Nos. 20-5766 and 20A49

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ANDRE VIALVA, PETITIONER

v.

UNITED STATES

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND TO APPLICATION FOR A STAY OF EXECUTION

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In 1999, petitioner and other members of his street gang carjacked and murdered Todd and Stacie Bagley. The following year, petitioner was convicted on three capital-murder counts and sentenced to death by a jury in the Western District of Texas. The district court and the court of appeals accorded petitioner extensive review on both direct appeal and collateral review under 28 U.S.C. 2255, and this Court denied three petitions for writs of certiorari from the resulting judgments.

Now, more than two decades after petitioner's conviction, the government is prepared to carry out his lawful sentence. Petitioner, however, seeks a stay of execution pending this Court's consideration of his petition for a writ of certiorari seeking review of the Fifth Circuit's affirmance of the denial of his

motion to preliminarily enjoin on procedural grounds the carrying out of his execution. That application lacks merit, and both it and the accompanying petition for a writ of certiorari should be denied. The decision below is correct and does not conflict with any decision of this Court or another court of appeals, and neither further review nor extraordinary relief is warranted.

Petitioner seeks an injunction primarily on the ground that he received 55 days between the notice of his execution and his execution date rather than the 91 days Texas affords its prisoners. But contrary to petitioner's contention, neither the Federal Death Penalty Act of 1994 (FDPA), Pub. L. No. 103-322, Tit. VI, 108 Stat. 1959, nor "judicially created law," Pet. 8, requires the federal government to mirror the pre-execution procedures used by the State of conviction. As the several courts of appeals that have recently addressed the scope of the FDPA have uniformly recognized, the statute's requirement 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), does not require the federal government to adhere to state procedures that do not effectuate death. And nothing in the Constitution, federal statutes and regulations, or court decisions supports petitioner's contention that the Executive Branch's authority in this area is dependent on state law.

The equities also favor denying petitioner's application for a stay. Petitioner has not demonstrated that he will suffer any cognizable harm from being executed pursuant to the federal government's procedures rather than Texas's. And the harm to the government, the victims, and the public interest from further delay in carrying out his lawful sentence is significant. Petitioner was convicted over two decades ago for the heinous murders of the Bagleys, and his death sentence has been consistently upheld on direct appeal and multiple rounds of collateral review. The lawful sentence should be carried out without further delay.

STATEMENT

1. In June 1999, petitioner and other members of a street gang in Killeen, Texas, carjacked and murdered Todd and Stacie Bagley. United States v. Bernard, 299 F.3d 467, 471-473 (5th Cir. 2002), cert. denied, 539 U.S. 928 (2003). Petitioner and fellow gang members Christopher Lewis and Tony Sparks developed a plan to abduct and rob a motorist at gunpoint, lock the victim in the trunk of his car, use the victim's bank card to make ATM withdrawals, and then abandon the vehicle (with the victim still locked in the trunk) in a remote area. Id. at 471. And after searching around town, the three men located a couple whom they viewed as suitable victims: Todd and Stacie Bagley, youth ministers visiting Killeen from Iowa who had stopped at a convenience store after a Sunday morning worship service. Id. at 471-472.

While Todd used a pay phone and his wife, Stacie, waited in their car, two of the group approached Todd and asked for a ride. 299 F.3d at 472. Todd agreed, and the three gang members entered the backseat of the Bagleys' car. Ibid. After giving Todd directions, petitioner pulled a handgun on him, Sparks pulled another gun on Stacie, and petitioner stated that "the plans have changed." Ibid. The trio then robbed the Bagleys, forced them into the trunk of their car, and drove around in the car for several hours attempting to empty the Bagleys' bank accounts from multiple ATMs and pawn Stacie's wedding ring. Ibid.

