

No.

IN THE
Supreme Court of the United States

LEZMOND CHARLES MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for Stay

APPENDIX TO EMERGENCY APPLICATION FOR A STAY OF EXECUTION

Execution Scheduled for August 26, 2020 (time to be determined)

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FILED

AUG 19 2020

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U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEZMOND C. MITCHELL,

Defendant-Appellant.

No. 20-99009

D.C. No.
3:01-cr-01062-DGC-1

OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted August 18, 2020
Pasadena, California

Before: Sandra S. Ikuta, Morgan B. Christen, and Andrew D. Hurwitz, Circuit
Judges.

Per Curiam

Lezmond Mitchell has filed an emergency motion to stay his execution pending appeal of the denial of his motion to strike his execution warrant, vacate his execution, and enjoin violation of the district court's original judgment. We deny the motion because Mitchell has not carried his burden of demonstrating

either that he is likely to succeed on the merits or that it is probable that he would suffer an irreparable injury in the absence of a stay.

I

Lezmond Mitchell was convicted of numerous offenses and sentenced to death in September 2003.¹ The district court’s judgment (the “Judgment”) provides, “When the sentence is to be implemented, the Attorney General shall release the defendant to the custody of the United States Marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State of Arizona.”² The parties agree that, for present purposes, there is no

¹ We have described the facts of this case in detail in three prior opinions. *See generally Mitchell v. United States*, 958 F.3d 775 (9th Cir. 2020); *Mitchell v. United States*, 790 F.3d 881 (9th Cir. 2015); *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007).

² The district court amended the Judgment on January 8, 2004, but left the provision quoted above unchanged.

meaningful difference between the language of the Judgment and the language of the Federal Death Penalty Act (FDPA). *See* 18 U.S.C. § 3596(a).³

On July 25, 2019, T.J. Watson, the warden of the Federal Correctional Complex at Terre Haute, Indiana, served Mitchell with a letter indicating that the Bureau of Prisons had set an execution date of December 11, 2019.⁴ On October 4, 2019, however, we stayed Mitchell's execution pending resolution of his third appeal. *Mitchell v. United States*, No. 18-17031, ECF No. 26 (Oct. 4, 2019).

On July 29, 2020, after we rejected Mitchell's appeal but before the mandate issued, *see* Fed. R. App. P. 41(b), Watson served Mitchell with another letter

³ The FDPA provides, in pertinent part:

A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

18 U.S.C. § 3596(a).

⁴ On July 31, 2019, Watson served Mitchell with an amended letter that corrected the name of the sentencing judge, which had been misstated on the prior version.

indicating that the Bureau of Prisons had set a new execution date of August 26, 2020 (the “Execution Warrant”). The Execution Warrant states that it “serve[s] as official notification that pursuant to [28 C.F.R. § 26.3(a)(1)], the Director of the Federal Bureau of Prisons has set August 26, 2020, as the date for your execution by lethal injection.”⁵

On August 6, 2020, Mitchell filed a motion in district court to strike the Execution Warrant, vacate his execution date, and enjoin any violation of the Judgment. Mitchell argued that if the Bureau of Prisons follows its execution protocols his execution will not be “implement[ed] . . . in the manner prescribed by the law of [Arizona]” and thus will be in violation of the Judgment and 18 U.S.C. § 3596(a). In support of his argument, Mitchell identified specific procedures set forth in Arizona statutes, the Arizona Rules of Criminal Procedure, and the Arizona Department of Corrections’s Department Order 710 (the “Department Order Manual”). According to Mitchell, the Bureau of Prisons’ protocols are inconsistent with or allow it to deviate from these Arizona procedures.

⁵ 28 C.F.R. § 26.3(a)(1) establishes how the Bureau of Prisons will determine the date and time for an execution.

The district court denied the motion. Mitchell filed a notice of appeal with the district court and moved to stay his execution pending resolution of the appeal. We heard argument on Tuesday, August 18, 2020.

II

We consider Mitchell’s motion for a stay pending appeal using the “traditional test for stays” set out in *Nken v. Holder*, 556 U.S. 418, 433 (2009). This test considers four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The party seeking the stay bears the burden of showing that these factors favor a stay. *Id.* at 433–34. “The first two factors . . . are the most critical,” and the “mere possibility” of success or irreparable injury is insufficient to satisfy them. *Id.* at 434 (cleaned up). As to likelihood of success, the movant must show a “reasonable probability” or “fair prospect” of success. *Leiva Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (citation omitted). As to irreparable harm, the standard is higher: the movant must demonstrate that irreparable harm is probable—as opposed to merely possible—if the stay is not granted; that is, irreparable harm

must be “the more probable or likely outcome.” *Id.* at 968. We consider the final two factors only “[o]nce an applicant satisfies the first two.” *Nken*, 556 U.S. at 435.

Mitchell argues that he is entitled to a stay pending appeal of the district court’s order because the district court erred in denying his motion for injunctive relief. Mitchell claims that on appeal of the district court’s order, he would have a likelihood of success on the merits of his claim that inconsistencies between the Bureau of Prisons’ protocol for implementing his execution and Arizona’s procedures violate the Judgment and the FDPA. Mitchell likewise asserts that he would prevail on the second injunctive relief factor, that he will suffer an irreparable harm, due to the possibility that he “could be executed by means of an illegal protocol.”

For purposes of Mitchell’s stay motion, we need not comprehensively delineate the scope of the FDPA. *Cf. In re Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020), *cert. denied sub nom. Bourgeois v. Barr*, No. (19A1050), 2020 WL 3492763 (U.S. June 29, 2020). We assume without deciding that the Department Order Manual constitutes “law of the State” for purposes of the FDPA and the Judgment. *See* 18 U.S.C. § 3596(a) (requiring the sentence to be implemented “in the manner prescribed by the law of the State in which the

sentence is imposed”). In addition, we hold that procedures that do not effectuate death fall outside the scope of 18 U.S.C. § 3596(a). *See Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020). The FDPA incorporates only those state laws that prescribe the manner for “implementation” of a death sentence. *See* 18 U.S.C. § 3596(a) (“When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed.”). In this context, “implement” means “to carry out” or “to give practical effect to and ensure of actual fulfillment by concrete measures.” *Implement*, Webster’s Third New International Dictionary 1134 (1961). Therefore, 18 U.S.C. § 3596(a) addresses, at most, state laws that set forth procedures for giving practical effect to a sentence of death. We therefore agree with the Seventh Circuit’s conclusion that, even under a broad reading, the FDPA incorporates “only ‘those [state] procedures that effectuate the death, including choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements.’” *Peterson*, 965 F.3d at 554 (citation omitted).

In his stay motion, Mitchell identifies six purported inconsistencies between the Bureau of Prisons' execution protocol and the procedures in the Department Order Manual.⁶ We consider each in turn.

First, he points to the Department Order Manual's requirement that the IV Team be "currently certified or licensed within the United States to place IV lines." The Bureau of Prisons' protocol provides that "[q]ualified personnel includes currently licensed physicians, nurses, EMTs, Paramedics, Phlebotomists, other medically trained personnel, including those trained in the United States Military having at least one year professional experience and other personnel with

⁶ In district court, Mitchell identified five additional purported inconsistencies relating to: (1) the presence of witnesses and spiritual advisers, Ariz. Rev. Stat. § 13-758; (2) notice of an execution date, Ariz. Rev. Stat. § 13-759; (3) judicial postponement of execution dates upon a finding of impracticality, Ariz. R. Crim. P. 31.23(c); (4) accommodations for defense counsel during the execution, such as the provision of temporary office space and access to mobile devices; and (5) discretion given the Director of the Arizona Department of Corrections to modify the execution protocol. Because Mitchell has not raised these purported inconsistencies in connection with his motion to stay his execution pending appeal, we do not consider them. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994). Moreover, the first four purported inconsistencies fall outside the scope of 18 U.S.C. § 3596(a), because they are not pertinent to effectuating death. *See Peterson*, 965 F.3d at 554.

At oral argument, Mitchell argued for the first time that the Bureau of Prisons' protocol calls for the use of a saline flush in a manner that is different from the Department Order Manual. Mitchell forfeited any reliance on this difference because it was neither raised to the district court nor raised in the briefing. *See Sierra Med. Servs. All. v. Kent*, 883 F.3d 1216, 1223 (9th Cir. 2018).

necessary training and experience in a specific execution related function.” We see little difference between these requirements; both require that the persons placing IV lines have the appropriate qualifications. Given the substantial overlap between the two protocols, Mitchell argues only that it is possible that the “[q]ualified personnel” referred to in the Bureau of Prisons’ protocol might not be “currently certified or licensed within the United States to place IV lines.”

As to the second and third examples of purported inconsistencies, Mitchell points to the Department Order Manual’s requirements that “[a] central femoral venous line will not be used unless the person placing the line is currently qualified” to do so and that “[t]he IV Team shall be responsible for inserting either peripheral IV catheters or a central femoral line as determined by the Director acting upon the recommendation of the IV Team Leader.” The Bureau of Prisons’ protocol provides that a “suitable venous access line or lines will be inserted and inspected by qualified personnel” and that “[t]he Director or designee shall determine the method of venous access (1) based on the training and experience of personnel establishing the intravenous access; (2) to comply with specific orders of federal courts; or (3) based upon a recommendation from qualified personnel.” Again, we see little difference between the protocols; both give the Director discretion to determine, based on a recommendation from qualified personnel, the

method of venous access, and both protocols require that the venous access line be placed by qualified personnel. At oral argument, Mitchell primarily focused on the possibility that under the Bureau of Prisons' protocol, the decision to insert a peripheral IV catheter or a central femoral line may be made without a recommendation of a person "currently certified or licensed within the United States to place IV lines." This argument therefore merges with his first claim—that it is possible that the Bureau of Prisons may allow persons without the proper qualifications to place IV lines.

Fourth, Mitchell points to the Department Order Manual's requirement that a chemical used in execution "have an expiration or beyond-use date that is after the date that an execution is carried out." The Bureau of Prisons' protocol also prohibits the use of expired drugs: its March 10, 2020 General Guidelines for Compounding and Testing Pentobarbital Sodium for Use in Executions (the "General Guidelines") provide that an injectable solution is "available for use" only if, among other things, "its expiration date has not passed." Therefore, the state and federal requirements are substantially the same. Mitchell argues only that it is possible that the Bureau of Prisons will not comply with its protocol or will make last-minute changes to its protocol.

Fifth, Mitchell points to the Department Order Manual's requirement that the "decision to use a compounded or non-compounded chemical . . . be provided to the inmate and their counsel of record in writing at the time the state files a request for Warrant of Execution in the Arizona Supreme Court." Because the Bureau of Prisons has made public its decision to use compounded Sodium Pentobarbital in the General Guidelines, Mitchell has received notice that the Bureau of Prisons intends to use compounded Pentobarbital Sodium to carry out the execution.

Sixth, Mitchell points to the Department Order Manual's requirement that "[a] quantitative analysis of any compounded or non-compounded chemical to be used in the execution shall be provided upon request within ten calendar days after the state seeks a Warrant of Execution." At oral argument, Mitchell conceded that he had not requested such a quantitative analysis from the Bureau of Prisons, but such information has been made readily available to him. The government represented in district court that the "BOP has tested its compounded pentobarbital for quality assurance," and has publicly filed certificates of analysis and laboratory reports regarding Pentobarbital Sodium in the United States District Court for the

District of Columbia. *See In re BOP Execution Protocol Cases*, 1:19-mc-00145-TSC, ECF No. 39-1 at 975–1020; ECF No. 97-2 at 1–9.⁷

We are not persuaded by Mitchell’s arguments. The Bureau of Prisons’ protocol and the Department Order Manual procedures on which Mitchell relies are largely indistinguishable. To the extent there is any difference between the federal and Arizona procedures with respect to the first four examples, the Bureau of Prisons has provided a declaration certifying that it will comply with those procedures.⁸ As to the fifth and sixth examples, the Bureau of Prisons has complied with the Department Order Manual’s procedures. Therefore, Mitchell has not carried his burden of proving a “reasonable probability,” *Leiva Perez*, 640 F.3d at 967 (citations omitted), that his execution will be carried out in a manner inconsistent with Arizona law (assuming that the Department Order Manual is state law). It is not enough to show a “mere possibility” that the Bureau of Prisons might use protocols inconsistent with Arizona procedures. *Id.* (cleaned up). Nor

⁷ This procedure arguably also falls outside the scope of 18 U.S.C. § 3596(a), because providing such information is not pertinent to the effectuation of death. *See Peterson*, 965 F.3d at 554.

