Nos. 20-922 and 20A121

IN THE SUPREME COURT OF THE UNITED STATES

LISA MARIE MONTGOMERY, PETITIONER

v.

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL, ET AL.

(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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ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

Montgomery v. Barr, No. 20-cv-3261 (Nov. 19, 2020) (granting preliminary injunction on clemency claim)

Montgomery v. Rosen, No. 20-cv-3261 (Dec. 26, 2020) (entering partial final judgment on 28 C.F.R. 26.3(a)(1) claim)

United States Court of Appeals (D.C. Cir.):

Montgomery v. Rosen, No. 20-5379 (Jan. 1, 2021) (summarily reversing district court judgment of December 26, 2020)

Montgomery v. Rosen, No. 20-5379 (Jan. 5, 2021) (denying rehearing en banc)

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On December 16, 2004, petitioner drove to the home of Bobbie Jo Stinnett, who was eight months pregnant, strangled Stinnett to death, and cut the premature baby from her stomach with a kitchen knife. Petitioner then took the child home in an effort to pass it off as her own. She confessed to her crime and was sentenced to death by a jury of her peers. Petitioner's conviction has been upheld as lawful after exhaustive direct and collateral review, resulting in two prior denials of certiorari by this Court. She is scheduled to be executed at 6 pm on January 12, 2021.

Here, petitioner seeks to delay her execution based merely on a claim that the government has misinterpreted its own regulation governing the scheduling of executions, which she alleges entitled her to be executed no earlier than January 20, 2021. Although the district court accepted that claim, a panel of the court of appeals summarily reversed, and the court of appeals denied en banc

rehearing with no judge even calling for a vote. Petitioner's arguments against the panel decision lack merit and do not warrant certiorari. Nor can petitioner come close to satisfying the equitable standard for a stay or injunction pending certiorari.

The regulation at issue provides that "[i]f the date designated for execution passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisons [BOP] when the stay is lifted." 28 C.F.R. 26.3(a)(1) (emphases added). Petitioner contends that this language bars the Director from rescheduling an execution during the pendency of an order postponing the execution, as he did here. But the Director rescheduled petitioner's execution before the originally designated date had passed. The regulation's explicit triggering condition -- that "the date designated for execution passes by reason of a stay" -- thus did not occur. Ibid. And in any event, Section 26.3(a)(1)'s command that the Director "shall" reschedule "promptly * * * when the stay is lifted" imposes a duty to reschedule upon termination of a stay, not a prohibition on doing so before that time. Ibid. Petitioner's contrary reading distorts the regulation's function of promoting prompt rescheduling and instead effectively imposes an arbitrary extension on any court-ordered stay. The panel's summary rejection of petitioner's theory was fully consistent with existing law endorsing summary disposition when the merits are clear.

The questions presented plainly fail to satisfy the criteria for certiorari. Petitioner concedes the absence of a conflict in the courts of appeals on the meaning of Section 26.3(a)(1). And her claim raises the exceedingly narrow question whether, when a district court issues an order postponing an execution, Section 26.3(a)(1) prohibits the government from rescheduling the execution before the originally scheduled date has passed but while the stay is still in effect, for a date after the stay will have expired. Merely to state the question is to illustrate its lack of broad significance. Petitioner's strained effort to convert the panel's routine summary reversal into a question worthy of this Court's review fares no better. As this Court's recent orders in other capital litigation make clear, summary reversal is an appropriate mechanism for resolving meritless claims in the expedited context of last-minute challenges to executions.

Finally, the equities overwhelmingly weigh against emergency relief halting petitioner's execution. Her request for delay is based purely on the government's purported violation of its own scheduling regulations, not any substantive infringement of her rights. She does not challenge her conviction or even the proposed method of execution. She has already filed a clemency petition, and has had decades to litigate her claims. The government and the public, including the victim's family members, have a powerful interest in securing finality and justice at long last.

STATEMENT

A. Factual and Procedural Background

1. In April 2004, petitioner and Bobbie Jo Stinnett met at a dog show. Stinnett maintained a website to promote her dog-breeding business, which she ran out of her home. In the spring of 2004, Stinnett became pregnant and shared that news with her online community, including petitioner. United States v. Montgomery, 635 F.3d 1074, 1079 (8th Cir. 2011).

Around that time, petitioner, who was herself unable to become pregnant because she had been sterilized years earlier, falsely began telling people that she was pregnant. Petitioner said that she had tested positive for pregnancy, and she began wearing maternity clothes and behaving as if she were pregnant. Petitioner's second husband and her children were unaware of her sterilization and believed that she was pregnant. Montgomery, 635 F.3d at 1079-1080.

On December 15, 2004, when Stinnett was eight months pregnant, petitioner contacted Stinnett via instant message using an alias and expressed interest in purchasing a puppy from her. The women arranged to meet the following day. The following day, petitioner drove from her home in Melvern, Kansas, to Stinnett's home in Skidmore, Missouri, carrying a white cord and sharp kitchen knife in her jacket. Montgomery, 635 F.3d at 1079.