While locked in the trunk, the Bagleys spoke to Lewis and Sparks through the car's rear panel, discussing their faith and explaining that God's blessings were available to anyone. 299 F.3d at 472. After the conversation, Sparks told petitioner that he no longer wanted to go through with the crime, but petitioner "insisted on killing the Bagleys and burning their car to eliminate the witnesses" and any incriminating fingerprints. Ibid. Petitioner drove to his home, where he retrieved a ski mask and clothing. Ibid. The Bagleys pleaded with petitioner's accomplices for their lives. Ibid.

After two other gang members, Brandon Bernard and Terry Brown, met up with the group, petitioner "repeated that he had to kill the Bagleys because they had seen his face." 299 F.3d at 472. Bernard and Brown then set off to purchase lighter fluid to burn

the Bagleys' car. Ibid. Sparks, who had expressed his desire to discontinue the crime, went home. Id. at 472 n.3.

Petitioner and the other three gang members then drove the Bagleys' car (with the Bagleys still in the trunk) and Bernard's car to a remote location on the Fort Hood military installation. 299 F.3d at 472-473. Bernard helped pour lighter fluid in the Bagleys' car, while the Bagleys sang and prayed in the trunk. Id. at 472. Stacie said, "Jesus loves you" and "Jesus, take care of us." Ibid. Petitioner cursed in reply, put on his mask, ordered the trunk opened, and shot the Bagleys. Id. at 472-473. Petitioner shot Todd in the head at close range, killing him instantly. Ibid. But his shot to the side of Stacie's face merely knocked her unconscious. Id. at 473. Bernard then set fire to the car, killing Stacie, who died of smoke inhalation. Ibid.

The gang's escape was foiled when Bernard's car slid off the road into a ditch near the Bagleys' burning vehicle. 299 F.3d at 473. The four men were arrested after first responders discovered the Bagleys' charred bodies in the car's trunk. Ibid.

2. A federal jury found petitioner guilty of carjacking resulting in death, conspiracy to murder the Bagleys, and murdering the Bagleys within the special maritime and territorial jurisdiction of the United States. 299 F.3d at 473. Following a capital-sentencing hearing, the jury recommended that he be sentenced to death on the carjacking and murder counts. Ibid.

On June 16, 2000, the district court imposed that sentence pursuant to the FDPA. See Pet. App. 4, at 2; 299 F.3d at 471. The court of appeals affirmed, 299 F.3d 467, and this Court denied certiorari, 539 U.S. 928 (2003).

3. In 2004, petitioner filed a motion for collateral relief under 28 U.S.C. 2255. D. Ct. Doc. 372 (June 14, 2004). The district court denied his motion and his request for a certificate of appealability (COA). D. Ct. Doc. 449, at 63 (Sept. 28, 2012). The court of appeals likewise denied a COA, United States v. Bernard, 762 F.3d 467, 470 (5th Cir. 2014), and this Court denied certiorari, 136 S. Ct. 1155 (2016).

In 2017, petitioner sought reconsideration of the district court's denial of his Section 2255 motion under Federal Rule of Civil Procedure 60(b)(6). D. Ct. Doc. 553 (Oct. 13, 2017). The court dismissed his Rule 60(b)(6) motion for lack of jurisdiction as an uncertified successive Section 2255 motion and denied a COA. D. Ct. Doc. 570, at 6 (Dec. 20, 2017). The court of appeals likewise denied a COA, United States v. Vialva, 904 F.3d 356, 358 (5th Cir. 2018) (per curiam), and this Court denied certiorari, 140 S. Ct. 859 and 140 S. Ct. 860 (2020).

4. On July 31, 2020, the government notified petitioner that his execution was scheduled for September 24. D. Ct. Doc. 673. Two weeks later, petitioner filed a motion in the district court pursuant to the All Writs Act, 28 U.S.C. 1651(a), seeking to enjoin the Federal Bureau of Prisons (BOP) and the U.S. Marshals

Service (Marshals) from carrying out his execution. D. Ct. Doc. 675 (Aug. 14, 2020). Among other things, petitioner argued that his execution would be unlawful because the government had not obtained a judicial warrant authorizing the Marshals to carry out his death sentence and had not complied with pre-execution procedures set forth in Texas law related to issuing a warrant and setting the execution date. Id. at 4-10.

