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

EMERGENCY APPLICATION FOR A STAY OF EXECUTION

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

To the Honorable Samuel Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Petitioner, Christopher André Vialva, respectfully requests a stay of his execution, which is scheduled for September 24, 2020 at 6:00 p.m. Mr. Vialva asks the Court to stay his execution to preserve the Court's jurisdiction to review his contemporaneously filed petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit raising two questions:

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?

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). "[I]n a close case it may [also] be appropriate to balance the equities, to assess the relative harms to the parties as well as the interests of the public at large." *Indiana State Police Pension Trust v. Chrysler, LLC*, 556 U.S. 960 (2009) (internal quotations omitted). Those standards are met here.

I. There Is a Reasonable Probability This Court Will Grant Certiorari.

This case presents the Court with its first opportunity to construe the meaning and scope of the Federal Death Penalty Act's ("FDPA") requirement that federal executions be implemented in the manner prescribed by the law of the state in which the judgment was imposed. Specifically, the question is what law, if any, applies to the date-setting and warrant requirements of a federal execution. This is an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The Court has not addressed this aspect of the FDPA.

In the absence of guidance, the circuit courts have struggled to answer what constitutes "state law" under the FDPA and which provisions of state law a court and the Government are bound to follow. Sup. Ct. R. 10(a). Justice Sotomayor noted, "[W]ith additional federal executions scheduled in the coming months, the importance of clarifying the FDPA's meaning remains. I believe that this Court should address this issue in an appropriate case." *Mitchell v. United States*, __ S. Ct. __, 2020 WL 5016766, *1 (Aug. 25, 2020). This is such a case.

This case does not raise the same questions as *Mitchell* and other cases interpreting the FDPA in the courts of appeals. A brief review of those cases is warranted to show the distinction between the prior decisions and this case.

The D.C. Circuit recently addressed the scope of the FDPA in response to a challenge specifically to execution-chamber procedures the BOP intended to use. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 109 (D.C. Cir. 2020). The result was a sharply divided opinion in which the three judges reached three different interpretations of the FDPA. Two of the judges rejected the argument that the FDPA's language requires adherence only to the top-line method of execution provided by state law. *Id.* Judge Rao concluded "the FDPA also requires the federal government to follow execution procedures set forth in state statutes and regulations, but not execution procedures set forth in less formal state execution protocols." *Id.* at 112. Judge Tatel "agree[d] with Judge Rao that the term 'manner' refers to more than just general execution method." *Id.* at 146 (Tatel, J., dissenting). Only Judge Katsas believed that "manner" referred solely to the choice of execution method, such as

lethal injection versus hanging. Judge Tatel similarly rejected Judge Katsas's limited definition of "manner." *Id.* at 146 ("I agree with Judge Rao that the term 'manner' refers to more than just general execution method.") (Tatel, J., dissenting).

In a Seventh Circuit case, family members of the victims sought an injunction to allow them to attend the prisoner's execution. The protocol of Arkansas, where the prisoner had been sentenced to death, provided the victims' families' right to attend. *Peterson v. Barr*, 965 F.3d 549 (7th Cir. 2020). The Seventh Circuit held § 3596(a)'s reference to "manner prescribed by the law" does not refer to the "details" of the state's execution protocol "such as witnesses." *Id.* at 554.

More recently, the Ninth Circuit "assume[d] without deciding that the [Arizona] Department [of Corrections] Order Manual constitutes 'law of the State' for purposes of the FDPA and the Judgment." *United States v. Mitchell*, Case No. 20-99009, 2020 WL 4815961, *2 (9th Cir. Aug. 19, 2020). Purporting to decide nothing, the Ninth Circuit effectively endorsed an interpretation of applicable state law broader than the D.C. Circuit's. The interpretation encompassed at least portions of Arizona's protocol within its understanding of the law of the state.