⁸ Mitchell filed a reply to the Bureau of Prisons’ declaration, to which he attached a 37-page document setting forth additional purported inconsistencies between the Bureau of Prisons’ protocol and Arizona procedures. Reliance on these purported differences was forfeited. *See supra* note 6; *Greenwood*, 28 F.3d at 977.

has Mitchell carried his burden of showing that it is more probable than not, *id.* at 968, that he will suffer any irreparable harm. Therefore, Mitchell is not entitled to the “extraordinary remedy” of a stay pending appeal, *Nken*, 556 U.S. at 428 (citation omitted), and we do not address the final two factors, *see id.* at 435.

In sum, Mitchell has not carried his burden of demonstrating a likelihood of success on the merits or that it is probable that he will suffer irreparable harm, and therefore he is not entitled to a stay or to the underlying injunctive relief he seeks. We also recognize that the Supreme Court has instructed us that last-minute stays of executions “should be the extreme exception, not the norm.” *Barr v. Lee*, No. 20A8, 2020 WL 3964985, at *2 (U.S. July 14, 2020) (citation omitted). We therefore deny Mitchell’s motion for a stay of execution pending appeal and affirm the district court’s order denying his motion to strike the Execution Warrant, vacate the execution date, or enjoin violation of the Judgment.

IT IS SO ORDERED.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 United States of America,

10 Plaintiff,

11 v.

12 Lezmond Mitchell,

13 Defendant.
14

No. CR-01-01062-001-PCT-DGC

ORDER

15 Defendant Lezmond Mitchell has filed a motion to strike his execution warrant,
16 vacate his execution date, and enjoin violation of this Court's January 8, 2004 Judgment
17 (Doc. 606), and a motion to stay his execution pending resolution of the first motion
18 (Doc. 609). The United States has filed responses opposing both motions (Docs. 611, 612),
19 and Mr. Mitchell has filed a reply (Doc. 613). A hearing on the motions was held on
20 August 12, 2020. The Court will deny both motions.

21 **I. Procedural History.**

22 In 2003, a jury convicted Mr. Mitchell of first-degree murder, felony murder,
23 carjacking resulting in death, and related federal crimes arising out of the 2001 kidnapping
24 and murder of a 63-year-old grandmother and her 9-year-old granddaughter.¹ The jury
25 unanimously recommended a sentence of death on the federal carjacking count.

26 On September 15, 2003, Judge Mary Murguia sentenced Mr. Mitchell to death and
27 issued a Judgment that included the following provision:

28 ¹ A detailed discussion of the facts surrounding the crimes and Mr. Mitchell's trial can be
found at *United States v. Mitchell*, 502 F.3d 931, 942 (9th Cir. 2007).

Pursuant to the Federal Death Penalty Act of 1994, specifically, Section 3594 of Title 18 of the United States Code, pursuant to the jury's special findings returned on May 20, 2003, and pursuant to the jury's unanimous vote recommending that the defendant be sentenced to death, IT IS THE JUDGMENT OF THIS COURT THAT the defendant, Lezmond Charles Mitchell, be sentenced to death on Count Two of the Second Superseding Indictment. The judgment and death sentence on Count Two is supported by independent verdicts with regard to each victim. Furthermore, pursuant to Title 18, Section 3596 of the United States Code, the defendant is hereby committed to the custody of the Attorney General of the United States until exhaustion of the procedures for appeal of the judgment and conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the defendant to the custody of the United States Marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State of Arizona.

Doc. 425. The Court subsequently amended its Judgment on January 8, 2004, but left the above portion of the order unchanged. Doc. 466. The Judgment was affirmed on appeal and has not been altered as a result of Mr. Mitchell's subsequent habeas petitions.²

On July 25, 2019, T.J. Watson, the warden of the Federal Correctional Complex at Terre Haute, Indiana, served Mr. Mitchell with a letter indicating that, pursuant to 28 C.F.R. § 26.3(a)(1), the Director of the Bureau of Prisons ("BOP") had set December 11, 2019, as Mr. Mitchell's execution date ("2019 Letter"). The same day, in four pending federal lethal injection lawsuits in the District Court for the District of Columbia, the Government filed a notice indicating that it had adopted a revised lethal injection protocol for federal death penalty sentences. Doc. 606-1, BOP Addendum.

On October 4, 2019, Mr. Mitchell's execution was stayed by the Ninth Circuit pending its consideration of his appeal from this Court's denial of a Rule 60(b) motion. *Mitchell v. United States*, No. 18-17031 (9th Cir. Oct. 4, 2019), ECF No. 26. The Ninth Circuit ultimately affirmed the Court's denial. *Id.* (Apr. 3, 2020), ECF No. 37.

On July 29, 2020, Warden Watson served Mr. Mitchell with a letter stating that the BOP had set a new execution date of August 26, 2020 ("2020 Letter"). Doc. 606-2. Eight

² Throughout his motion, Mr. Mitchell refers to the Judgment date as January 8, 2003. See Doc. 606. The amended Judgment was entered on January 8, 2004. Doc. 466.

1 days later, Mr. Mitchell filed his motion to strike the execution warrant and vacate his
2 execution date. Doc. 606.

3 **II. Motion to Stay.**

4 Mr. Mitchell asks the Court to stay his execution “until the resolution of his motion”
5 to vacate the execution date. Doc. 609 at 15.³ Because the Court resolves that motion in
6 this order, it will deny the motion to stay as moot.⁴

7 **III. Motion to Strike, Vacate, and Enjoin.**

8 Mr. Mitchell asks this Court to vacate the August 26, 2020 execution date and enjoin
9 the government from attempting to execute him “in a manner that violates this Court’s
10 judgment.” Doc. 606 at 6.

11 **A. Timeliness.**

12 The government asserts that Mr. Mitchell’s motion is untimely. It argues that he
13 “has known about the federal government’s current execution protocol since July 25, 2019,
14 when the Department of Justice adopted it, filed it in the District of Columbia litigation
15 challenging the protocol’s validity, and delivered him notice of the United States’ intent to
16 carry out his sentence pursuant to federal regulations.” Doc. 611 at 3. The government
17 asserts “[t]here is no reason Mitchell could not have raised this issue a year ago, when his
18 execution was first scheduled, which would have allowed for fair briefing, court
19 consideration, and reasonable appeals.” *Id.* at 5.

20 Mr. Mitchell received notice of his December 2019 execution date on July 25, 2019,
21 while he had an appeal pending before the Ninth Circuit related to this Court’s denial of
22 his Rule 60(b) motion. Shortly thereafter, on August 5, 2019, he asked this Court to stay
23 his execution pending resolution of the appeal. Motion to Stay Execution, *Mitchell v.*

24
25 ³ This order cites to page numbers placed at the top of each page by the Court’s electronic
case filing system, not to page numbers in the original documents.

26 ⁴ During the hearing, counsel for Mr. Mitchell asked the Court to stay his execution pending
27 appeal of the Court’s decision. That request was not made in Mr. Mitchell’s motion (Doc.
28 609), and the standard for such a stay has not been briefed by the parties. The Court
accordingly will not address the request. Mr. Mitchell can take up the stay question with
the Ninth Circuit, as he did in his previous appeal from this Court.

1 *United States*, No. 3:09-cv-8089-DGC (D. Ariz. Aug. 5, 2019), ECF. No. 84. The Court
2 denied the motion on jurisdictional grounds, *id.* (Aug. 30, 2019), ECF. No. 92, and Mr.
3 Mitchell filed a motion to stay his execution in the Ninth Circuit on September 9, 2019.
4 That motion was granted on October 4, 2019. *Mitchell v. United States*, No. 18-17031 (9th
5 Cir. Oct. 4, 2019), ECF No. 26. The Court cannot conclude that Mr. Mitchell was required
6 to proceed with additional challenges to his execution when it was stayed. Mr. Mitchell
7 received notice of his new execution date on July 29, 2020, and filed this motion days later.

8 Additionally, at a status conference on August 15, 2019, after issuance of the 2019
9 Letter, the government acknowledged to the Court that its intent was to conduct the
10 execution in Indiana, but stated that it was “not prepared to respond” to the Court’s query
11 about whether the execution would follow Arizona state procedures. Doc. 606-6 at 084–
12 85; RT 08/15/19 at 10–11. Thus, the issue raised in this motion – whether the government
13 can legally conduct Mr. Mitchell’s execution without following Arizona procedures – was
14 not ripe until Mr. Mitchell was served with the 2020 Letter.

15 **B. Meaning of the Federal Death Penalty Act (“FDPA”).**

16 Congress enacted the FDPA in 1994. The statute looks to state law for the “manner”
17 of implementing federal death sentences:

18 When the sentence is to be implemented, the Attorney General shall release
19 the person sentenced to death to the custody of a United States marshal, *who*
20 *shall supervise implementation of the sentence in the manner prescribed by*
21 *the law of the State in which the sentence is imposed.* If the law of the State
22 does not provide for implementation of a sentence of death, the court shall
23 designate another State, the law of which does provide for the
implementation of a sentence of death, and the sentence shall be
implemented in the latter State in the manner prescribed by such law.

24 18 U.S.C. § 3596(a) (emphasis added).

25 The Judgment in this case uses essentially the same language. It provides that the
26 execution shall be conducted “in the manner prescribed by the law of the State of Arizona.”
27 Doc. 466.

1 The parties dispute the meaning of these phrases. The government maintains that
 2 by requiring it to implement Mr. Mitchell’s execution “in the manner prescribed” by
 3 Arizona law, the FDPA merely requires it to use Arizona’s “top-line” choice of execution
 4 method – lethal injection. Doc. 611 at 6–13. Mr. Mitchell argues that “implementation
 5 . . . in the manner prescribed” by Arizona law incorporates all of Arizona’s detailed
 6 execution procedures. Doc. 606 at 9. And because the execution protocol issued by the
 7 federal government in 2019 (“2019 Protocol”) does not follow those procedures, Mr.
 8 Mitchell contends that his execution under the 2019 Protocol would violate the FDPA. *Id.*⁵

9 Both parties rely heavily on a recent decision of the D.C. Circuit, *In re Fed. Bureau*
 10 *of Prisons’ Execution Protocol Cases* (*Execution Protocol Cases*), 955 F.3d 106 (D.C. Cir.
 11 2020), *cert. denied sub nom. Bourgeois v. Barr*, No. (19A1050), 2020 WL 3492763 (U.S.
 12 June 29, 2020). The plaintiffs in that case were four federal death row inmates who
 13 challenged the 2019 Protocol. The district court preliminarily enjoined their executions,
 14 holding that “the FDPA gives decision-making authority regarding ‘implementation’” of
 15 federal death sentences to states, and, therefore, the 2019 Protocol’s uniform federal
 16 implementation procedure is “not authorized by the FDPA.” *In re Fed. Bureau of Prisons’*
 17 *Execution Protocol Cases*, No. 1:19-mc-145, 2019 WL 6691814, at *4, *7 (D.D.C. Nov.
 18 20, 2019). The court found that the FDPA language requiring executions to be conducted
 19 “in the manner prescribed” by state law applied not just to the general execution method,
 20 but also to “procedural details” like how the “catheter is to be inserted.” *Id.* at *4, *6.