The district court construed this motion as a request for a preliminary injunction and denied the request. Pet. App. 2, at 11. It explained that federal law and the court's judgment at the conclusion of the original criminal prosecution already authorized the Marshals to proceed with petitioner's execution and that no further warrant was necessary. Id. at 6-8. But "out of an abundance of caution," the court issued a supplemental order that ratified petitioner's existing execution date and directed the Marshals to carry out his sentence, even as it reiterated that such an order was not "required to empower" the government to proceed. Pet. App. 3, at 1. As for petitioner's reliance on Texas law, the court observed that the FDPA, "even under a broad reading," requires the federal government to comply only with a state's procedures for "effectuating death," such as the choice of lethal-injection drug, and does not require compliance with the sort of "pre-execution procedures" petitioner had identified. Pet. App. 2, at 9. Accordingly, the court found no likelihood that petitioner could succeed on the merits of his claims. Ibid.

The district court also determined that petitioner could not satisfy any of the equitable requirements for obtaining injunctive relief. Pet. App. 2, at 9-11. It explained that petitioner was not challenging the death sentence itself and had not identified any "irreparable injury" or "cognizable harm" he would likely suffer if his sentence was carried out using BOP's procedures rather than Texas's. Id. at 9-10. The court further determined that the public's strong interest in carrying out petitioner's sentence, especially after his rights to direct appeal and collateral review had been exhausted, outweighed his interest in further delay. Id. at 10-11.

5. The court of appeals affirmed and denied petitioner's motion to stay his execution. Pet. App. 1, at 1. It observed that petitioner's objections relating to the procurement of a judicial order setting the execution date and empowering the Marshals to proceed were "beside the point" given that "the district court ha[d] unambiguously directed a United States marshal to carry out the execution and adopted the September 24, 2020 execution date." Id. at 4. Instead, the court of appeals explained, "the dispositive question" is whether the government should have adhered to Texas's requirement that a court provide at least 91 days between setting an execution date and the execution itself. Id. at 4. And the court rejected petitioner's contention that the FDPA incorporated such requirements. Id. at 4-6.

The court of appeals explained that the FDPA's requirement 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), is "at least limited to procedures effectuating death and excludes pre-execution process requirements such as date-setting and issuing warrants." Pet. App. 1, at 5. The court observed that the FDPA's text "explicitly refers to the 'implementation of the sentence.'" Ibid. And it noted that its interpretation of that text accorded with the interpretations of "other circuits that have recently looked at this provision." Ibid. (citations omitted).

The court of appeals also rejected petitioner's argument that, independent of the FDPA, "historical practice" requires federal courts "to follow state law" with respect to "warrant and date-setting requirements." Pet. App. 1, at 6. It found that petitioner had "not sufficiently demonstrated" that judicial practice in fact required that result. Ibid. And it declined, in any event, to "recognize the existence of any such 'judicially created law.'" Ibid.[1]

The court of appeals further determined that petitioner had failed to establish the remaining preliminary-injunction criteria. Pet. App. 1, at 6-7. It explained that petitioner is "not

[1] The court of appeals also observed that petitioner did "not clearly state whether or how" the district court's recent order "failed to comply with the Texas warrant requirements," but that, in any event, those requirements did "not apply" under the FDPA for the same reasons. Pet. App. 1, at 4 n.5.

challenging his death sentence, but only the pre-execution procedures for carrying it out"; that he has "thoroughly litigated his conviction and sentence"; that he was "given official notice well in advance of his execution date"; and that "the public's interest in timely enforcement of the death sentence outweighs" his desire "for more time." Ibid.