When petitioner arrived, she and Stinnett initially played with the puppies. But sometime after 2:30 p.m., petitioner attacked Stinnett, using the cord to strangle her until she was unconscious. Petitioner then cut into Stinnett's abdomen with the knife, which caused Stinnett to regain consciousness. A struggle ensued, and petitioner again strangled Stinnett with the cord, this time killing her. Petitioner then extracted the baby from Stinnett's body, cut the umbilical cord, and left with the child. Stinnett's mother arrived at Stinnett's home shortly thereafter, found her daughter's body covered in blood, and called 911. Stinnett's mother said the scene looked as if Stinnett's "stomach had exploded." Montgomery, 635 F.3d at 1079-1080.

The next day, December 17, 2004, state law-enforcement officers arrived at petitioner's home, where petitioner was sitting on the couch, holding the baby. An officer explained that they were investigating Stinnett's murder and asked about the baby. Petitioner initially claimed that she had given birth at a clinic in Topeka, but later admitted to that lie and told another one. She claimed that, unbeknownst to her husband, she had given birth at home with the help of two friends because the family was having financial problems. When asked for her friends' names, petitioner said that they had not been physically present but had been available by phone if difficulties arose. Petitioner asserted

that she had given birth in the kitchen and discarded the placenta in a creek. Montgomery, 635 F.3d at 1080.

At some point, petitioner requested that the questioning continue at the sheriff's office. Once there, petitioner confessed that she had killed Stinnett, removed the baby from her womb, and abducted the child. The baby was returned to her father. Montgomery, 635 F.3d at 1080.

2. On December 17, 2004, the government filed a criminal complaint charging petitioner with kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1) (2000). Compl., United States v. Montgomery, No. 05-cr-6002 (W.D. Mo.) (Dec. 17, 2004). Shortly thereafter, in January 2005, a federal grand jury indicted petitioner on one count of kidnapping resulting in death. Indictment 1, Montgomery, No. 05-cr-6002 (W.D. Mo.) (Jan. 12, 2005). The indictment included special findings (id. at 1-4) required under the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 et seq., for charges as to which a capital sentence is sought. See also Superseding Indictment 1-3, Montgomery, No. 05-cr-6002 (W.D. Mo.) (Mar. 13, 2007).

After trial, the jury unanimously found petitioner guilty of kidnapping resulting in death and recommended a capital sentence. 635 F.3d at 1085. The district court sentenced petitioner in accord with that recommendation. Ibid. The court of appeals affirmed,

635 F.3d 1074, and this Court denied certiorari, Montgomery v. United States, 565 U.S. 1263 (No. 11-7377) (Mar. 19, 2012).

In 2012, petitioner sought post-conviction relief under 28 U.S.C. 2255. After holding an evidentiary hearing, the district court denied relief and further denied a certificate of appealability (COA). See Order, Montgomery v. United States, No. 12-8001 (W.D. Mo. Mar. 3, 2017); Order, Montgomery, No. 12-8001 (Dec. 21, 2015). The court of appeals similarly denied a COA and dismissed petitioner's appeal. Judgment, Montgomery v. United States, No. 17-1716 (8th Cir. Jan. 25, 2019). This Court denied certiorari. Montgomery v. United States, 140 S. Ct. 2820 (No. 19-5921) (May 26, 2020).

B. The Present Proceedings

1. On October 16, 2020, the Director of BOP designated December 8, 2020, as the date for petitioner's execution. 20-cv-3261 D. Ct. Doc. (D. Ct. Doc.) 33, at 170-172 (Dec. 13, 2020); see 28 C.F.R. 26.3(a)(1) (providing that the Director shall set an execution date "no sooner than 60 days from the entry of the judgment of death"). Petitioner was thus notified of the designated date 53 days in advance -- well in excess of the 20 days' notice required by regulation. See 28 C.F.R. 26.4(a) (effective until Dec. 27, 2020) ("The Warden of the designated institution shall notify the prisoner under sentence of death of the date designated for execution at least 20 days in advance,

except when the date follows a postponement of fewer than 20 days of a previously scheduled and noticed date of execution, in which case the Warden shall notify the prisoner as soon as possible.").

On November 9, 2020, two of petitioner's counsel, Kelley Henry and Amy Harwell, wrote to President Trump seeking a postponement of petitioner's execution on the ground that they were suffering from symptoms of COVID-19. See D. Ct. Doc. 2-2, 2-3, 2-5 (Nov. 12, 2020). The Pardon Attorney responded the next day, explaining that, while not authorized to grant a reprieve, she would "accommodate the obvious difficulties" facing counsel. D. Ct. Doc. 2-6, at 1 (Nov. 12, 2020).

2. On November 12, 2020, petitioner filed this action and moved for a temporary restraining order and preliminary injunction delaying her execution. She argued that permitting the execution to proceed despite the illness of two of her lawyers, which hampered their ability to prepare a clemency application, would interfere with her right to counsel under 18 U.S.C. 3599.