21 The D.C. Circuit reversed, with two members of the panel finding that the district
 22 court misconstrued the FDPA. *Execution Protocol Cases*, 955 F.3d at 108. The circuit
 23 court summarized its core holding as follows:

24 Judge Katsas concludes that the FDPA regulates only the top-line choice
 25 among execution methods, such as the choice to use lethal injection instead
 26 of hanging or electrocution. Judge Rao concludes that the FDPA also
 requires the federal government to follow execution procedures set forth in

27 ⁵ Although Mr. Mitchell asserts that his execution would violate both the FDPA and the
 28 Court’s Judgment, his legal analysis relies entirely on the meaning of the FDPA. Neither
 he nor the government argues that the Judgment has a different meaning. This order
 accordingly focuses entirely on the FDPA.

1 state statutes and regulations, but not execution procedures set forth in less
2 formal state execution protocols. Judge Rao further concludes that the
3 federal protocol allows the federal government to depart from its procedures
4 as necessary to conform to state statutes and regulations. On either of their
views, the plaintiffs' primary FDPA claim is without merit.

5 *Execution Protocol Cases*, 955 F.3d at 112.

6 Judge Tatel dissented. He agreed with Judge Rao "that the term 'manner' refers to
7 more than just general execution method," but concluded that the statute also incorporates
8 informal execution protocols if "issued by state prison officials pursuant to state law." *Id.*
9 at 146 (Tatel, J., dissenting).

10 Mr. Mitchell cites the opinions of Judges Rao and Tatel to support his view that
11 "manner" in the FDPA means more than the top-line method of execution. Doc. 606 at 11.
12 On this issue, the Court agrees with Mr. Mitchell.

13 The starting point is the Crimes Act of 1790, which specified that "the manner of
14 inflicting the punishment of death, shall be by hanging the person convicted by the neck
15 until dead." Crimes Act of 1790, ch. 9, § 33, 1 Stat. 112, 119. "Manner" as used in this
16 phrase clearly means only the general method of execution – hanging. Judge Katsas
17 tracked the word "manner" from the 1790 Act to the 1937 statute that replaced it. 955 F.3d
18 at 115–18 (Katsas, J., concurring). The 1937 statute continued to use the word "manner,"
19 but did not specify a single method of execution. Instead, it provided that "[t]he manner
20 of inflicting the punishment of death shall be the manner prescribed by the laws of the State
21 within which the sentence is imposed." *See An Act To Provide for the Manner of Inflicting*
22 *the Punishment of Death*, Pub. L. No. 75-156, 50 Stat. 304 (1937). Judge Katsas reasoned
23 that because "manner" meant the general method of execution in the 1790 statute, it must
24 also have meant the general method of execution in the 1937 statute, particularly because
25 both statutes refer to "the manner of inflicting the punishment of death." 955 F.3d at 116.
26 The government and Judge Katsas also note that the Supreme Court in *Andres v. United*
27 *States*, 333 U.S. 740, 745 & n.6 (1948), stated that the 1937 statute was "prompted by the
28 fact that 'Many States . . . use(d) more humane *methods* of execution, *such as electrocution*,

1 *or gas*” and “it appear(ed) desirable for the Federal Government likewise to change its
2 law *in this respect*.” *Id.* (quoting H.Rep. No. 164, 75th Cong., 1st Sess., 1 (1937))
3 (emphases added).

4 Although this view has some merit, the Court ultimately finds it unpersuasive
5 because the 1937 statute fundamentally changed the way in which federal death penalty
6 sentences were carried out. It shifted the focus from a single federal method – hanging –
7 to a range of approaches used by the States. And Congress’s intent to adopt more humane
8 methods of execution certainly does not exclude the possibility that Congress intended to
9 incorporate details of state executions that made them more humane. The 1937 Act further
10 stated that the “marshal charged with the execution of the sentence may use available State
11 or local facilities and the services of an appropriate State or local official” to perform the
12 execution. An Act To Provide for the Manner of Inflicting the Punishment of Death, Pub.
13 L. No. 75-156, 50 Stat. 304 (1937). This contemplated at least the possibility of a
14 wholesale use of state execution procedures.

15 In fact, that is what happened. As Judge Rao explained:

16 In practice, . . . the federal government incorporated more than the state’s
17 method of execution when it carried out executions under the 1937 statute.
18 The government concedes that nearly all executions conducted under the
19 1937 statute took place in state facilities. Presumably, those executions were
20 carried out in accordance with state law and possibly with other state
21 procedures. DOJ notes that three executions under the 1937 statute took
place in federal facilities, but DOJ is unable to identify a single way in which
the executions were otherwise inconsistent with state law.

22 955 F.3d at 137 (Rao, J., concurring) (citation omitted).

23 To further support Judge Katsas’s view, the government cites two newspaper
24 articles to suggest that federal procedures were in fact used in executions under the 1937
25 Act. One article stated that inmates were to “be executed by whatever method is prescribed
26 by the law of the State,” but that the Department of Justice (“DOJ”) would provide “all
27 U.S. Marshals instructions for carrying out executions” and those procedures would govern
28 “[u]nless [a] court specifies otherwise.” Doc. 611-4 (Associated Press, U.S. Arranging To

1 Execute Five, June 17, 1938). Another article noted that the government’s supervision
2 over an execution was “so strict” that the local sheriff “was forced to obtain special
3 permission from Washington to be present.” Doc. 611-5 (United Press, Seadlund Will Die
4 Tonight, July 13, 1938).

5 These brief accounts are not only hearsay, they lack the detail necessary to
6 determine what procedures were actually used in the executions. The government relies
7 on *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933), for the
8 proposition that agency “practice” has “peculiar weight when it involves a
9 contemporaneous construction of a statute by [those] charged with the responsibility of
10 setting its machinery in motion.” *Id.*; Doc. 611 at 11–12. But the Court is not persuaded
11 that two short newspaper articles can be relied upon to establish the execution practice
12 under the 1937 statute, particularly in light of the government concessions cited by Judge
13 Rao above and a 1994 letter from Attorney General Janet Reno described below.

14 The government also cites a Federal Bureau of Prisons’ 1942 Manual of Policies
15 and Procedures which stated that the 1937 Act’s “manner” provision “refers to the method
16 of imposing death, whether by hanging, electrocution, or otherwise, and not to other
17 procedures incident to the execution prescribed by the State law.” *See* Doc. 611-6. But
18 this statement is not “practice” as required by *Norwegian Nitrogen*, and the record before
19 the D.C. Circuit suggested that virtually all executions under the 1937 Act were held in
20 state facilities. 955 F.3d at 137 (Rao, J., concurring); *id.* at 148 (Tatel, J., dissenting).

21 The continuing history provides additional insight. The 1937 statute was repealed
22 by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1987, and for
23 the next several years the United States had no statute that specified a method for federal
24 death sentences. DOJ promulgated regulations in 1993 that adopted lethal injection as the
25 uniform federal execution method with specific federal procedures. 58 Fed. Reg. 4898,
26 4901–02 (1993) (codified at 28 C.F.R. § 26.3). At the time, DOJ hypothesized “that
27 Congress might have repealed the 1937 statute because it ‘no longer wanted the federal
28 method of execution dependent on procedures in the states, some of which were

1 increasingly under constitutional challenge.” 58 Fed. Reg. at 4,899. This statement again
2 suggests that state procedures were used under the 1937 Act.

3 Significantly, when Congress passed the FDPA in 1994, it did not choose to retain
4 the single-method approach of the existing DOJ regulations. Congress chose instead to
5 return to the 1937 model, providing that the “United States marshal . . . shall supervise
6 implementation of the [death] sentence in the manner prescribed by the law of the State in
7 which the sentence is imposed.” 18 U.S.C. § 3596(a). Attorney General Janet Reno wrote
8 to Congress shortly before the FDPA was passed and noted that it “contemplate[d] a return
9 to an earlier system in which the Federal Government does not directly carry out
10 executions, but makes arrangements with states to carry out capital sentences in Federal
11 cases.” *See* H.R. Rep. No. 104-23, at 22 (1995) (quoting Letter from Attorney General
12 Janet Reno to Hon. Joseph R. Biden, Jr., at 3–4 (June 13, 1994)). Her statement confirms
13 that the federal government’s practice under the 1937 Act was to use state procedures for
14 federal executions. She then “recommend[ed] amendment of the legislation to perpetuate
15 the current approach, under which the execution of capital sentences in Federal cases is
16 carried out by Federal officials pursuant to uniform regulations issued by the Attorney
17 General.” *Id.* Congress disregarded her request and returned to the 1937 model.

18 In light of this history, the Court cannot conclude that the 1790 use of the word
19 “manner” remained intact until it found its way into the FDPA. Congress deliberately
20 chose in 1994 to revert from a single-method execution approach, like that adopted in 1790
21 and in the 1993 DOJ regulations, to the state-focused approach of the 1937 statute. And it
22 did so in the face of Attorney General Reno’s assertion that federal executions under the
23 1937 statute had occurred in state facilities. This history suggests that Congress knowingly
24 adopted an approach in the FDPA that looked to state law and procedures for the means of
25 execution. It does not support the government’s contention that the FDPA entrusted all
26 execution details to federal officers and looked to state law solely for the general method
27 of execution.

28 ///

1 **C. To What State Law Does the FDPA Look?**

2 The Court must next decide what level of state procedures Congress intended to
3 embrace in the FDPA. Judges Rao and Tatel differ on what constitutes the “law of the
4 State” for purposes § 3596(a). Judge Rao would limit it to execution procedures set forth
5 in state “statutes and formal regulations.” 955 F.3d at 129 (Rao, J. concurring). In her
6 opinion, by directing the federal government to look to the *law* of the State, the FDPA
7 requires the government to “follow all procedures prescribed by state statutes and formal
8 regulations, but no more.” *Id.* at 134 (Rao, J., concurring). Judge Tatel takes a more
9 expansive view, finding that the “law of the State” also includes “protocols issued by state
10 prison officials pursuant to state law.” *Id.* at 146 (Tatel, J., dissenting). The Court agrees
11 with Judge Rao.

12 Judge Tatel writes:

13 The “law” of each state, then, requires executions to be implemented
14 according to procedures determined by state corrections officials, who, in
15 turn, have set forth such procedures in execution protocols. In other words,
16 “by law,” each state directed its prison officials to develop execution
17 procedures, and “by law,” those officials established such procedures and set
18 them forth in execution protocols. Accordingly, the protocols have been
19 “prescribed by . . . law.”

20 955 F.3d at 147 (Tatel, J., dissenting).

21 This analysis places too little weight on the key word “prescribed.” Under the
22 FDPA, the state law must not just authorize or direct that the manner of death be set forth
23 by correction officials in a state protocol, the state law must “prescribe[]” the manner of
24 death to be followed in federal executions: “[the marshal] shall supervise implementation
25 of the sentence in the *manner prescribed by the law of the State* in which the sentence is
26 imposed.” 18 U.S.C. § 3956(a) (emphasis added).

27 “Prescribe” means “to lay down a rule,” to “dictate.” *Merriam-Webster.com*
28 *Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/prescribe>
(last visited Aug. 12, 2020). It means “to tell someone what they must have or do.”
Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/prescribe>

1 (last visited Aug 12, 2020). A state statute that, in the words of Judge Tatel, merely
2 “direct[s] its prison officials to develop execution procedures” does not “prescribe,” “lay
3 down,” or “dictate” those procedures. 955 F.3d at 147 (Tatel, J., dissenting).

4 To support his interpretation, Judge Tatel looks to the purpose of the FDPA – which
5 he equates to the purpose of the 1937 Act from which its language was taken – which is to
6 make executions more humane by adopting the more advanced procedures used by the
7 States. 955 F.3d at 148 (Tatel, J., dissenting). Judge Rao correctly responds, however, that
8 courts cannot depart from the plain meaning of a statute (in this case, the word
9 “prescribed”) in the interest of more fully promoting the statute’s purpose. *Id.* at 140–41
10 (Rao, J., concurring). “[O]ur function [is] to give the statute the effect its language
11 suggests,” not to further whatever “admirable purposes it might be used to achieve.”
12 *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010). “[I]t frustrates rather
13 than effectuates legislative intent simplistically to assume that *whatever* furthers the
14 statute’s primary objective must be the law.” *Pension Ben. Guar. Corp. v. LTV Corp.*, 496
15 U.S. 633, 646–47 (1990) (emphasis in original).

