act, 28 U.S.C. 1651(a), to order that their sentences be implemented*. Thus, § 26.2 directs the government's attorney in a capital case to file with the court a proposed Judgment and Order consistent with the regulations.

58 Fed. Reg. 4898-01, 4899-900 (emphasis added).

uncertainty surrounding whether *any* law requires a court to ensure that orders setting executions comport with the material aspects of the law of the state in which the court sits. These are fundamental requisites for implementation. Yet, there appears to be no modern authoritative judicial construction of what law governs implementation of an execution.

As the survey of state laws reflects, the rule of law governs the setting of execution dates and issuance of execution warrants in the United States. If there is an absence of Congressional direction uniformly applicable to all federal capital cases, the only option left is the one to which courts have traditionally resorted: the law of the state in which the court sits. The Court should grant certiorari to announce what the law is and so hold.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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