On November 19, the district court granted petitioner's motion in part, explaining that it would "stay Plaintiff's execution -- briefly -- to permit Harwell and Henry to recover from their illness and to have a short time to finish their work in supplementing Plaintiff's placeholder petition for a reprieve or commutation of sentence." D. Ct. Doc. 19, at 21. The court presumptively required petitioner to file any clemency application

by December 24, 2020 -- which she did, see D. Ct. Doc. 46 -- and enjoined respondents from executing respondent "before December 31, 2020." D. Ct. Doc. 20, at 1 (Nov. 19, 2020).

The government chose not to appeal or otherwise seek relief from the district court's injunction. Instead, on November 23, the Director of BOP designated January 12, 2021 as the new date for petitioner's execution. D. Ct. Doc. 33, at 173-175. Upon designation, this date superseded the original date of December 8.

On December 9, petitioner sought leave to file a supplemental complaint raising two new claims. First, she alleged that the Director violated 28 C.F.R. 26.3(a)(1) by designating a new execution date during the pendency of the injunction. That provision states that "[i]f the date designated for execution passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisons when the stay is lifted." Ibid. Second, she alleged that the Director violated the Federal Death Penalty Act (FDPA) by failing to comply with two Missouri state court procedural rules in rescheduling her execution. D. Ct. Doc. 29-1; 20-cv-3261 Docket Entry (Dec. 11, 2020).

The court granted petitioner leave to file the supplemental complaint and, on December 24, granted partial summary judgment on petitioner's first supplemental claim. In the court's view, the Director violated Section 26.3(a)(1) when he rescheduled

petitioner's execution during the pendency of the stay. Pet. App. 3a-38a. The court vacated the Director's designation and granted partial final judgment. Id. at 37a, 39a-40a.

On December 28, the government appealed to the D.C. Circuit. The next day, after unsuccessfully seeking relief in the district court, see Pet. App. 41a-44a, the government moved the court of appeals for a stay pending appeal or vacatur of the district court's partial final judgment. On January 1, 2021, a panel of the court of appeals summarily reversed. As the court explained, "[t]he governing regulation, 28 C.F.R. § 26.3(a)(1), did not prohibit the Director from making [the new] designation on November 23 because, at that time, the 'date designated for execution' had not yet 'passe[d].'" Pet. App. 1a-2a (quoting 28 C.F.R. 26.3(a)(1)) (brackets in original).

Petitioner moved for rehearing en banc. The court of appeals denied rehearing on January 5, with no member of the court calling for a vote. Pet. App. 45a. The court issued its mandate the same day. Id. at 46a-47a.[1] Four days later, petitioner filed this petition and application.

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[1] Petitioner subsequently renewed her motion for summary judgment on the FDPA claim, but the district court denied the motion and granted judgment to the government. See D. Ct. Doc. 62. Petitioner's stay application on that claim is currently pending before a panel of the D.C. Circuit. See Montgomery v. Rosen, No. 21-5001 (D.C. Cir.).

ARGUMENT

Petitioner's request for emergency relief and her accompanying petition for a writ of certiorari should be denied. Although petitioner requests a stay of execution (Appl. 6-7), she cannot obtain that relief in this case. A stay "temporarily divest[s] an order of enforceability," Nken v. Holder, 556 U.S. 418, 428 (2009), but there is no order before this Court that, if divested of enforceability, would bar petitioner's execution. The court of appeals has already issued its mandate. See Pet. App. 47a. And petitioner cannot challenge her criminal judgment in this non-habeas suit. See Hill v. McDonough, 547 U.S. 573, 579-583 (2006). What petitioner appears to seek is an order under the All Writs Act, 28 U.S.C. 1651, barring respondents from proceeding with her execution on the scheduled date. Such an order would be an injunction -- an "in personam" order "directed at someone, and govern[ing] that party's conduct." Nken, 556 U.S. at 428.

The standard for an injunction is appreciably higher than the standard for a stay. 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) (citation omitted). A movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted).

In addition to satisfying the typical stay standard, a movant seeking an injunction pending certiorari must further show that the relevant "legal rights" are "'indisputably clear.'" Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted); 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 showing "'demands a significantly higher justification' than a request for a stay" pending review. Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (quoting Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

Ultimately, though, the precise standard is immaterial, because petitioner cannot prevail under any applicable standard for equitable relief. The summary ruling by the court of appeals is plainly correct, and that non-precedential ruling on the proper application of the government's rescheduling regulation in these narrow circumstances does not conflict with the decision of any other court of appeals or implicate a question of exceptional importance. The equities, moreover, weigh heavily against an

injunction or stay of petitioner's execution for a horrific federal crime committed over 16 years ago.

I. THE DECISION BELOW WAS CORRECT

The court of appeals correctly held that 28 C.F.R. 26.3(a)(1) did not bar the Director from rescheduling petitioner's execution during the pendency of the order postponing the execution for a date after the order terminated.