ARGUMENT

Petitioner's application for a stay of execution, and his petition for a writ of certiorari, should be denied. Petitioner does not challenge the validity of his death sentence or seek to stay the district court judgment embodying that sentence. His claim instead is that the lower courts erred in denying him injunctive relief that would have precluded the enforcement of that original criminal judgment. Thus, although he purports (Appl. 10) to seek a stay pending disposition of his petition for a writ of certiorari, he is in fact seeking an injunction from this Court under the All Writs Act, 28 U.S.C. 1651(a), to bar his execution pending review. Petitioner has failed to show that such relief is warranted under standards applicable to stays of court orders, much less under the considerably higher standard for obtaining an injunction from this Court.

In order to obtain a stay of execution pending consideration of a petition for a writ of certiorari, a movant must first establish a likelihood of success on the merits -- specifically, "a reasonable probability that four Members of the Court would

consider the underlying issue sufficiently meritorious for the grant of certiorari" as well as "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citations omitted). A movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citations omitted).

In addition to those typical stay standards, when a movant seeks an injunction pending review, the requisite merits showing is not just a reasonable probability of reversal, but "legal rights" that are "indisputably clear." Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers); see South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). That "'demands a significantly higher justification' than a request for a stay" pending review. Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (per curiam) (quoting Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

Petitioner cannot satisfy either standard. To start, he has failed to establish a reasonable probability that this Court will grant certiorari and a significant possibility of reversal, let alone an "indisputably clear" right on the merits. The court of appeals' determination that neither the FDPA nor historical practice requires the federal government to comply with state pre-

execution procedures is correct and does not conflict with any decision of this Court or another court of appeals. Petitioner has also failed to demonstrate that the balance of equities favors delaying his execution, which would undermine the interests of the government, the victim's families, and the public in the timely enforcement of his lawful sentence. No further review, or further delay, is warranted.

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

Petitioner asserts a "reasonable probability" that this Court will grant review and a "fair prospect" that it will reverse on the two questions presented in his petition for a writ of certiorari. Appl. 2 (quoting Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam)); see Appl. at 2-6. But because petitioner is asking the Court to, in the first instance, halt executive action (the execution of his lawful sentence) that the lower courts have refused to enjoin, he is in substance seeking an injunction -- i.e., an order "directed at someone" that "governs that party's conduct," Nken v. Holder, 556 U.S. 418, 428 (2009) -- that would be warranted only if "the legal rights at issue are indisputably clear." Wisconsin Right to Life, Inc., 542 U.S. at 1306 (Rehnquist, C.J., in chambers); see Respect Maine PAC, 562 U.S. at 996 (distinguishing stays from injunctions); see also pp. 10-11, supra. Neither of petitioner's two potential bases for

review even satisfies this Court's stay standards, much less the stringent standards for an injunction.

A. Petitioner first contends (Pet. 6-8) that his execution violates the FDPA's requirement that the "implementation of [a death] sentence" be "in the manner prescribed by the law of the State in which the sentence is imposed," 18 U.S.C. 3596(a), because BOP's pre-execution procedures do not track Texas's pre-execution procedures. Specifically, he focuses on Texas's requirements that a state court set the execution date at least 91 days in advance, Tex. Code Crim. Proc. art. 43.141(a) and (c); and that, within ten days of issuing the order setting the execution date, the state court also "issue a warrant under the seal of the court" that "command[s] the director [of the relevant prison] to proceed" with the execution, id. art. 43.15(a). As the court of appeals correctly determined, petitioner has not shown a substantial likelihood of success of the merits of that claim.

1. As the government has discussed at length in this Court in prior briefing, the FDPA's directive to implement a federal death "sentence in the manner prescribed by the law of the State in which the sentence is imposed," 18 U.S.C. 3596(a), requires the federal government to follow only a State's general, top-line method of execution, not additional procedural details. See, e.g. Gov't Br. in Opp. at 14-24, Bourgeois v. Barr, No. 19-1348 (June 19, 2020). As Judge Katsas has thoroughly explained, "[a]ll indicators of the FDPA's meaning -- statutory text, history,

context, and design -- point to [this] conclusion." In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 114 (D.C. Cir.) (per curiam) (Protocol Cases) (Katsas, J., concurring), cert. denied, No. 19-1348 (June 29, 2020); see id. at 114-124. And the three Justices who have addressed the issue have indicated that the government's position is "likely to prevail when this question is ultimately decided." Barr v. Roane, 140 S. Ct. 353, 353 (2019) (Alito, J., statement respecting the denial of stay or vacatur).