16 In concluding that state “law” does not include informal execution protocols, Judge
17 Rao relies on *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). In that case the Supreme
18 Court considered a provision of the Trade Secrets Act that protected confidential
19 information by prohibiting its disclosure unless ““authorized by law.”” *Id.* at 294 (quoting
20 18 U.S.C. § 1905). The Supreme Court held that a regulation issued pursuant to an
21 agency’s “housekeeping” statute and without notice-and-comment procedures did not
22 qualify as “law” under the Act. *Id.* at 309–16. From this, Judge Rao concludes that the
23 word “law” in § 3596(a) does not include informal state protocols, but is limited to “binding
24 law prescribed through formal lawmaking procedures.” 955 F.3d at 132 (Rao, J.,
25 concurring).

26 Judge Tatel responds that “prescribed by law” and similar phrases appear more than
27 1,200 times in the United States Code and have no single meaning, but must instead be
28 interpreted in context. 955 F.3d at 149 (Tatel, J., dissenting). He then turns again to the

1 overall purpose of the FDPA – to adopt more humane state execution procedures – and
 2 concludes that excluding state protocols from the requirement of the FDPA would defeat
 3 the statute’s purpose. But this analysis glosses over the actual language at issue –
 4 “prescribed by law.” Judge Tatel does not assert that informal state protocols constitute
 5 “law,” and, as Judge Rao notes, Judge Tatel cites no case where such informal procedures
 6 have been held to have the force of law. 955 F.3d at 143 n.15 (Rao, J., concurring).

7 Because the FDPA directs the federal government to impose the death penalty “in
 8 the manner *prescribed by the law of the State*,” only those execution procedures actually
 9 prescribed by state law – state statutes and regulations that have the force and effect of law
 10 – must be applied in a federal execution. Procedures contained in less formal state
 11 protocols simply are not “the law of the State.” 18 U.S.C. § 3596(a).

12 **D. What is Arizona “Law” for Purposes of the FDPA?**

13 Mr. Mitchell asserts that Arizona’s execution protocol, found in Arizona
 14 Department of Corrections, Rehabilitation and Reentry (“ADC”) Department Order 710
 15 (“DO 710”), constitutes Arizona “law” within the meaning of the FDPA, and that the
 16 government therefore is required to comply with it fully during his execution. He makes
 17 two arguments in support.

18 First, Mr. Mitchell’s motion notes briefly that an “Arizona statute provides that the
 19 method of execution is lethal injection to occur ‘under the supervision of the state
 20 department of corrections.’” Doc. 606 at 14 (quoting A.R.S. § 13-757). Mr. Mitchell
 21 asserts that ADC drafted DO 710 “[p]ursuant to that authority,” and, “[a]ccordingly, these
 22 protocols are part of Arizona law.” *Id.* But state statutes frequently direct state agencies
 23 to take action, and Mr. Mitchell cites no authority for the proposition that a protocol issued
 24 in response to such a legislative direction automatically constitutes state law. Certainly
 25 A.R.S. § 13-757, which states only that executions are to occur “under the direction” of
 26 ADC, does not say that all procedures adopted by ADC therefore have the force of law.

27 Mr. Mitchell also notes that DO 710 cites various statutes. *Id.* (citing Doc. 606-3 at
 28 25). But the statutes cited in DO 710 do not concern the legal effect of the department

1 order. Instead, they include provisions defining the word “person” (A.R.S. §§ 1-215(28),
 2 13-105(30)); stating that a person sentenced before November 23, 1992, may choose either
 3 lethal injection or lethal gas as the means of execution (A.R.S. § 13-757(B)); providing
 4 that the identities of executioners are kept confidential (A.R.S. § 13-757(C)); stating who
 5 may be present at executions (A.R.S. § 13-758); requiring that the ADC director provide a
 6 return of warrant to the courts after an execution (A.R.S. § 13-759); and addressing the
 7 competency of persons to be executed (A.R.S. §§ 13-4021 through 13-4026).⁶ Doc. 606-
 8 3 at 25. None of these statutes states that department orders issued by ADC have the force
 9 and effect of law; indeed, none directly concerns ADC’s issuance of orders. They instead
 10 are statutes that touch on topics addressed in DO 710. Mr. Mitchell cites no authority
 11 suggesting that mere citation of these statutes somehow makes DO 710 part of Arizona
 12 law.⁷

13 Second, Mr. Mitchell notes that prior versions of DO 710 contained language stating
 14 that they did not “create any enforceable legal rights or obligations.” In 2017, in a lawsuit
 15 pending in this Court, ADC entered into a settlement agreement with the plaintiffs,
 16 including several death row inmates, and agreed to exclude such language from future
 17 protocols. Doc. 606-4, Stipulation and Order from *First Amendment Coalition of Arizona,*
 18 *Inc. v. Ryan*, D. Ariz. Case No. 2:14-cv-01447-NVW. Mr. Mitchell contends that this
 19 stipulation distinguishes DO 710 from the protocols litigated in the D.C. Circuit, which,

20
 21 ⁶ The list also includes a citation to Ariz. R. Crim. P. 31.17(c)(3), which at the time DC 710
 22 was issued apparently concerned notifications to the Arizona Supreme Court about the date
 and time of execution. That provision now appears to be in Rule 31.23.

23 ⁷ Mr. Mitchell never addresses Arizona administrative law concerning agency rulemaking,
 24 such as the Arizona Administrative Procedures Act, A.R.S. § 41-1001, *et seq.*, to show that
 25 DO 710 is an agency regulation with the force and effect of law. His motion and reply
 26 brief are entirely silent on this subject. *See* Docs. 606, 613. The Court also notes that DO
 27 710 is one of more than 125 Department Orders issued by ADC. *See* [https://corrections.](https://corrections.az.gov/reports-documents/adcrp-policies/departments-orders-index)
 28 [az.gov/reports-documents/adcrp-policies/departments-orders-index](https://corrections.az.gov/reports-documents/adcrp-policies/departments-orders-index) (last visited August 11,
 2020). These orders cover a wide variety of prison-related topics, from housing to
 visitation to medical care. *Id.* Department Order 101 sets the procedures for drafting and
 reviewing Department Orders, and suggests that the process is entirely internal. *See*
<https://corrections.az.gov/sites/default/files/policies/100/0101071320.pdf> (last visited
 August 11, 2020). The Court further notes that the ADC Department Orders are not
 included in the Arizona Administrative Code. *See* [https://apps.azsos.gov/publicservices/](https://apps.azsos.gov/publicservices/Title_05/5-01.pdf)
[Title_05/5-01.pdf](https://apps.azsos.gov/publicservices/Title_05/5-01.pdf) (last visited August 11, 2020). Mr. Mitchell addresses none of this.

1 because they “do not appear to have the binding force of law, cannot be deemed part of the
2 ‘law of the State.’” 955 F.3d at 143 n.15 (Rao, J., concurring.) Mr. Mitchell argues,
3 therefore, that the “Arizona law” governing the manner of state executions includes DO
4 710. Doc. 606 at 14.

5 The Court is not persuaded. The *First Amendment Coalition* case was resolved by
6 a Settlement Agreement – a contract – which the parties agreed could be enforced by other
7 persons sentenced to death in Arizona. The Settlement Agreement provided:

8 [T]he parties intend this Stipulated Settlement Agreement to be enforceable
9 by, and for the benefit of, not only Plaintiffs but also all current and future
10 prisoners sentenced to death in the State of Arizona (“Condemned Prisoner
11 Beneficiaries”), who are express and intended third-party beneficiaries of
this Stipulated Settlement Agreement[.]

12 Doc. 606-4 at 7.

13 The remaining provisions of the stipulation make clear that the parties viewed the
14 Settlement Agreement as a binding contract between ADC and death row inmates. It
15 identifies seven specific “covenants” by ADC that are enforceable (*id.* at 4–8), provides
16 that the court may take action upon “breach” of the Settlement Agreement (*id.* at 8),
17 provides that the case can be reopened at the request of a third-party beneficiary (*id.* at 7–
18 8), and provides that “an injunction shall immediately issue in this action or in a separate
19 action for breach of this Stipulated Settlement Agreement” (*id.* at 10). In short, the *First*
20 *Amendment Coalition* case was resolved in the same manner as many other lawsuits – by
21 a binding contract that could be enforced in court by specific parties and third-party
22 beneficiaries.

23 The stipulation says nothing about creating Arizona law, and Mr. Mitchell cites no
24 authority for the proposition that a settlement agreement between litigants creates Arizona
25 law. True, the Settlement Agreement includes a covenant that present and future versions
26 of DO 710 would not say that they do not “create any legally enforceable rights or
27 obligations” (*id.* at 3), but the reason for this covenant is readily apparent – the parties
28

1 intended to establish legally enforceable contract rights and such language would be
2 inconsistent with their agreement.

3 The Court cannot conclude that the Settlement Agreement makes DO 710 the “law”
4 of Arizona within the meaning of the FDPA. The settlement is a contract, not a statute or
5 formal regulation. Mr. Mitchell cites nothing to suggest that Congress intended “the law
6 of the State” to include contracts. The Court accordingly holds, for purposes of the FDPA,
7 that the “law” of Arizona includes Arizona’s death penalty statutes and criminal rules, but
8 that Mr. Mitchell has failed to show that it also includes DO 710.⁸

9 **E. What Does Arizona Law Require in this Case?**

10 To resolve the merits of Mr. Mitchell’s motion, the Court must compare the
11 requirement of the BOP’s 2019 Protocol to Arizona’s death penalty statutes and criminal
12 rules to see if there is inconsistency. Mr. Mitchell cites three differences. Doc. 606 at 17.
13 First, under Arizona law, a prisoner is entitled to 35 days’ notice of his execution date,
14 A.R.S. § 13-759, while the BOP protocol provides only 20 days’ notice, 28 C.F.R.
15 § 26.4(a). Second, a prisoner may have five witnesses at his execution under Arizona law,
16 A.R.S. § 13-758, but only three under the BOP protocol, 28 C.F.R. § 26.4(c–d). Third,
17 Arizona Rule of Criminal Procedure 31.23 allows for up to a 60-day delay if the execution
18 is deemed by the Arizona Supreme Court to be “impracticable,” while the BOP protocol
19 permits delay only upon a court-ordered stay, 28 C.F.R. § 26.3(a)(1).

20 Although these three state procedures differ from the 2019 Protocol, the Court
21 concludes that they are not the kinds of procedures incorporated by the FDPA. The FDPA

22 ⁸ Counsel for Mr. Mitchell argued at the hearing that not requiring the government to follow
23 state protocol procedures in this case would create a “paradox” between the first and second
24 sentences of § 3596(a). The Court does not see the paradox. The first sentence, which
25 applies when a defendant is convicted in a state such as Arizona that imposes the death
26 penalty, provides that the marshal “shall supervise implementation of the sentence in the
27 manner prescribed by the law of the State[.]” 18 U.S.C. § 3596(a). The second sentence,
28 which applies when a defendant is convicted in a state that does not impose the death
penalty, provides that “the court shall designate another State, the law of which does
provide for the implementation of a sentence of death, and the sentence shall be
implemented in the latter State in the manner prescribed by such law.” *Id.* Both sentences
require that the government implement the sentence “in the manner prescribed” by the
state’s law. Thus, the Court’s interpretation of that phrase would apply in both sentences,
producing no paradox.