A. The Director clearly complied with Section 26.3(a)(1) when, on November 23, 2020, he designated January 12, 2021, as the date for petitioner's execution. That provision ensures that a stay does not produce undue delay in the rescheduling of an execution. It provides that "[i]f the date designated for execution passes by reason of a stay," the Director "shall" designate a new date "promptly . . . when the stay is lifted." 28 C.F.R. 26.3(a)(1) (emphases added). The Director's conditional duty that he "shall" reschedule is triggered "[i]f the date designated for execution passes by reason of a stay of execution." Ibid. When the Director reschedules the execution before the original date ever passes, then the regulation does not restrict the Director at all. Moreover, by stating that the Director "shall" reschedule promptly "when the stay is lifted," the text imposes a duty on the Director to designate a new date once the stay expires, not a prohibition on doing so before that date. Petitioner's contrary arguments are plainly wrong.

1. As the panel recognized, petitioner has no plausible explanation for how the regulation's unambiguous triggering condition -- the requirement in the "if" clause that the designated execution date have "passe[d] by reason of a stay" -- was satisfied here. The Director designated a new date on November 23, 2020, over two weeks before the original December 8 execution date. Once the Director designated January 12, 2021 as the new date, December 8 was no longer "the date designated for execution." 28 C.F.R. 26.3(a)(1). "[T]he date designated for execution" thus never "passe[d]" at all. Ibid.

Petitioner argues that "the date designated for execution," 28 C.F.R. 26.3(a)(1), refers to "the execution date subject to the stay." Appl. 15. But that is not what the regulation says, and for good reason, as there is no such thing as "the execution date subject to the stay." The district court's injunction did not prohibit the government from executing petitioner on a particular date, but rather from executing her at any point during the pendency of the injunction. Petitioner's interpretation also produces the absurd result that, following the Director's decision to reschedule, there were simultaneously two dates designated for her execution. And her claim that the "date passes by reason of a stay" whenever "a stay of execution renders an execution date inoperable," ibid., again amounts to a blatant rewriting of the regulatory text.

Even assuming the phrase "the date designated for execution" could be read to refer to an original, inoperative date of execution, that date did not pass "by reason of a stay," as opposed to "by reason of" the rescheduling. 28 C.F.R. 26.3(a)(1) (emphasis added). Respondents could have chosen to seek a stay or vacatur of the district court's original injunction. Instead, they chose to reschedule the execution. It was the act of rescheduling that rendered the original date a nullity. Petitioner counters that respondents rescheduled because of the stay. Appl. 15-16. But Section 26.3(a)(1) does not authorize an inquiry, typically prohibited by black-letter administrative law, into the subjective motives behind the Director's decision to reschedule an execution. See, e.g., United States v. Morgan, 313 U.S. 409, 422 (1941). Rather, the regulation turns on an objective fact -- namely, whether the original date has passed by reason of the judicial order given that the execution has neither been carried out nor rescheduled by the Executive Branch.

Petitioner also argues that respondents' reading "renders the phrase 'when the stay is lifted' superfluous," Appl. 16 (emphasis omitted), but she is mistaken. In instances where the original date passes and the Director does not reschedule prior to expiration of a stay, the highlighted language requires him to do so promptly when the stay expires. But if the Director reschedules before the stay expires, there is no need to require the Director

to reschedule upon expiration. Petitioner further contends that respondents' interpretation produces the "illogical" consequence that "if a stay is in effect, then up until the date passes, the Director can reschedule an execution date whenever he chooses," but "once the date passes, * * * the Director's authority is frozen until the stay is lifted." Ibid. (emphases omitted). But that contention is premised on her flawed reading of the "shall" clause, which, as explained below, imposes a duty -- not a prohibition.

2. Petitioner misreads the regulation's instruction that the Director "shall" reschedule "promptly . . . when the stay is lifted." 28 C.F.R. 26.3(a)(1). She interprets that language to prohibit the Director from rescheduling prior to the expiration of a stay. But while she suggests the language constitutes a "specific prohibition" to that effect, Appl. 9 (citation omitted), it plainly does not. Rather, although the text is undoubtedly "mandatory," Pet. 7, it is phrased as a mandatory duty to reschedule when a certain event occurs (termination of a stay) if a certain precondition is met (the original date has passed by reason of the stay). Petitioner effectively reads the regulation to state that the new date "shall be designated promptly . . . [only] when the stay is lifted" (or " . . . [no earlier than] when the stay is lifted"). It simply does not say that.

To fill the textual gap, petitioner invokes the canon of expressio unius, arguing that "when a statute or regulation 'limits a thing to be done in a particular mode, it includes a negative of any other mode.'" Appl. 8 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 583 (2000)). That canon does not support her interpretation. Courts "do not read the enumeration of one case to exclude another unless it is fair to suppose that [the drafter] considered the unnamed possibility and meant to say no to it." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (referring to statutes). Here, for the reasons explained above, the far more plausible inference is that the regulation expressly requires the Director to promptly reschedule an execution once a stay has expired while leaving the Director the discretion to reschedule a date even before the stay expires if doing so is appropriate in the circumstances.