The "manner" provision of the FDPA traces its roots to the Crimes Act of 1790, which provided that "the manner of inflicting the punishment of death[] shall be by hanging." Act of Apr. 30, 1790, ch. 9, § 33, 1 Stat. 119. Petitioner does not dispute that this provision prescribed only the general method of execution ("hanging"), not other procedures or details related to the execution process. Ibid. That understanding "followed the law of England," where Blackstone equated the "manner" of execution with the general method of causing an offender's death -- e.g., "hanging" -- rather than "subsidiary details" of the process. Protocol Cases, 955 F.3d at 115 (Katsas, J., concurring).

After more than 140 years under the Crimes Act of 1790, Congress in 1937 changed the prescribed "manner" of federal executions from hanging to the "the manner prescribed by the laws of the State within which the sentence is imposed." Act of June 19, 1937 (1937 Act), ch. 367, 50 Stat. 304. There is no indication

that Congress broadened its scope beyond its long-settled meaning in the federal execution context -- i.e., as a reference to the general method of execution -- by retaining the term in the 1937 Act. To the contrary, "if a word is obviously transplanted from another legal source," it typically "brings the old soil with it." Hall v. Hall, 138 S. Ct. 1118, 1128 (2018) (citation omitted).

The history and context of the 1937 Act strongly reinforce that presumption. The Act was "prompted by the fact that" States had adopted "'more humane methods of execution, such as electrocution, or gas,'" and the Attorney General proposed that Congress "change its law in this respect." Andres v. United States, 333 U.S. 740, 745 n.6 (1948) (emphases added; citation omitted). Accordingly, this Court has described the 1937 Act as adopting "the local mode of execution," which it equated with the general method of execution -- e.g., "death by hanging." Id. at 745. Indeed, when the federal government announced the first executions under the 1937 Act, it made clear that the inmates would "be executed by whatever method is prescribed by the laws of the State," while the Department of Justice would provide "all United States marshals instructions for carrying out executions" that would govern other particulars associated with the execution "[u]nless [a] court specifies otherwise." C.A. Gov't Br. Addendum 2; see ibid. (citing federal instructions regarding execution time and number of witnesses). BOP confirmed that understanding in a 1942 manual, explaining 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." C.A. Gov't Br. Addendum 1, at 3a (emphases added). The manual included regulations providing that a U.S. Marshal would be in "charge of the conduct of executions," which would occur "at the place fixed in the judgment" of the court or "designated by the Department of Justice." Id. at 3a-4a. The manual also specified details about the execution date, time, and witnesses. Ibid.

Thus, although the federal government was permitted to carry out executions under the 1937 Act in state facilities in cooperation with state personnel, see 50 Stat. 304 -- just as it may today, see 18 U.S.C. 3597(a) -- it never considered itself legally obligated to follow subsidiary details of state execution protocols, let alone pre-execution procedures established by state law. The government's longstanding "practice" in that regard adds further "weight" to the already-compelling evidence that references to the "manner" of execution in federal law have long referred only to the top-line choice of execution method, and not to pre-execution procedures. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

In 1994, Congress "carried forward the relevant language and" substance of the 1937 Act in the FDPA. Protocol Cases, 955 F.3d at 117 (Katsas, J., concurring); accord id. at 148 (Tatel, J., dissenting) ("By using virtually identical language in FDPA

section 3596(a), Congress signaled its intent to continue the same system" as the 1937 Act.). The FDPA therefore requires what the 1937 Act required: compliance with "the local mode of execution," such as lethal injection, but not with all the procedural details of state law. Andres, 333 U.S. at 745 & n.6. Because BOP conducts federal executions using lethal injection, 28 C.F.R. 26.3(a)(4) -- the same method of execution as Texas, see Wood v. Collier, 836 F.3d 534, 536 (5th Cir. 2016) -- the government has fully complied with the FDPA provision that petitioner invokes, and it need not follow additional state procedures.