1 calls for “*implementation of the sentence* in the manner prescribed by the law of the
 2 State[.]” 18 U.S.C. § 3596(a) (emphasis added). The sentence, of course, is death, and the
 3 “manner” of “implementation” of that sentence is the procedures by which death is caused.
 4 The Court cannot conclude that matters unrelated to the procedures for effectuating death
 5 constitute the manner of implementing the death sentence as referred to in the FDPA. Other
 6 judges agree. A unanimous panel of the Seventh Circuit recently held that “Section 3596(a)
 7 cannot be reasonably read to incorporate every aspect of the forum state’s law regarding
 8 execution procedure. We do not understand the word ‘manner’ as used in § 3596(a) to
 9 refer to details such as witnesses. The word concerns how the sentence is carried out, not
 10 who watches.” *Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020). In the D.C. Circuit
 11 case, even Judge Tatel found that § 3596(a) requires the federal government to follow only
 12 “those procedures that effectuate the death, including choice of lethal substances, dosages,
 13 vein-access procedures, and medical-personnel requirements.” *Execution Protocol Cases*,
 14 955 F.3d at 151 (Tatel, J., dissenting).

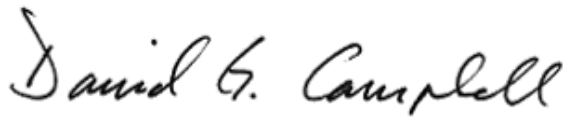
15 Mr. Mitchell identifies no procedures in Arizona statutes or criminal rules
 16 concerning the means for effectuating death that conflict with the BOP protocol. The Court
 17 therefore concludes that the government’s planned method of execution is not inconsistent
 18 with the salient provisions of Arizona law.⁹

19 **IT IS ORDERED:**

20 1. Mr. Mitchell’s motion to strike his execution warrant, vacate his execution
 21 date, and enjoin violation of this Court’s Judgment (Doc. 606) is **denied**.

22 2. Mr. Mitchell’s motion to stay his execution (Doc. 609) is **denied**.

23 Dated this 13th day of August, 2020.

24 

25 David G. Campbell
 26 Senior United States District Judge
 27

28 ⁹ By addressing the parties’ legal arguments dispassionately in this order, the Court does not mean to minimize the difficult and vexing human issues on both sides of this case.



U.S. Department of Justice
Federal Bureau of Prisons

Federal Correctional Complex
Terre Haute, Indiana

July 29, 2020

Mr. Lezmond Charles Mitchell
Reg. No. 48685-008
Special Confinement Unit
United States Penitentiary
Terre Haute, Indiana 47802

Dear Mr. Mitchell:

The purpose of this letter is to inform you that a date has been set for the implementation of your death sentence, pursuant to the Judgment and Order issued on January 8, 2004, by Judge Mary H. Murguia of the United States District Court for the District of Arizona. This letter will serve as official notification that pursuant to Title 28, Code of Federal Regulations, Section 26.3(a)(1), the Director of the Federal Bureau of Prisons has set August 26, 2020, as the date for your execution by lethal injection.

Soon, I will come to your housing unit to personally discuss with you many of the details surrounding the execution. At that time, I will be available to answer any questions you may have regarding the execution process.

Sincerely,


J.J. Watson
Complex Warden

cc: The Honorable David G. Campbell, Senior Judge, U.S. District Court (D. Arizona)
Ms. Debra D. Lucas, Acting Clerk of the Court (D. Arizona)
Mr. Michael G. Bailey, United States Attorney (D. Arizona)
Ms. Sharon Sexton, Assistant United States Attorney (D. Arizona)
Mr. William Voit, Assistant United States Attorney (D. Arizona)
Mr. Jonathan Aminoff, Assistant Federal Defender (California)
Ms. Celeste Bacchi, Assistant Federal Defender (California)
Mr. Josh Minkler, United States Attorney (S.D. Indiana)
Mr. Joseph "Dan" McClain, U.S. Marshal (S.D. Indiana)
Mr. Ethan P. Davis, Acting Assistant Attorney General, Civil Division
Mr. Paul Perkins, Office of the Assistant Attorney General, Civil Division

FILED

UNITED STATES COURT OF APPEALS

AUG 14 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEZMOND C. MITCHELL,

Defendant-Appellant.

No. 20-99009

D.C. No. 3:01-cr-01062-DGC-1
District of Arizona,
Phoenix

AMENDED ORDER

Before: IKUTA, CHRISTEN, and HURWITZ, Circuit Judges.

The order filed earlier today is vacated. This amended order is filed in its place. In the remaining briefs on the pending emergency motion, the parties are directed to focus on the underlying merits of Defendant-Appellant's appeal of the district court's August 13, 2020 order. The parties should also be prepared to discuss the merits of the appeal at a hearing on Tuesday, August 18, 2020, at 1:00 p.m. Pacific Time.

FILED

UNITED STATES COURT OF APPEALS

AUG 18 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEZMOND C. MITCHELL,

Defendant-Appellant.

No. 20-99009

D.C. No.

3:01-cr-01062-DGC-1

District of Arizona,

Phoenix

ORDER

Before: IKUTA, CHRISTEN, and HURWITZ, Circuit Judges.

At oral argument, counsel for the government represented that the Bureau of Prisons would comply with the Arizona Department of Corrections’s Department Order 710 to the extent it requires: (1) that the person or persons who place the IV lines be “currently certified or licensed within the United States to place IV lines,” (2) that the insertion of “either peripheral IV catheters or a central femoral line” shall be based upon the recommendation of a person “currently certified or licensed within the United States to place IV lines,” (3) that “[a] central femoral venous line will not be used unless the person placing the line is currently qualified by experience, training, certification, or licensure within the United States to place a central femoral line,” and (4) that the chemicals used in the execution “have an expiration or beyond-use date that is after the date that an execution is carried out.”

Counsel for the government is hereby ordered to file, on or before Wednesday, August 19, 2020, at noon PDT, a declaration from a person at the Bureau of Prisons, who is knowledgeable as to its execution procedures, confirming that the Bureau of Prisons will adhere to the requirements set forth above when carrying out the execution of Lezmond Mitchell.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEZMOND C. MITCHELL,

Defendant-Appellant.

C.A. No. 20-99009

D. Ct. No. CR-01-01062-PCT-DGC

**NOTICE OF FILING OF
DECLARATION**

The United States gives notice that it is simultaneously filing as an attachment to this notice a declaration from Rick Winter, Regional Counsel for the Federal Bureau of Prisons (“BOP”) North Central Region, a person who is knowledgeable as to its execution procedures, as ordered by the Court on August 18, 2020 (Dkt. 13).

The government maintains its position that Mitchell has failed to carry his burden of establishing a clear entitlement to equitable relief by, among other things, failing to proffer evidence in either the district court or this Court clearly showing a likelihood of non-speculative, significant irreparable harm warranting an injunction. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *see also Brewer v. Landrigan*, 562 U.S. 996, 996 (2010) (mem.). The government nevertheless submits the attached declaration in compliance with the Court’s order and to fully respond to the Court’s questions at oral argument.

Respectfully submitted this 19th day of August, 2020.

MICHAEL BAILEY
United States Attorney
District of Arizona

s/ Krissa M. Lanham
KRISSA M. LANHAM
Assistant U.S. Attorney
Two Renaissance Square
40 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-4449
Telephone: (602) 514-7500

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Krissa M. Lanham
Assistant U.S. Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
LEZMOND CHARLES MITCHELL)	CA No. 20-99009
)	
Defendant-Appellant.)	
)	

DECLARATION OF RICK WINTER

I, Rick Winter, do hereby declare and state as follows:

1. I am employed by the United States Department of Justice, Federal Bureau of Prisons ("BOP"), as Regional Counsel for the BOP's North Central Region. I have held this position since October 2016. I have been employed by the BOP since 1994.
2. The statements I make hereinafter are made on the basis of my review of the official files and records of the BOP, my own personal knowledge, or on the basis of information acquired by me through the performance of my official duties.
3. The BOP, under the supervision of the United States Marshals Service, is responsible for implementing federal death sentences. See 18 U.S.C. § 3596(a); 28 C.F.R. Part 26. Lezmond Mitchell's execution is scheduled to take place on August 26, 2020.
4. All qualified personnel responsible for inserting either peripheral IV catheters or a central femoral line during the execution of Lezmond Mitchell will be currently certified or licensed within the United States to place IV lines.
5. The insertion of either peripheral IV catheters or a central femoral line will be based upon the recommendation of a person currently certified or licensed within the United States to

place IV lines.

6. Only peripheral IV catheters or a central femoral line will be used during the execution of Lezmond Mitchell. A central femoral venous line will not be used unless the person placing the line is currently qualified by experience, training, certification or licensure within the United States to place a central femoral line.
7. The BOP will only use chemicals in the execution of Lezmond Mitchell that have an expiration or beyond-use date that is after the date on which his execution will be carried out. If the chemical's expiration or beyond-use date states only a month and year (e.g. "June 2017"), then BOP will not use that chemical after the last day of the month specified.

I declare, under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed this 19th day of August, 2020.

Rick Winter /sl
Rick Winter
Federal Bureau of Prisons

CA No. 20-99009
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEZMOND CHARLES MITCHELL,
Defendant-Appellant.

DC No. 3:01-cr-01062-DGC
(Civil No. 3:09-cv-08089-DGC)

DEATH PENALTY CASE

**Execution Set For:
August 26, 2020 at
Time: To Be Determined.**

**APPELLANT'S REPLY TO APPELLEE'S
NOTICE OF FILING OF DECLARATION**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

The Honorable David G. Campbell
United States District Judge

CUAUHTEMOC ORTEGA
Interim Federal Public Defender
JONATHAN C. AMINOFF
Jonathan_Aminoff@fd.org
CELESTE BACCHI
Celeste_Bacchi@fd.org
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Tel: (213) 894-5374; Fax: (213) 894-0310
Attorneys for Petitioner-Appellant
LEZMOND CHARLES MITCHEL

Mitchell objects to the manner of execution that that Government and the Court are creating. Under 18 U.S.C. § 3596, the Government is obligated to execute Mitchell in accordance with *all of* Arizona law, not in accordance with a judicially-created lethal injection protocol that only covers four select provisions of Arizona’s lethal injection protocol.¹ This Court has no power to fashion such compromises in death penalty cases and it should not do so here. *Morales v. Cate*, 623 F.3d 828, 831 (9th Cir. 2010) *as amended* (Sept. 28, 2010) (“Despite the best of intentions on the part of the district court to fashion a compromise and a choice of methods here, imposing on Brown such a choice between the new three-drug protocol and a one-drug option never adopted by the State places an undue burden on Brown and is beyond the power and expertise of the district court at this juncture. The result in this case should not be driven by compromise nor by the

¹ The Court directed BOP to comply with certain provisions of Department Order 710 in an apparent effort to make sure that the BOP’s execution of Mitchell would be substantially similar in four ways that the Court deems to be material. Mitchell has argued—and this Court’s order seems to agree—that Arizona law includes not just the directives in Arizona statutes, but Department Order 710 as well. However, the law requires that Mitchell be executed “in the manner prescribed by law of the State of Arizona” does not include *just* those four provisions. Rather, he is entitled to be executed according to the entirety of Department Order 710, as everything within that order creates legally enforceable rights or obligations under Arizona law. *See First Amendment Coalition of Arizona, Inc. v. Ryan*, Case No. 2:14-cv-01447, dkt. 186 (D. Ct. Ariz. June 21, 2017) at 1-2 (pursuant to stipulation, ADC and related defendants may never again claim that the protocols do not create legally enforceable rights and obligations).

State’s deadlines superimposed on the district court’s already pending review of the new execution protocol.”)

Nor does the Government have the right to engage in ad hoc, last-minute changes to its execution protocol. “Because the death penalty is undeniably the most serious penalty available to a State, the procedures for such penalty must be implemented in a reasoned, deliberate, and constitutional manner.” *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012) (internal quotations omitted). This Court once chastised the State of Arizona for “amending its execution protocol on an ad hoc basis—through add-on practices, trial court representations and acknowledgments, and last minute written amendments—leaving the courts with a rolling protocol that forces us to engage with serious constitutional questions and complicated factual issues in the waning hours before executions.” *Id.* The protocol that Arizona has now is, in part, the result of this Court’s admonishment that the informal, rolling amendments “cannot continue.” *Id.* If the State of Arizona cannot conduct executions in this manner, neither can the federal government.