The primary case petitioner cites for the canon -- Christensen -- directly supports respondents' interpretation. That case involved a statute providing that "[a]n employee . . . (A) who has accrued compensatory time off . . . , and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 529 U.S. at 582 (emphasis added; citation omitted). The question was

whether an employer could require employees to use compensatory time. Id. at 578. Relying on the canon of expressio unius, the government argued that "the express grant of control to employees to use compensatory time, subject to the limitation regarding undue disruptions of workplace operations, implies that all other methods of spending compensatory time are precluded." Id. at 582-583.

The Court disagreed. It "accept[ed] the proposition that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" Christensen, 529 U.S. at 583 (citation omitted; second set of brackets in original). But it reasoned that "[t]he 'thing to be done' as defined by [the statute] is not the expenditure of compensatory time." Ibid. Instead, the statute "is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it." Ibid. The Court concluded that when "viewed in the context of the overall statutory scheme, [the statute] is better read not as setting forth the exclusive method by which compensatory time can be used, but as setting up a safeguard to ensure that an employee will receive timely compensation from working overtime." Id. at 583-584.

The same logic applies here. As petitioner concedes (Appl. 8), the "thing to be done" under Section 26.3(a)(1), Christensen, 529 U.S. at 583, is the rescheduling of an execution after a stay

expires when the date has passed by reason of the stay. The regulation merely establishes a "minimal guarantee" that, when the designated date has lapsed by reason of a stay, the Director will reschedule an execution promptly when the stay expires. Ibid. But the regulation does not set forth the "exclusive method" by which the Director must reschedule executions. Ibid.

In all events, "[t]he expressio unius canon is a 'feeble helper in an administrative setting.'" Adirondack Med. Ctr. v. Sebelius, 740 F.3d 692, 697 (D.C. Cir. 2014) (quoting Cheney R.R. v. ICC, 902 F.2d 66, 68-69 (D.C. Cir.), cert. denied, 498 U.S. 985 (1990)). Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved, and the same logic applies a fortiori to the interpretation of the agency's own regulations. See St. Marks Place Hous. Co. v. U.S. Dep't of Hous. & Urban Dev., 610 F.3d 75, 82-83 (D.C. Cir. 2010). Just as the canon alone does not "support the conclusion that Congress has clearly resolved an issue," Mobile Commc'ns Corp. of Am. v. FCC, 77 F.3d 1399, 1405 (D.C. Cir.) (brackets and citation omitted), cert. denied, 519 U.S. 823 (1996), nor does it support the conclusion that the agency intended to limit its own discretion.

Petitioner also claims that her interpretation properly construes the regulation to codify a purported "foundational principle that the Government cannot schedule a new execution date during a pending stay." Appl. 10. In support of this principle,

she cites one unreasoned circuit decision and two state-court decisions declining to set new execution dates while a stay of execution was in effect during habeas proceedings or direct appeal. Ibid. She points to nothing that might suggest Section 26.3(a) was intended to codify this smattering of decisions, which plainly do not rise to the level of a "background norm[]." Appl. 14; see Milner v. Dep't of the Navy, 562 U.S. 562, 576-577 (2011).

In any event, the cited cases are wrong to the extent they hold that a court may enjoin the government from preparing for an execution in the absence of any reason to believe that the preparations would themselves be illegal. Petitioner fails to explain why scheduling is prohibited while other preparatory activities -- such as purchasing or compounding drugs -- plainly are not. Petitioner contends that "[t]he Government's authority to schedule executions yields to the power of the Judicial Branch over the same matter." Appl. 12. But the regulatory claim at issue in this case has nothing to do with the power of the judicial branch. The district court's initial injunction did not expressly say that preparations were enjoined, D. Ct. Doc. 20; the district court declined to hold that the injunction implicitly extended to preparations, D. Ct. Doc. 47, at 12 (Dec. 24, 2020); and any such holding would violate the rule that an injunction's requirements must be clearly articulated, see Abbott v. Perez, 138 S. Ct. 2305, 2321 (2018).

3. Petitioner's reading not only flouts the regulation's text, but undermines its purpose. Whereas Section 26.3(a)(1) is designed to guard against needless delay following a stay, petitioner reads it to have precisely the opposite effect of mandating an additional 20-day period of delay on top of any stay that lasts for at least 20 days. See 28 C.F.R. 26.4(a). In this case, because the district court set its preliminary injunction to expire on December 31, 2020, petitioner's reading would mean that she could not be executed until at least January 20, 2021. She argues that this additional "20-day period gives an individual facing execution the opportunity to consider and pursue appropriate then-ripe legal remedies in the wake of a decision dissolving a stay and ensures adequate time for appellate review." Appl. 17.