2. Even if this Court were not likely to limit the term "manner" in Section 3596(a) to a State's top-line choice of execution method, petitioner still could not demonstrate a significant likelihood of success on the merits. Section 3596(a)'s text governing the manner of "implementation of the sentence" of "death," itself demonstrates that the provision applies only to matters that actually "implement[]" that "death." 18 U.S.C. 3596(a). The district court and every appellate judge to consider the question, including Judge Tatel in his D.C. Circuit dissent, thus agree with the court of appeals here that Section 3596(a) does not apply to procedures that do not effectuate death, like the Texas date-setting procedures at issue here. See United States v. Mitchell, No. 20-99009, 2020 WL 4815961, at *2-*3 & n.6 (9th Cir. Aug. 19, 2020) (per curiam), stay denied, No. 20A32 (Aug. 25, 2020); Peterson v. Barr, 965 F.3d 549, 554 (7th Cir. 2020), stay

denied, No. 20A6 (July 14, 2020); Protocol Cases, 955 F.3d at 151 (Tatel, J., dissenting) ("agree[ing]" that Section 3596(a) "requires the federal government to follow only 'implementation' procedures," or "those procedures that 'effectuat[e] the death,' including choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements") (citations omitted); id. at 129-131 (Rao, J., concurring) (concluding that Section 3596(a) "requires the federal government to apply only those execution procedures prescribed by a state's statutes and formal regulations," and observing that the "specifics of an execution procedure" may include "the choice of lethal substance or method of injection"); see also LeCroy v. United States, No. 20-13353, 2020 WL 5542483, at *4 (11th Cir. Sept. 16, 2020) ("Whatever [Section 3596(a)] means, we are confident that it does not extend to ensuring a lawyer's presence at execution.").

Not only would petitioner's contrary approach be a poor fit with the statutory text, it would threaten to undermine the basic purpose of the FDPA by making it "impossible to carry out executions of prisoners sentenced in some States." Roane, 140 S. Ct. at 353 (Alito, J., statement respecting the denial of stay or vacatur). Texas's statute relating to scheduling of execution dates, for example, conditions a court's ability to set the date on the defendant's exhaustion of state habeas corpus remedies, which would be unavailable to a federal prisoner convicted under federal law. Tex. Code Crim. Proc. art. 43.141(a)

and (b). And Texas's warrant requirement addresses warrants issued "under the seal" of Texas state courts "to the director of the correctional institutions division of the Texas Department of Criminal Justice at Hunstville, Texas." Id. art. 43.15(a). As the court of appeals recognized, "strict compliance with Texas warrant requirements" in a federal case like this, which involves the execution of a federal prisoner at a federal facility in Indiana, "may be impossible." Pet. App. 1, at 4 n.5. Requiring federal authorities to comply with such procedural requirements could also, in some States, enable local obstruction of federal sentences. It is implausible that Congress meant to impose such obstacles, including potentially insurmountable obstacles, on the implementation of federal death sentences. See Protocol Cases, 955 F.3d at 119-121 (Katsas, J., concurring).

B. Petitioner also contends that if the FDPA does not require state pre-execution procedures, then "judicially created law" does. Pet. 8; see Pet. 8-12. That contention relies almost exclusively on an 1818 Attorney General opinion. Death-Warrants, 1 Op. Att'y Gen. 228. That opinion does not support petitioner's claim.

The opinion addressed the question of whether President Monroe could issue a warrant "fix[ing] the day for the execution" in a case involving "mail-robbers" tried in Maryland before Supreme Court Justice Gabriel Duvall, who was riding circuit. 1 Op. Att'y Gen. at 228. The Attorney General found no "uniform rule to guide

the conduct of the President in this respect," which "can be prescribed by Congress only." Ibid. And the Attorney General observed that, although federal courts had generally followed "the practice of the State courts in which they hold their sessions" in deciding whether to set an execution date by court order, "there is no law -- that is, no positive act of Congress -- which gives to the courts of the United States the express power of fixing the day." Ibid. In the absence of any congressional action, the Attorney General determined that the President had inherent power to issue warrants setting the date of an execution "in all cases where they are made necessary by the practice of the State in which the sentence is passed." Ibid.