A Pennsylvania district court provided the most salient interpretation of § 3596(a). *United States v. Hammer*, 121 F. Supp. 2d 794 (M.D. Pa. 2000). The court held "[i]t is clear . . . that the sentence of death must be implemented in a manner consistent with the law of the Commonwealth of Pennsylvania." *Id.* at 797. The court distinguished between the imposition of a sentence and the implementation of a sentence. It concluded the word "impose" relates to the adjudication of the sentence

by the court while "implement" refers to the process for carrying out the sentence. *See id*. at 798 ("'Implement' is defined as 'to give practical effect to and ensure of actual fulfillment by concrete measures.'") (citing Webster's Third New International Dictionary (1961)). The court held "[t]he implementation of the death sentence involves a process which includes more than just the method of execution utilized." *Id*. The court concluded "the law of Pennsylvania relating to the implementation of a death sentence applies, including the method of execution and the time of execution." *Id*.

Disputes about what law, if any, federal courts are to apply when implementing death sentences under § 3596(a) will continue to arise until this Court provides guidance.[1] Given this context, and the importance of the issue, there is a reasonable probability at least four Justices will vote to grant certiorari to answer the questions presented.

II. There Is a Fair Prospect This Court Will Hold the Fifth Circuit's Order Was Erroneous.

The Fifth Circuit held § 3596(a)'s implementation requirements simply do not speak to the district court's actions in setting an execution date. Only this Court can answer what law, if any, governs the district court's implementation of executions.

[1]The dispute is ongoing. Yesterday, Judge Chutkan construed ' 3596(a) in a manner diametrically opposed to the district court's construction in this case. "Congress vested the U.S. Marshal with authority to oversee an execution *and* constrains the exercise of that authority to the limits of relevant state law." *See In re Federal Bureau of Prisons' Execution Protocol Cases*, Case No. 1:19-mc-00145-TSC, Dkt. 261 at 18 (D.D.C. Sept. 20, 2020).

The text of the statute requires the involvement of the district court to ascertain relevant state law. The text makes clear Congress intended the court apply state law when issuing orders implementing the death sentence. Moreover, the historical judicial practice strongly supports the following conclusions: (1) state law warrant and date-setting requirements must be applied; (2) historical practice constituted part of the legal backdrop against which Congress enacted § 3596(a); and (3) Congress intended continued judicial resort to state law, whether based on § 3596(a) or in complement to it. *See* Petition for a Writ of Certiorari at 7–12.

Moreover, even if there is no fair prospect that five Justices will interpret § 3596(a) to require reversal of the Fifth Circuit on that point, there is a fair prospect the Court will reverse the Circuit's ultimate conclusion no law exists or is to be applied. The judiciary's historical practice of filling Congress's silence with state law is clear. The federal courts understood that Congress's silence did not mean the courts were unrestrained by law or that there was no law to apply. To the extent § 3596(a)'s directive to apply state law does not control, state law must nevertheless apply in the absence of some Congressional directive. *See* Petition for a Writ of Certiorari at 9–13.

III. Mr. Vialva Will Suffer Irreparable Harm Absent a Stay.

Mr. Vialva will suffer irreparable harm if this Court declines to grant a stay of his September 24, 2020, execution: he will be unlawfully executed. This case does not present a question involving the validity of Mr. Vialva's sentence. Instead, it presents a question of the validity of the implementation of his sentence. The harm he will suffer from an illegal execution is irreparable. *See Hill v. McDonough*, 547 U.S. 573,

578 (2006) (granting stay of execution to petitioner challenging the manner of execution); *Nelson v. Campbell*, 540 U.S. 942 (2003) (same); *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases."); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (granting stay of execution in light of the "obviously irreversible nature of the death penalty"); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) ("In a capital case, the possibility of irreparable injury weighs heavily in the movant's favor.").[2]

Failure to stay risks "foreclos[ing] . . . certiorari review by this Court," which itself constitutes "irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984). Allowing the Government to execute Mr. Vialva while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Id.* at 1302. The Government would not "be significantly prejudiced by an additional short delay," and a stay would serve both the public interest and judicial economy. *Id.*

[2] This Court has granted stay applications to prevent far less severe consequences, ranging from the chilling of witness testimony to the reduction of commercial competition. *See, e.g., Hollingsworth*, 558 U.S. at 195; *California v. American Stores Company*, 492 U.S. 1301, 1302, 1304 (1989). Such harms pale in comparison to the irreparable harm that will result if the Government executes Mr. Vialva in violation of the FDPA.