That argument is hard to take seriously. The 20-day regulation has the evident purpose of ensuring that a capital defendant has enough notice of her upcoming execution, which petitioner received. Nothing suggests that the government considered and decided to lengthen a stay of execution beyond what the court mandates, let alone so that a capital defendant can challenge the lifting of the stay without needing to obtain a further stay from a higher court. Likewise, it is implausible that the government had the counterproductive purpose of helping a capital defendant to litigate her claims sequentially, rather

than forcing her to litigate any alternative claims while a stay is in place. Conducting litigation while the stay remains operative is particularly critical in capital litigation, to avoid indefinite delay through a multitude of last-minute objections. Conversely, just as petitioner construes the government's own regulation to grant a litigation windfall to capital defendants, she reads the regulation to penalize the government for choosing to reschedule the execution date rather than seek emergency relief from the district court's initial postponement. Again, petitioner has no explanation for why a regulation promulgated by the Executive Branch would mandate such a perverse result.

4. Finally, petitioner argues that the rescheduling of her execution is inconsistent with the government's prior practice and interpretation of Section 26.3(a)(1). She notes the historical practice of courts setting execution dates. Appl. 10-11. But she does not explain the relevance of that practice to the issue here, nor does she deny the Director's authority to set dates.

Petitioner also asserts that "[f]or every execution scheduled since the Government resumed capital punishment in 2019, when the prisoner has obtained a stay of execution, the Government has waited until the expiration of the stay to set a new execution date." Appl. 11. But as petitioner herself admits (Pet. 10 n.2), the government rescheduled an execution during the pendency of a stay just six months ago, and the Ninth Circuit rejected the

inmate's challenge to that decision. Specifically, the government rescheduled Lezmond Mitchell's execution on July 29, 2020 for August 26, 2020, see Letter Notice Regarding Case Status and Rescheduling of Execution, C.A. Doc. 47, Mitchell v. United States, No. 18-17031 (9th Cir. July 29, 2020), even though a stay pending appeal previously granted by the Ninth Circuit on October 4, 2019 did not elapse until the mandate ending the appeal issued on August 18, 2020, see Mandate, C.A. Doc. 55, Mitchell, No. 18-17031 (Aug. 18, 2020); Order, C.A. Doc. 26, Mitchell, No. 18-17031 (Oct. 4, 2019). Mitchell challenged the government's rescheduling of his execution during the pendency of the stay. See Mot. to Enforce Stay, C.A. Doc. 48, Mitchell, No. 18-17031 (July 30, 2020). The court of appeals rejected Mitchell's challenge, see Order, C.A. Doc. 52, Mitchell, No. 18-17031 (Aug. 11, 2020), and he was executed as scheduled.

Petitioner also attempts to show that the government expressly considered -- and rejected -- the possibility of rescheduling during the pendency of a stay when it adopted Section 26.3(a)(1). She points to a passage in the 1993 Notice of Proposed Rulemaking (NPRM), which states that giving authority to the Director to determine the execution date "will obviate the practice, which is a pointless source of delay in state cases, of seeking a new execution date from the sentencing court each time a higher court lifts a stay of execution that caused an earlier

execution date to pass." Implementation of Death Sentences in Federal Cases, 57 Fed. Reg. 56,536, 56,536 (Nov. 30, 1992); see Appl. 12. But even apart from the obvious flaws in relying on this snippet of regulatory history, the NPRM makes clear that Section 26.3(a)(1) was intended to obviate the delay associated with prior state practice. Petitioner does not explain why the NPRM should be read to implicitly enshrine an aspect of the purported prior practice that achieves nothing other than needless delay.[2]

B. Petitioner also errs in her alternative contention that summary reversal was inappropriate. She observes that "[t]his Court's own summary reversal precedent makes clear that 'summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law.'" Appl. 20 (quoting Maryland v. Dyson, 527 U.S. 465, 467 n.1 (1999)). But in recognition of the exigencies of last-minute capital litigation, this Court itself has summarily vacated district court injunctions against federal executions in this posture four times in the last six months -- sometimes within 24 hours of when the injunctions were issued.

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[2] Petitioner also cites a prior brief where the government observed that the rescheduling of an inmate's execution following the termination of a stay was "consistent" with the applicable regulations. Appl. 13 (citation omitted). That was correct, as Section 26.3(a)(1) does not require the Director to reschedule before a stay expires; but nor does it prohibit him from doing so.

See Barr v. Lee, 140 S. Ct. 2590, 2591-2592 (2020); Barr v. Purkey, 140 S. Ct. 2594 (2020); Barr v. Purkey, 141 S. Ct. 196 (2020); Barr v. Hall, No. 20A102, 2020 WL 6797719 (Nov. 19, 2020).