Petitioner asserts that the 1818 opinion reflected a "judicially developed rule" that "when Congress is silent, executions are to be implemented in the manner prescribed by state law, including that state's warrant requirements." Pet. 10. Setting aside whether any such rule exists under current federal law (which, as explained above, it does not), nothing in the Attorney General's opinion indicates that the state-law procedures govern federal executions.

In concluding that the President could set an execution date in the mail-robbers case, the Attorney General did not suggest, by negative implication or otherwise, that federal executive action is beholden to state procedural law. The issue the Attorney General confronted was that, because Justice Duvall was declining

to schedule executions in the absence of an executive order, the prisoners would not be executed at all unless some action were taken. See 1 Op. Att'y Gen. at 228 (noting that "the case has become one of great emergency" in light of the prisoners' repeated efforts to escape). The Attorney General determined that the President had the authority to resolve such an impasse with a federal court by himself setting the execution date. But he did not conclude that the President was invariably required to follow state procedures, let alone every aspect of them. Indeed, the determination that the President could set a date that state law would require the governor to set, ibid., belies any suggestion that the federal procedures must be precisely the same as the State's.

Petitioner's broader reading of the Attorney General's opinion -- that the implementation of federal sentences is entirely dependent on whatever procedures States may elect to adopt -- cannot be squared with the Attorney General's insistence on "giv[ing] effect to our laws." 1 Op. Att'y Gen. at 228 (emphasis added); see U.S. Const. Art. VI, Cl. 2 (Supremacy Clause). And to the extent that deference to certain state procedures may have been prudent in 1818, given the dependence of federal law enforcement on state facilities at the time, that does not suggest that compliance with all state procedures is required to carry out a federal execution today. See, e.g., Printz v. United States,

521 U.S. 898, 909-910 (1997) (describing early federal reliance on state assistance in carrying out federal sentences).

Indeed, consistent with the action urged by the Attorney General in his 1818 opinion, this Court later explained that the default constitutional rule for setting execution dates is one of shared authority between the Executive and the Judiciary. See Holden v. Minnesota, 137 U.S. 483, 495-496 (1890). Accordingly, in an 1855 opinion, the Attorney General explained that the date of execution was sometimes fixed by the President and sometimes by the courts, likewise without regard to the requirements of state law. Pardoning Power, 7 Op. Att'y Gen. 561, 562; see Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898, 4899-4900 (Jan. 19, 1993) (describing 19th-century practices). In 1830, President Andrew Jackson decided to "'leave'" it to the "'discretion of the court'" to fix the date of execution in all cases -- again, irrespective of state requirements -- and it appears that this became the "established practice" for a period. 7 Op. Att'y Gen. at 562-563 (citation omitted).

Current federal law prescribes a uniform federal rule for setting the date of an execution that shifts principal responsibility for setting execution dates back to the Executive Branch, while also recognizing the concurrent authority of the courts. Specifically, the Attorney General's regulations governing federal death sentences provide, in relevant part, that

"[e]xcept to the extent a court orders otherwise, a sentence of death shall be executed * * * [o]n a date and at a time designated by the Director of the Federal Bureau of Prisons." 28 C.F.R. 26.3(a). Nothing in the Attorney General's 1818 opinion, let alone the Constitution, supports petitioner's implicit suggestion that a State could unilaterally decide to override federal law by enacting procedural rules that would make it more costly, more difficult, or even impossible to carry out an execution in accord with the current regulations.