The irreparable harm in this situation is that without a stay of execution, Mitchell will not be able to pursue his claim that the lethal injection protocol fails to comply with Arizona’s lethal injection protocol, *see* Exhibit 3 (table), and that Mitchell will be executed via an execution procedure that is unlawful. This is precisely the harm that the District Court for the District of Columbia described as

“manifestly irreparable” when granting a preliminary injunction to multiple death-sentenced inmates on a very similar claim. *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, No. 12-CV-0782, 2019 WL 6691814, at *7 (D.D.C. Nov. 20, 2019), *vacated and remanded sub nom. In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020), *cert. denied sub nom. Bourgeois v. Barr*, No. (19A1050), 2020 WL 3492763 (U.S. June 29, 2020) (“Here, absent a preliminary injunction, Plaintiffs would be unable to pursue their claims, including the claim that the 2019 Protocol lacks statutory authority, and would therefore be executed under a procedure that may well be unlawful. This harm is manifestly irreparable.”) The Government’s application to vacate the District Court for the District of Columbia’s injunction was *unanimously* denied by the Supreme Court. *Barr v. Roane*, 140 S. Ct. 353, 205 L. Ed. 2d 379 (2019).

Mitchell respectfully requests that this Court stay Mitchell’s August 26, 2020 execution, and remand this case to the district court for a factual determination regarding the totality of the differences between the Arizona protocol and the federal protocol. *Kappos v. Hyatt*, 566 U.S. 431, 439 (2012) (“[A] district court, unlike a court of appeals, has the ability and the competence to receive new evidence and to act as a factfinder.”); *see also Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 n.5 (9th Cir. 1994) (“Facts not presented to the district court are not part of the record on appeal.”).

Alternatively, Mitchell requests that this Court stay Mitchell's August 26, 2020 execution and consider the underlying merits of Mitchell's claim regarding the Government's violation of the district court's January 2004 sentencing order after full briefing and an appeal in the ordinary course.

However, if the Court is not inclined to grant Mitchell's motion for stay of execution, then Mitchell requests that this motion be denied expeditiously such that he can seek further review in the United States Supreme Court.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: August 19, 2020

By /s/ Jonathan C. Aminoff

JONATHAN C. AMINOFF
CELESTE BACCHI
Deputy Federal Public Defenders

Attorney for Defendant-Appellant
LEZMOND CHARLES MITCHELL

EXHIBIT 3

Arizona Method v. DOJ Method

Date

ARIZONA	DOJ PROTOCOL(S)
<p>The warrant of execution must specify an execution date that is 35 days after the warrant’s issuance. If the Supreme Court finds that it is impracticable to carry out an execution on that date, it may extend the execution date but may not extend it more than 60 days after the warrant's issuance. Additionally, the warrant must:</p> <p>(1) state the date for starting the execution time period;</p> <p>(Ariz. R. Crim. P. 31.23(C))</p>	<p>On a date [. . .] designated by the Director of the Federal Bureau of Prisons []. If 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;</p> <p>(28 C.F.R. § 26.3(a)(1))</p> <p>Except to the extent a court orders otherwise, the Director of the BOP will designate a date, time, and place for the execution of the sentence.</p> <p>[. . .]</p> <p>Under current federal regulations, the date established will be no sooner than 60 days from the entry of the judgment of death (28 C.F.R. § 26.3 {a} (1)) and notice of it must be given to the defendant no later than 20 days before the execution (28 C.F.R. § 26.4(a)). If the date designated passes by reason of a stay of execution, then a new date will be promptly designated by the Director of the BOP when the stay is lifted.</p> <p>(DOJ Protocol at 5.)</p>

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*Time*¹

ARIZONA	DOJ PROTOCOL(S)
<p>The Director shall select the time of execution and provide notice to the Arizona Supreme Court and the parties at least 20 calendar days prior to the execution date. (Arizona Rules of Criminal Procedures, Rule 31.17(c)(3)).</p> <p>(AZ Protocol at 3.)</p> <p>The warrant must:</p> <p>(2) state that the warrant is valid for 24 hours beginning at an hour to be designated by the director of the Arizona Department of Corrections;</p> <p>(3) order the director to provide written notice of the designated hour of execution to the Supreme Court and each party at least 20 calendar days before the execution date; and</p> <p>(Ariz. R. Crim. P. 31.23(c)(3))</p>	[Not specified]

¹ See *US v. Hammer*, 121 F.Supp.2d 794 (M.D.Pa. 2000) on issues of litigating time of the day of the execution in this context.

Place of Execution

ARIZONA	DOJ PROTOCOL(S)
[Not specified]	<p>At a federal penal or correctional institution designated by the Director of the Federal Bureau of Prisons. (28 C.F.R. § 26.3 (a)(2))</p> <p>On June 18, 1993, the Director of the BOP established the United States Penitentiary, Terre Haute, Indiana, as the site of such executions.</p> <p>(DOJ Protocol at 5.)</p>

Whom?

ARIZONA	DOJ PROTOCOL(S)
<i>See execution teams detailed below.</i>	<p>By a United States Marshal designated by the Director of the United States Marshals Service, assisted by additional personnel selected by the Marshal and the Warden of the designated institution and acting at the direction of the Marshal; and</p> <p>(28 C.F.R. § 26.3(a)(3))</p>

Method of Execution

ARIZONA	DOJ PROTOCOL(S)
<p>The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections.</p> <p>(Ariz. Rev. Stat. Ann. § 13-757(A))</p>	<p>By intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director of the Federal Bureau of Prisons and to be administered by qualified personnel selected by the Warden and acting at the direction of the Marshal.</p> <p>28 C.F.R. § 26.3(a)(4)</p> <p>Federal death sentences are implemented by an intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director, Federal Bureau of Prisons (BOP) and to be administered by qualified personnel selected by the Warden and acting at the direction of the United States Marshal. 28 CFR 26.3.</p> <p>(DOJ Addendum 7/25/2019 at A.)</p>

The Drug

ARIZONA	DOJ PROTOCOL(S)
<p>Sodium Thiopental or Pentobarbital:</p> <p>The Director shall have the sole discretion as to which drug protocol will be used for the scheduled execution. This decision will be provided to the inmate and their counsel of record in writing at the time the state files a request for Warrant of Execution in the Arizona Supreme Court.</p> <p>If the Department is able to obtain the chemical pentobarbital in sufficient quantity and quality to successfully implement the one-drug protocol with pentobarbital set forth in Chart A, then the Director shall use the one-drug protocol with pentobarbital set forth in Chart A as the drug protocol for execution.</p> <p>If the Department is unable to obtain such pentobarbital, but is able to obtain the chemical sodium pentothal in sufficient quantity and quality to successfully implement the one-drug protocol with sodium pentothal set forth in Chart B, then the Director shall use the one-drug protocol with sodium pentothal set forth in Chart B as the drug protocol for execution.</p> <p>(AZ Protocol, Attachment D at 2.)</p>	<p>The lethal substances to be utilized in federal lethal injections shall be Pentobarbital Sodium.</p> <p>(DOJ Addendum 7/25/2019 at C.)</p>

Pre-Execution Access to Counsel, Family, Spiritual Advisors, Etc.

ARIZONA	DOJ PROTOCOL(S)
<p>Thirty-five days prior to the execution, the Warden (or designee) will offer the inmate the opportunity to contact their Attorney of Record by phone and to speak with a facility chaplain. (AZ Protocol at 11.)</p> <p>The Warden shall allow the inmate to keep in the cell one box each of legal and religious materials, a pencil and paper, and a book or periodical. (AZ Protocol at 12.)</p> <p>The inmate's visitation privileges shall be terminated at 2100 hours the day prior to the execution. The inmate will be permitted two hours of in-person visitation with no more than two Attorneys of Record, concluding one hour prior to the scheduled execution. (AZ Protocol at 15.)</p>	<p>Beginning seven days before the designated date of execution, the prisoner shall have access only to his spiritual advisers (not to exceed two), his defense attorneys, members of his family, and the officers and employees of the institution. Upon approval of the Director of the Federal Bureau of Prisons, the Warden may grant access to such other proper persons as the prisoner may request. (28 C.F.R. § 26.4 (b) / DOJ Protocol at 10.)</p> <p>The condemned individual's Attorney(s) of Record, spiritual adviser(s), immediate family members or other persons approved by the Director of the BOP, will be given visiting privileges during the final 24 hours as determined by the Warden. Visiting privileges will be suspended when preparations for the execution require suspension. (DOJ Protocol at 14.)</p> <p>From 12 to 3 hours prior to execution, visits by family, attorneys, religious representatives, and other persons approved by the Director of the BOP, will be at the discretion of the Warden. (DOJ Protocol at 16.)</p>

Pre-Execution Phone Calls

ARIZONA	DOJ PROTOCOL(S)
Twenty-four hours prior to the day of the execution, the Warden shall ensure phone calls are concluded by 2100 hours. The inmate's telephone privileges shall be terminated at 2100 hours the day prior to the execution, excluding calls from the inmate's Attorney of Record and others as approved by the Division Director for Prison Operations. (AZ Protocol at 15.)	Excluding calls to the condemned individual's Attorney(s) of Record and calls specifically approved by the Warden, the condemned individual's telephone privileges will be terminated 24 hours prior to the execution. (DOJ Protocol at 14.)

Qualification/Selection of Executioners

ARIZONA	DOJ PROTOCOL(S)
<p>Command Team (deals with overall coordination of execution procedures) is selected by Division Director with documented approval of Director.</p> <p>Housing Unit 9 Section (deals with conditions of confinement and application of approved procedures) is the Restraint + Special Ops team and is selected by Division Director with documented approval of Director.</p> <ul style="list-style-type: none"> Restraint Team (at least 7 members) provides continuous observation of the inmate on day of execution and applies appropriate restraint procedures 	<p>Not less than fourteen (14) days prior to a scheduled execution, the Director or designee, in conjunction with the United States Marshal Service, shall make a final selection of qualified personnel to serve as the executioner(s) and their alternates. <i>See</i> BOP Execution Protocol, Chap. 1, §§ III (F) and IV (B) & (E).</p> <p>(DOJ Addendum 7/25/2019 at D.)</p> <p><u>BOP Protocol, Chap. 1, §§ III (F)</u> Those persons necessary to carry out the execution will be identified.</p>

ARIZONA	DOJ PROTOCOL(S)
<ul style="list-style-type: none"> • Special Ops team (at least 5 members) implements the protocol, with primary duty of administering the chemicals and mixing the chemicals <p>Intravenous Team Members (deals with inserting access, ensuring lines are functioning, supervising the Special Ops team in mixing the chemicals, prepares the syringes, monitors the inmate) are selected by the Director. At least two or more qualified (<i>see below</i>) members.</p> <p>Maintenance Response Team (deals with testing equipment and ensuring it works) is at least 4 members and selected by the warden.</p> <p>Critical Incident Response Team (deals with educating staff regarding possibly psychological responses and coping mechanisms) is at least 4 members and selected by the Employee Relations Administrator.</p> <p>Traffic Control Team (deals with state/local law enforcement, traffic control, etc.) is at least 9 members and selected by the Division Director for Prison Operations.</p>	<p>The Warden, with the assistance of the Director, USMS, and the Director, BOP, will be responsible for identifying, selecting and obtaining the services of the individuals administering the lethal injection.</p> <p>The Warden is responsible for selection of the persons involved in perimeter security, transportation, and command post operations, as well as crowd control, support functions and access screening.</p> <p>Individuals will be identified for placement in all vital or important positions. Alternates will also be identified. The Assistant Director, Correctional Programs Division, Regional Director, and the Warden will determine which positions require alternates and will ensure adequate coverage is provided. (DOJ Protocol at 7.)</p> <p><u>BOP Protocol, Chap. 1, § IV (B) & (E)</u></p> <p><i>B. Qualified Person</i></p> <p>The Warden will finalize arrangements for a qualified person to be present at the execution and to declare the executed individual deceased.</p> <p><i>E. Selection of Executioner(s)</i></p>