Petitioner emphasizes that "[t]he decision below was the first ever to address the meaning of § 26.3(a)(1)." Appl. 23. The novelty of her claim simply reflects that no other inmate has attempted to advance such an obviously atextual reading of the regulation. And nothing precludes a court from summarily disposing of a case based on the face of the plain text alone, as the panel did here, even without a prior precedent confirming the obvious. The D.C. Circuit has long recognized this point. See, e.g., In re National Cong. Club, No. 84-5701, 1984 WL 148396, at *1 (Oct. 24, 1984) (per curiam) (summarily reversing where "the facial meaning of the provision" forecloses the district court's order, given that "there is a need for speedy resolution, the facts are undisputed, there are narrow legal issues involved, and the issues are well-briefed"); cf. Strawberry v. Albright, 111 F.3d 943, 946 (D.C. Cir. 1997) (per curiam) (summarily affirming based on statutory text), cert. denied, 522 U.S. 1147 (1998). Petitioner points to nothing in this Court's precedents suggesting otherwise.

II. CERTIORARI IS NOT WARRANTED

There is no reasonable probability that this Court will grant review of the decision below, as this case does not remotely satisfy any of the criteria for certiorari. The questions

presented have extremely limited legal and practical significance. The decision below -- a nonprecedential, per curiam order -- does not conflict with the decision of any other court of appeals. And the en banc D.C. Circuit has already implicitly rejected petitioner's claim that the panel's decision worked an avulsive change in the governing standard for summary reversals.

A. Petitioner contends that the interpretation of Section 26.3(a)(1) carries "exceptional importance" for "the more than 50 prisoners currently on federal death row." Appl. 17. But the question whether the government is correctly interpreting its own regulations in this case is limited to an extremely narrow set of circumstances, arising only when (1) a district court issues an order postponing an execution for a brief period of time; (2) the government chooses to reschedule the execution for a date after that period rather than seek emergency appellate relief; (3) the government reschedules the execution while the stay remains in effect; and (4) the government reschedules before the original execution date has passed.

Petitioner argues that Section 26.3(a)(1) precludes the Director from rescheduling in those circumstances, and that the Director instead must wait until the stay has expired and then reschedule the execution no sooner than 20 days later, per 28 C.F.R. 26.4(a). But by petitioner's own telling, no inmate had ever raised that argument before she did, and no court had ever

opined on it. See, e.g., Pet. 22-23. And it is uncertain whether the question will even arise again in the future. There are no federal executions currently scheduled beyond this month, and these narrow circumstances may well not recur even if further executions are scheduled.

B. No doubt recognizing that the panel's ruling on the merits does not warrant review by this Court, petitioner also seeks certiorari on the question whether the panel's unpublished, nonprecedential disposition departed from established standards for granting summary reversal. The Court is equally unlikely to grant review on that question.

Faced with a last-minute order halting a scheduled execution on clearly erroneous grounds, the government is entitled to seek expeditious relief to avoid endless rescheduling as inmates engage in seriatim litigation for delay's own sake. Accordingly, in this case, the government promptly moved for stay or vacatur following the district court's entry of partial final judgment. In her opposition to the government's motion for emergency stay relief in the court of appeals, petitioner argued that a stay was inappropriate because it "would moot the appeal." C.A. Opp. 2 (Dec. 30, 2020) (emphasis omitted). Now, she contends that summary reversal on the merits was inappropriate, too -- so inappropriate, in fact, that it merits this Court's review. In her view, the government effectively has no mechanism for seeking timely

appellate review even when a district court clearly errs in granting a capital defendant relief shortly before the scheduled execution. That is not the law. As noted, this Court has summarily vacated district court injunctions against federal executions in this posture four times in the last six months. See pp. 24-25, supra.

Petitioner acknowledges that "exigent issues arise that require the immediate attention of the courts." Appl. 21. But she claims that this case presents "no emergency" and that "[t]here was no practical impediment to plenary consideration of the opinion below and the claim it vindicated." Appl. 21-22. That assertion disregards this Court's repeated recognition of the profound importance of timely carrying out scheduled executions. See p. 31, infra. It is also belied by petitioner's own filing of an emergency stay application and petition for a writ of certiorari in this Court a mere three days before her execution. And the emergency was of petitioner's own making: she waited weeks after her execution date was rescheduled to bring the current claim. See D. Ct. Doc. 21 (Nov. 23, 2020) (notice of rescheduled execution date); D. Ct. Doc. 29 (Dec. 9, 2020) (motion for leave to file supplemental complaint). The transparent reason that petitioner thinks expedition is unwarranted is because she seeks to endlessly delay her execution via seriatim litigation.

Nor did the grant of summary reversal in any way upset

existing standards governing summary dispositions. As discussed, the panel's decision was fully consistent with circuit precedent endorsing summary disposition in cases where the relevant statutory or regulatory text plainly forecloses one party's position. See p. 25, supra. The en banc court's denial of rehearing, without any judge calling for a vote, reflects the judgment of the full court of appeals that the panel decision did not represent the extraordinary departure from settled law that petitioner claims it did.

In an effort to show tension in the circuits, petitioner asserts that "[d]ecisions and rules of courts of appeals * * * state that summary reversal is not available on a new or unanswered question of law," citing cases providing that summary disposition is appropriate when "'one party is * * * clearly correct.'" Appl. 20 (quoting Dunn v. Wells Fargo Bank, N.A., No. 20-1080, 2020 WL 1066008, at *1 (7th Cir. Feb. 25, 2020)). But that proposition is fully consistent with the standard articulated and applied by the panel in this case to the district court's novel misreading of the regulation's clear text.