II. EQUITABLE CONSIDERATIONS WEIGH HEAVILY AGAINST A STAY

In all events, the balance of equities weighs strongly in favor of permitting the government to carry out petitioner's lawful sentence. Petitioner here is not challenging the validity of his death sentence, but only the pre-execution procedures for carrying it out. Appl. 6. The mere existence of his death sentence does not, therefore, establish irreparable injury. See Hill v. McDonough, 547 U.S. 573, 580-581 (2006). And petitioner has not identified any cognizable harm that would result from following BOP's procedures rather than Texas's.

Petitioner does not dispute that the top-line manner of execution (lethal injection) is the same under federal and state law. And he has already received most of the pre-execution procedures he desires. The government selected an execution date well in advance and served a letter on petitioner officially notifying him of his impending execution. The district court then

issued a supplemental order ratifying his execution date and directing the Marshals to proceed. Pet. App. 3, at 1-2. Although petitioner notes (Appl. 8) that Texas law would have required 91 days between the notice and his execution date -- rather than the 55 days he received -- he has never identified any potentially meritorious legal challenges he might have brought if given more time. Petitioner has had two decades in which to challenge his sentence and has done so repeatedly and unsuccessfully. He has also litigated extensively in three different jurisdictions since being notified of his execution. See Pet. App. 2, at 10 n.3 (discussing litigation within the Fifth, Seventh, and D.C. Circuits).[2]

On the other side of the ledger, this Court has repeatedly emphasized that "[b]oth the [government] and the victims of crime

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[2] Petitioner suggests the government engaged in inequitable conduct by allegedly failing to "follow its own regulations requiring it to obtain a court order fixing the date" of execution. Appl. 8. He is mistaken. Petitioner relies on 28 C.F.R. 26.2(a), which directs prosecutors to furnish the court with a "proposed Judgment and Order" prior to sentencing that states (among other things) that the "sentence shall be executed by a United States Marshal * * * on a date and at a place designated by the Director of the Federal Bureau of Prisons." Ibid. As the district court explained, that provision "does not indicate that the issuance of a judicial warrant is a prerequisite" to carrying out an execution, nor does the court have to adopt the proposed language "in order to confer [on the government] the authority to implement a lawfully imposed death sentence." Pet. App. 2, at 7. In any event, the court issued a supplemental order "out of an abundance of caution" that tracked the language in the proposed Judgment and Order. Pet. App. 3, at 1. The court of appeals therefore properly determined that petitioner's objection to the government's alleged failure to request a judicial order earlier was "beside the point." Pet. App. 1, at 4.

have an important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (citation omitted); see, e.g., Nelson v. Campbell, 541 U.S. 637, 650 (2004) (describing "the State's significant interest in enforcing its criminal judgments"); Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) (per curiam) (noting that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment"). Once postconviction proceedings "have run their course," as they have here, "finality acquires an added moral dimension." Calderon v. Thompson, 523 U.S. 538, 556 (1998). Consequently, delay "inflict[s] a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike." Ibid. (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)). Unduly delaying executions can also frustrate the death penalty by undermining its retributive and deterrent functions. See Bucklew, 139 S. Ct. at 1134; id. at 1144 (Breyer, J., dissenting).[3]

The government's significant interest in timely enforcement of a lawful sentence is "magnified by the heinous nature of the offenses committed by [the defendant]." Protocol Cases, 955 F.3d

[3] Petitioner contends (Appl. 8-9) that this interest is less compelling here because even though his initial motion under 28 U.S.C. 2255 was finally resolved in 2016, the government waited until 2020 to announce his execution. But in 2017, petitioner filed a Rule 60(b)(6) motion that led to proceedings that did not end until January of this year. See p. 6, supra.

at 127 (Katsas, J., concurring). Petitioner here was the ringleader of the murders of Todd and Stacie Bagley. After kidnapping them, robbing them, and driving around with them locked in their own trunk for several hours as they pleaded for their lives, petitioner shot them both, killing Todd and leaving Stacie to burn alive. His sentence has been upheld throughout his many years of direct and postconviction review. No further review of his case, and no further delay of his sentence, is warranted.

CONCLUSION

The application for a stay of execution and the accompanying petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2020