ARIZONA	DOJ PROTOCOL(S)
<p>Escort Team (deals with movement of witnesses) is at least 9 members and selected by Division Director for Prison Operations.</p> <p>Victim Services Team (deals with communication with victims) is at least 2 members and has specific duties on the day of the execution.</p> <p>(AZ Protocol at 5-8.)</p> <p>With respect to certain teams, the protocol has disqualifying provisions including: “No employee who was suspended or demoted in the past 12 months shall be considered. Any staff currently under investigation is also ineligible,” and “Staff with less than two years employment with the Department shall not be considered.”</p> <p>(AZ Protocol at 9.)</p>	<p>The Warden, with the assistance of the Director, USMS and Director, BOP, will finalize the selection of executioner(s) and their alternates.</p> <p>(DOJ Protocol at 9.)</p>

IV Team Qualifications

ARIZONA	DOJ PROTOCOL(S)
<p>The IV Team will consist of any two or more of the following:</p> <p>physician(s), physician assistant(s), nurse(s), emergency medical technician(s) (EMTs), paramedic(s), military corpsman or other certified or licensed personnel including those trained in the United States Military.</p> <p>All team members shall be currently certified or licensed within the United States to place IV lines.</p> <p>The IV Team members shall be selected by the Director.</p> <p>Selection of any team member shall include a review of the proposed team member's qualifications, training, experience, and/or any professional license(s) and certification(s) they may hold.</p> <p>Licensing and criminal history reviews shall be conducted, by the Inspector General's Office prior to assigning or retaining any IV Team member and upon the issuance of a Warrant of Execution.</p> <p>(AZ Protocol at 6.)</p>	<p>Qualified personnel includes currently licensed physicians, nurses, EMTs, Paramedics, Phlebotomists, other medically trained personnel, including those trained in the United States Military having at least one year professional experience and other personnel with necessary training and experience in a specific execution related function.</p> <p>Any documentation establishing the qualifications, including training, of such personnel shall be maintained by the Director or designee.</p> <p>(DOJ Addendum 7/25/2019 at D.)</p>

Intravenous Access

ARIZONA	DOJ PROTOCOL(S)
<p>The IV Team shall be responsible for inserting either peripheral IV catheters or a central femoral line as determined by the Director acting upon the recommendation of the IV Team Leader.</p> <p>A central femoral venous line will not be used unless the person placing the line is currently qualified by experience, training, certification or licensure within the United States to place a central femoral line.</p> <p>(AZ Protocol at 7.)</p>	<p>Lethal substances shall be administered intravenously. The Director or designee shall determine the method of venous access</p> <p>(1) based on the training and experience of personnel establishing the intravenous access;</p> <p>(2) to comply with specific orders of federal courts; or</p> <p>(3) based upon a recommendation from qualified personnel.</p> <p>(DOJ Addendum 7/25/2019 at H.)</p>

Last Meal

ARIZONA	DOJ PROTOCOL(S)
<p>The Warden shall advise the inmate he may request a last meal by completing the Last Meal Request, Form 710-5, and returning it no later than 14 days prior to the execution. Reasonable effort shall be made to accommodate the request.</p> <p>(AZ Protocol at 4.)</p>	<p>At least seven days prior to execution, the Warden or designee will contact the condemned individual to arrange for his/her last meal.</p> <p>(DOJ Protocol at 10.)</p>

<p>The ASPC-Eyman or ASPC-Perryville Warden shall ensure the inmate receives the last meal by 1900 hours. Every reasonable effort to accommodate the last meal request will have been made. All eating utensils and remaining food and beverage shall be removed upon completion of the meal.</p> <p>(AZ Protocol at 15.)</p>	<p>The Warden will contact the condemned individual to finalize arrangements for his/her final meal and ensure that it is properly prepared and served by staff.</p> <p>(DOJ Protocol at 14.)</p> <p>The condemned individual will be served a final meal at a time determined by the Warden.</p> <p>(DOJ Protocol at 16.)</p>
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Training

ARIZONA	DOJ PROTOCOL(S)
<p>The Division Director for Prison Operations shall establish a training schedule and identify dates for periodic on-site practice by the Housing Unit 9 Section Teams, to include 10 training scenarios within 12 months preceding the scheduled execution. [The Director shall] conduct a minimum of 2 training sessions with multiple scenarios 2 days prior to the scheduled execution.</p> <p>The IV Team members shall participate in at least 1 training session with multiple scenarios within 1 day prior to the scheduled execution.</p> <p>(AZ Protocol at 4.)</p>	<p>The Warden will ensure that appropriate training sessions are held for persons involved in the various aspects of the execution event.</p> <p>Not all of the persons involved need to practice together. Individual teams will practice as units, with inter-team practices scheduled, as necessary by the Warden, to facilitate coordination and smooth interaction.</p> <p>(Protocol at 9-10.)</p> <p>Final practices will be conducted as directed by the Warden.</p> <p>(DOJ Protocol at 13.)</p>

<p>IV Team members shall only be required to participate in the training sessions scheduled for 1 day prior to the actual execution.</p> <p>(AZ Protocol at 7.)</p> <p>Two days prior to an execution, the Division Director schedules and conducts on-site scenario training sessions, modifying practices as warranted.</p> <p>(AZ Protocol at 14.)</p>	<p>Non-medically licensed or certified qualified personnel shall participate in a minimum of ten (10) execution rehearsals a year and shall have participated in at least two (2) execution rehearsals prior to participating in an actual execution.</p> <p>(DOJ Addendum 7/25/2019 at D).</p>
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Last Rites

ARIZONA	DOJ PROTOCOL(S)
[Not specified]	[Not specified]

Procurement of LI Drugs

ARIZONA	DOJ PROTOCOL(S)
<p>The Housing Unit 9 Section Leader shall ensure that complete sets of chemicals are on site, not expired, and immediately available for use.</p> <p>ADC will only use chemicals in an execution that have an expiration or beyond-use date that is after the date that an execution is carried out. If the chemical's expiration or beyond-use date states only a month and</p>	<p>The Warden will ensure the purchase of lethal substances to be used in the execution. Once purchased, these lethal substances will be secured in the institution until called for by the Warden.</p> <p>(DOJ Protocol at 10.)</p>

<p>year (e.g., “June 2017”), then ADC will not use that chemical after the last day of the month specified.</p> <p>(AZ Protocol, Attachment D at 1.)</p> <p>The decision to use a compounded or non-compounded chemical will be provided to the inmate and their counsel of record in writing at the time the state files a request for Warrant of Execution in the Arizona Supreme Court.</p> <p>(AZ Protocol, Attachment D at 2.)</p>	
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Storage of LI Drugs

ARIZONA	DOJ PROTOCOL(S)
<p>The Housing Unit 9 Section Leader shall ensure the chemicals are ordered, arrive as scheduled and are properly stored. The chemicals shall be stored in a secured, locked area that is temperature regulated and monitored to ensure compliance with manufacturer specifications, under the direct control of the Housing Unit 9 Section Leader.</p> <p>(AZ Protocol, Attachment D at 1.)</p>	<p>[Not specified]</p>

Testing of LI Drugs

ARIZONA	DOJ PROTOCOL(S)
A quantitative analysis of any compounded or non-compounded chemical to be used in the execution shall be provided upon request within ten calendar days after the state seeks a Warrant of Execution. (AZ Protocol, Attachment D at 2.)	[Not specified]

Documentation of Execution Procedures

ARIZONA	DOJ PROTOCOL(S)
<i>See duties of Recorder throughout execution.</i>	The Warden will designate a recorder who will begin logging execution activities in the official execution log book commencing three hours prior to the scheduled execution. This includes the time of: condemned leaving the inmate holding cell, when strapped to the gurney, arrival of witnesses, opening of drapes, last statement, approval of the process, signal that drugs have been administered, EKG determination, announcement of death, closing of drapes, notification of public of death, removal of witnesses, removal of body, cleaning chores, and securing the chamber. (DOJ Protocol at 17.)

Preparing of Syringes

ARIZONA	DOJ PROTOCOL(S)
<p>The IV Team Leader, with the assistance of a Special Operations Team member, shall be responsible for preparing and labeling the assigned sterile syringes in a distinctive manner identifying the specific chemical contained in each syringe by</p> <ul style="list-style-type: none"> i) assigned number, ii) chemical name, iii) chemical amount and iv) the designated color, as set forth in the chemical charts below. This information shall be preprinted on a label, with one label affixed to each syringe to ensure the label remains visible. <p>(AZ Protocol, Attachment D at 1.)</p> <p>After the IV Team prepares all required syringes with the proper chemicals and labels as provided in the Chemical Chart, the Special Operations Team, under the supervision of the IV Team, shall attach one complete set of the prepared and labeled syringes to the 2-Gang, 2-Way Manifold in the order in which the chemical(s) are to be administered. The syringes will be attached to the 2-Gang, 2-Way Manifold in a</p>	<p>The lethal substances shall be placed into three sets of numbered and labeled syringes. One of the sets of syringes is used in the implementation of the death sentence and two sets are available as a backup.</p> <p>(Addendum 7/25/2019 at F.)</p>

ARIZONA	DOJ PROTOCOL(S)
<p>manner to ensure there is no crowding, with each syringe resting in its corresponding place in the shadow board which is labeled with the name of the chemical, color, chemical amount and the designated syringe number.</p> <p>The syringes shall be affixed in such a manner to ensure the syringe labels are clearly visible. Prior to attaching the syringes to the 2-Gang, 2-Way Manifold, the flow of each gauge on the manifold shall be checked by the IV Team Leader running the sterile saline solution through the line to confirm there is no obstruction.</p> <p>After all syringes are prepared and affixed to the 2-Gang, 2-Way Manifold in proper order, the Special Operations Team Leader shall confirm that all syringes are properly labeled and attached to the manifold in the order in which the chemicals are to be administered as designated by the Chemical Chart. Each chemical shall be administered in the predetermined order in which the syringes are affixed to the manifold.</p> <p>(AZ Protocol, Attachment D at 3.)</p>	

Dosage of Drugs

ARIZONA	DOJ PROTOCOL(S)
<p>CHART A (PENTOBARBITAL):</p> <p>Syringe No. Label 1A 20mL Sterile Saline Solution, BLACK 2A 2.5gm Pentobarbital, GREEN 3A 2.5gm Pentobarbital, GREEN 4A 20mL Sterile Saline Solution, BLACK</p> <p>CHART B (SODIUM PENTOTHAL):</p> <p>Syringe No. Label 1A 20mL Sterile Saline Solution, BLACK 2A 1.25gm Sodium Pentothal, GREEN 3A 1.25gm Sodium Pentothal, GREEN 4A 1.25gm Sodium Pentothal, GREEN 5A 1.25gm Sodium Pentothal, GREEN 6A 20mL Sterile Saline Solution, BLACK</p> <p>(AZ Protocol, Attachment D at 2.)</p> <p>One-drug protocol: One full set of syringes is used in the implementation of the death sentence (Bank “A”) and an additional complete set of the necessary chemicals shall be obtained and kept available in the chemical room, but need not be drawn into syringes unless the primary dosages prove to be insufficient for successful completion of the execution.</p>	<p>A set of syringes will consist of:</p> <p>Syringe #1 contains 2.5 grams of Pentobarbital Sodium in 50 mL of diluent Syringe #2 contains 2.5 grams of Pentobarbital Sodium in 50 mL of diluent Syringe #3 contains 60 mL of saline flush</p> <p>(Addendum 7/25/2019 at H.)</p>

(AZ Protocol, Attachment D at 1.)	
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Special Accommodations

ARIZONA	DOJ PROTOCOL(S)
<p>The chemical amounts as set forth in the Chemical Chart are designated for the execution of persons weighing 500 pounds or less. The chemical amounts will be reviewed and may be revised as necessary for an inmate exceeding this body weight.</p> <p>(AZ Protocol, Attachment D at 3.)</p>	[Not specified]