IV. The Balance of Equities and Relative Harms Weighs Strongly in Favor of Granting a Stay.

"[I]n a close case, it may be appropriate to balance the equities, to assess the relative harms to the parties, as well as the interests of the public at large." *Indiana State Police Pension Trust*, 566 U.S. at 960 (internal quotations omitted). These considerations strongly favor a stay here.

First, the Government ignored its own regulations and failed to comply with Texas law. The Government did not follow its own regulations requiring it to obtain a court order fixing the date of Mr. Vialva's execution. *See* 28 C.F.R. 26.2(a). On July 31, 2020, the Government simply announced its intent to conduct a warrantless execution of Mr. Vialva September 24, 2020, instead of seeking an order from the district court. The Government also failed to comply with Texas date-setting and warrant requirements, which afford the condemned a minimum of 91 days between notice and execution.[3]

Second, the Government's history of delay undermines its interest in timeliness. Mr. Vialva's initial motion to vacate his sentence under 28 U.S.C. § 2255 was finally adjudicated in February of 2016. The Government took almost a full year of extensions to respond to the petition for a writ of certiorari related to the disposition of that motion.[4] After waiting over four more years to announce its intent

[3] The Government was actively seeking executions in June of 2020. For example, on June 15, 2020, it gave Daniel Lee notice of his execution. There was no impediment to the Government's seeking a June 2020 warrant and order directing Mr. Vialva's September 24, 2020, execution.

[4] *See* Docket, *Vialva v. United States*, No. 14-8112, available at https://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-8112.htm.

to conduct a warrantless execution of Mr. Vialva, the Government's interest in executing him September 24, 2020, can hardly be deemed compelling.

Third, while the Government and the public have an interest in the timely enforcement of a [death] sentence," *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019), the Government and public equally have an interest in the lawful implementation of a death sentence. The public is not served by erratic or lawless implementation of the ultimate penalty of death.[5]

Finally, this is not an instance in which a death-sentenced prisoner delays litigation until the eve of execution. Mr. Vialva's first awareness the Government intended to execute him on September 24, 2020, arrived in the letter delivered by the Warden the afternoon of July 31, 2020. Mr. Vialva filed his motion for injunctive relief in the district court August 14, 2020. The district court ruled on his motion September 11, 2020. Mr. Vialva filed his notice of appeal September 12 and his Appellant's Brief in the Fifth Circuit September 15, 2020. The Circuit issued its order September 18, 2020 at 8:25 p.m. Mr. Vialva has pursued relief from the Government's violation of the FDPA and Texas law as expeditiously as possible.

[5] The Government's rush toward an execution disserves the public by turning the solemn undertaking of an execution into a disgraceful scramble. Approximately two months ago, the Government executed three men at the federal prison in Terre Haute: Daniel Lee, Wesley Purkey, and Dustin Honken. The executions of Lee and Purkey were utterly chaotic. Although Lee's execution was scheduled for July 13, 2020, at 4:00 p.m., he was not pronounced dead until 8:07 the next morning after being strapped to the execution gurney for four hours. Purkey was scheduled to be executed July 15, 2020 at 4:00 p.m., but he was not pronounced dead until 8:19 the next morning.

CONCLUSION

For the foregoing reasons, the Court should grant a stay of execution pending consideration and disposition of Mr. Vialva's petition for a writ of certiorari.

Respectfully submitted,

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