Ultimately, petitioner does not take issue with the standard itself, but rather its application to this case. But when "the asserted error consists of * * * misapplication of a properly stated rule of law," "certiorari is rarely granted." Sup. Ct. R. 10. Nothing in this case warrants an exception to that rule.

Petitioner's claim that this case "provides the ideal opportunity for the Court to provide" guidance "regarding the standard governing the availability of summary reversals," Appl. 24 -- in the context of a one-page, nonprecedential summary order issued in the course of expedited capital litigation -- is implausible.

III. THE EQUITIES WEIGH STRONGLY AGAINST AN INJUNCTION OR STAY

The equities weigh heavily against granting emergency relief halting petitioner's execution. Petitioner does not come close to showing irreparable harm -- an essential showing for obtaining an injunction, see, e.g., Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20, 32-33 (2008) -- arising from the bare procedural violation she alleges. She challenges only the timing of her lawful execution. And even in that regard, she has no substantive basis for her objection. When the district court initially postponed her execution to allow her attorneys more time to prepare a clemency petition in light of their illnesses, the government rescheduled the execution rather than seeking emergency appellate relief, and petitioner has since filed the clemency petition that formed the basis for the injunction. See Appl. 24-25 (asserting an entitlement to seek clemency). She also received adequate notice -- 50 days -- of her rescheduled execution date. Petitioner asserts that she requires additional time to "seek legal relief from her death sentence," Appl. 24 (citation omitted), but that is

a self-defeating contention from a litigious prisoner bent on delay for delay's sake.

On the other side of the ledger, this Court has repeatedly emphasized the public's "powerful and legitimate interest in punishing the guilty," Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted), by "carrying out a sentence of death in a timely manner," Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion). Once a criminal defendant is convicted and sentenced, and exhausts all permissible appeals and collateral challenges, the need for "finality acquires an added moral dimension." Calderon, 523 U.S. at 556. "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." Ibid. As this Court has recognized, unduly delaying executions can frustrate the death penalty and undermine its retributive and deterrent functions. See Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019); id. at 1144 (Breyer, J., dissenting).

The public's "interests have been frustrated in this case." Bucklew, 139 S. Ct. at 1133. Respondent committed her crime over 16 years ago, and has exhausted all permissible opportunities for further review of her conviction and sentence. Nevertheless, her execution has already been delayed once by the district court based on a (legally baseless) claim that two of her attorneys were temporarily unavailable to work on a clemency petition, and now

she seeks yet further delay because her execution was scheduled eight days earlier than would be permitted under her erroneous construction of the government's rescheduling regulation.

Nor is the harm to the government and the public mitigated in a meaningful way by the fact that petitioner's legal claim would only entitle her to delay her execution for a short period of time. Cf. Hall, 2020 WL 6797719, at *1 (vacating brief stay designed to permit additional findings). Setting aside that this timing should cut against granting a much longer delay pending certiorari, even minor delays can inflict serious psychological harms on the families of victims -- including the family members in this case who are planning to attend and support the execution.[3] In addition, the logistical challenges associated with conducting an execution, which are substantial in any case, are particularly acute here. The government already plans to transport an execution team to Terre Haute for the week of January 11, but there are no further executions scheduled after that week. Moreover, petitioner is currently housed in a women's prison in Texas and will need to be transported to Terre Haute shortly before the execution. See D. Ct. Doc. 59-1, at 3 (Jan. 6, 2021).

[3] See Alan Van Zandt, "People Gather in Skidmore to Remember Bobbie Jo Stinnett," KQ2.com (Dec. 9, 2020), https://www.kq2.com/content/news/People-in-Skidmore-gather-to-remember-Bobbie-Jo-Stinnett-573340761.html (noting candlelight vigil for petitioner's victim on original execution date).

The balance of equities does not support relief. Petitioner committed one of the most horrific crimes imaginable: strangling a pregnant mother to death and cutting her premature baby out of her stomach to kidnap the child. Contrary to petitioner's suggestion that she is at risk of being "unlawfully executed," Appl. 24, petitioner does not challenge her conviction for the kidnapping and murder she committed "in an especially heinous or depraved manner," United States v. Montgomery, 635 F.3d 1074, 1095-1096 (8th Cir. 2011), nor does she challenge her sentence of death or even the protocol that will be used in her execution. The relief she requests now -- an eleventh-hour injunction based on a meritless rationale that has nothing to do with her criminal culpability and was summarily rejected by a unanimous panel of the court of appeals without any noted dissent by the full court -- does not come close to tipping the equities toward petitioner or justifying further delay. This Court should deny petitioner's motion so that her execution may "proceed as planned." Lee, 140 S. Ct. at 2592.

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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Acting Solicitor General

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