Sedative

ARIZONA	DOJ PROTOCOL(S)
<p>Upon the inmate's arrival, the inmate may be offered a mild sedative.</p> <p>No later than four hours prior to the execution, the inmate may be offered a mild sedative.</p> <p>(AZ Protocol at 16.)</p> <p>The inmate may be offered a mild sedative based on the inmate's need. The sedative shall be provided to the inmate no later than four hours prior to the execution, unless it is determined medically necessary.</p>	[Not specified]

<p>The offer of the mild sedative, the inmate's decision, and the administration of the sedative, if chosen, shall be documented in the watch log.</p> <p>(AZ Protocol, Attachment D at 4.)</p>	
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Witnesses to Execution

ARIZONA	DOJ PROTOCOL(S)
<p>The director of the state department of corrections or the director's designee shall be present at the execution of all death sentences and shall invite the attorney general and at least twelve reputable citizens of the director's selection to be present at the execution.</p> <p>The director shall, at the request of the defendant, permit clergymen, not exceeding two, whom the defendant names and any persons, relatives or friends, not exceeding five, to be present at the execution. The director may invite peace officers as the director deems expedient to witness the execution. No persons other than those set forth in this section shall be present at the execution nor shall any minor be allowed to witness the execution.</p> <p>(Ariz. Rev. Stat. Ann. § 13-758)</p> <p>The Warden shall inform the inmate that two clergy and five other persons may be invited to be present at</p>	<p>In addition to the Marshal and Warden, the following persons shall be present at the execution:</p> <p>(1) Necessary personnel selected by the Marshal and Warden;</p> <p>(2) Those attorneys of the Department of Justice whom the Deputy Attorney General determines are necessary;</p> <p>(3) Not more than the following numbers of person selected by the prisoner:</p> <p>(i) One spiritual adviser;</p> <p>(ii) Two defense attorneys; and</p> <p>(iii) Three adult friends or relatives; and</p> <p>(4) Not more than the following numbers of persons selected by the Warden:</p> <p>(i) Eight citizens; and</p>

ARIZONA	DOJ PROTOCOL(S)
<p>the execution. The Warden shall notify the inmate that minors are prohibited from witnessing the execution pursuant to A.R.S. §13-758. The Warden shall notify the inmate that requests for Department or contract staff to attend the execution shall be denied. The Warden shall notify the inmate that requests for other inmates to attend the execution shall be denied.</p> <p>(AZ Protocol at 3-4.)</p> <p>In the event that the inmate wishes to designate one or more of their attorneys or other members of their legal team (not to exceed a cumulative three persons) to witness the execution, then the inmate shall identify these witnesses twenty-one days prior to the execution, and these witnesses shall sign and timely submit an Official Witness Agreement (Form 710-6), whereupon the Director shall invite these witnesses to attend the execution in accordance with section 10, subsection 10.2.1.1 of this Department Order.</p> <p>(AZ Protocol at 10.)</p> <p>The Director shall invite:</p> <ul style="list-style-type: none"> • The Arizona Attorney General. A.R.S. §13-758. 	<p>(ii) Ten representatives of the press.</p> <p>No other person shall be present at the execution, unless leave for such person's presence is granted by the Director of the Federal Bureau of Prisons. No person younger than 18 years of age shall witness the execution.</p> <p>(28 C.F.R. § 26.4(c-d))</p> <p>As to the Eight citizens:</p> <p>In identifying these individuals, the Warden, no later than 30 days after the setting of an execution date, will ask the United States Attorney for the jurisdiction in which the condemned individual was prosecuted to recommend up to eight individuals who are victims or victim family members to be witnesses of the execution.</p> <p>(DOJ Protocol at 8.)</p> <p>When the condemned individual is informed by the Warden of the execution date, he/she will be advised that he/she may designate not more than one spiritual adviser, two defense attorneys, and three adult friends or relatives (at least 18 years old) to be present at the execution. The condemned individual will be asked to submit the list of his/her witnesses to the Warden no later than 30 days after notification of the date of the scheduled execution.</p>

ARIZONA	DOJ PROTOCOL(S)
<ul style="list-style-type: none"> • Twelve or more reputable citizens, including up to five Arizona-market media. • The five official media witnesses selected as representatives, from media-print, television/cable, radio, and the local market where the crime occurred. These official media witnesses shall also agree to serve as pool reporters. • Law Enforcement and prosecutors from the jurisdiction where the crime occurred. • Any crime victims and survivors of the crime for which the sentence of death will be imposed, once the Victim Services Team identifies those persons and provides to the Director a list of victim witnesses within 14 days prior to the scheduled execution. <p>(AZ Protocol at 10.)</p> <p>Minors shall not be permitted to witness an execution.</p> <p>(A.R.S. §13-758.)</p>	<p>(DOJ Protocol at 6.)</p>

Entering the Chamber

ARIZONA	DOJ PROTOCOL(S)
<p>At the designated time, the overhead microphone will be turned on and the inmate will be brought into the execution room and secured on the table by the prescribed means with the inmate's arms positioned at an angle away from the inmate's side. Existing closed-circuit monitors will allow witnesses in the designated witness room to observe this process.</p> <p>(AZ Protocol, Attachment D at 4.)</p>	<p>Thirty minutes prior to the execution, at the appropriate time, the condemned individual will be:</p> <ul style="list-style-type: none"> a. removed from the Inmate Holding Cell by the Restraint Team; b. strip-searched by the Restraint Team and then dressed in khaki pants, shirt, and slip-on shoes. c. secured with restraints, if deemed appropriate by the Warden; d. escorted to the Execution Room by the Restraint Team. <p>In the Execution Room the ambulatory restraints, if any, will be removed and the condemned individual will be restrained to the Execution Table.</p> <p>(DOJ Protocol at 19.)</p> <p>Approximately thirty (30) minutes prior to the scheduled implementation of the death sentence, the condemned individual will be escorted into the execution room. The condemned individual will be restrained to the execution table.</p> <p>(DOJ Addendum 7/25/2019 at G.)</p>

Witness Observation

ARIZONA	DOJ PROTOCOL(S)
<p>At the designated time, the overhead microphone will be turned on and the inmate will be brought into the execution room and secured on the table by the prescribed means with the inmate's arms positioned at an angle away from the inmate's side. Existing closed-circuit monitors will allow witnesses in the designated witness room to observe this process.</p> <p>(AZ Protocol, Attachment D at 4.)</p> <p>Existing closed-circuit monitors will allow witnesses in the designated witness room to observe the IV Team's vein assessment and placement of IV catheters in the inmate. In addition, the audio feed from the overhead microphone will be turned off following the IV Team's assessment and placement of IV catheters.</p> <p>A camera will be focused on the area in the chemical room in which syringes are injected into the IV line, and existing closed-circuit monitors will allow witnesses in the designated witness room to observe the administration of the lethal injection drug(s), including the administration of additional or subsequent doses of the drug(s).</p>	<p>Once the condemned individual has been secured to the table, staff inside the Execution Room will open the drapes covering the windows of the witness rooms.</p> <p>(DOJ Protocol at 21.)</p>

ARIZONA	DOJ PROTOCOL(S)
<p>All cameras and monitors shall be placed in such a manner so as to ensure and preserve at all times the anonymity of all personnel involved in the execution process.</p> <p>(AZ Protocol, Attachment D at 4.)</p>	

Intravenous Access

ARIZONA	DOJ PROTOCOL(S)
<p>The Director acting upon the advice of the IV Team Leader shall determine the catheter sites. A femoral central line shall only be used if the person inserting the line is currently qualified by experience, training, certification or licensure within the United States to insert a femoral central line. The IV Team members shall insert a primary IV catheter and a backup IV catheter.</p> <p>The IV Team Leader shall ensure the catheters are properly secured and properly connected to the IV lines and out of reach of the inmate's hands. A flow of sterile saline solution shall be started in each line and administered at a slow rate to keep the lines open.</p>	<p>A suitable venous access line or lines will be inserted and inspected by qualified personnel and a slow rate flow of normal saline solution begun.</p> <p>(Addendum 7/25/2019 at G.)</p> <p>If peripheral venous access is utilized, two separate lines shall be inserted in separate locations and determined to be patent by qualified personnel. A flow of saline shall be started in each line and administered at a slow rate to keep the line open. One line will be used to administer the lethal substances and the second will be reserved in the event of the failure of the first line.</p>

<p>The primary IV catheter will be used to administer the lethal chemical(s) and the backup catheter will be reserved in the event of the failure of the first line. Any failure of a venous access line shall be immediately reported to the Director.</p> <p>The IV catheter in use shall remain visible to the Warden throughout the procedure.</p> <p>Should the use of the backup IV catheter be determined to be necessary, a set of backup chemicals should be administered in the backup IV.</p> <p>(AZ Protocol, Attachment D at 5.)</p>	<p>Any failure of a venous access line shall be immediately reported to the Director or designee.</p> <p>(Addendum 7/25/2019 at H.)</p>
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Last Words

ARIZONA	DOJ PROTOCOL(S)
<p>The Warden shall read aloud a summary of the Warrant of Execution. The Warden shall ask the inmate if he wishes to make a last statement. The microphone will remain on during the last statement. It will be turned off in the event the inmate uses vulgarity or makes intentionally offensive statements.</p> <p>(AZ Protocol at 18.)</p>	<p>The condemned individual will be asked if he/she has any last words or wishes to make a statement. The condemned individual will have been advised in advance that this statement should be reasonably brief.</p> <p>(DOJ Protocol at 21.)</p>

Administration of Drugs

ARIZONA	DOJ PROTOCOL(S)
<p>Upon receipt of the Director's order and under observation of the IV Team Leader, the Special Operations Team Leader will instruct the assigned Special Operations Team member(s) to begin dispensing the chemicals under the chosen drug protocol.</p> <p>Upon direction from the Special Operations Team Leader, the assigned Special Operations Team member will visually and orally confirm the chemical name on the syringe and then administer the first syringe of the sterile saline solution, followed by the full dose of the lethal chemical immediately followed by the sterile saline solution flush.</p> <p>When three minutes has elapsed since commencing the administration of the lethal chemical, the IV Team Leader, dressed in a manner to preserve their anonymity, will enter into the room where the Warden and inmate are located to physically confirm the inmate is unconscious by using all necessary medically appropriate methods, and verbally advise the Director of the same. The IV Team Leader will also confirm that the IV line remains affixed and functioning properly.</p>	<p>A set of syringes will consist of: Syringe #1 contains 2.5 grams of Pentobarbital Sodium in 50 mL of diluent Syringe #2 contains 2.5 grams of Pentobarbital Sodium in 50 mL of diluent Syringe #3 contains 60 mL of saline flush,</p> <p>Each syringe will be administered in the order set forth above when directed by supervisory personnel.</p> <p>(DOJ Addendum 7/25/2019 at H.)</p>

ARIZONA	DOJ PROTOCOL(S)
<p>If, after three minutes, the inmate remains conscious, the IV Team shall communicate this information to the Director, along with all IV Team input. The Director will determine how to proceed or, if necessary, to start the procedure over at a later time or stand down.</p> <p>If deemed appropriate, the Director may instruct the Special Operations Team to administer an additional dose of the lethal chemical followed by the sterile saline solution flush. This may be administered via the primary or backup IV catheter, as determined following consultation with the IV Team.</p> <p>Upon administering the lethal chemical and sterile saline solution from a backup set, the IV Team shall determine whether the inmate is unconscious by sight and sound, utilizing the audio equipment, camera and monitor. The IV Team Leader will again physically determine whether the inmate is unconscious using proper medical procedures and verbally advise the Director of the same.</p> <p>(AZ Protocol, Attachment D at 5-6.)</p>	

Monitoring the Condemned

ARIZONA	DOJ PROTOCOL(S)
<p>The inmate will be positioned to enable the IV Team or the Special Operations Team Leader and the Warden to directly observe the inmate and to monitor the inmate's face with the aid of a high resolution color camera and a high resolution color monitor.</p> <p>After the inmate has been secured to the execution table, the Restraint Team Leader shall personally check the restraints which secure the inmate to the table to ensure they are not so restrictive as to impede the inmate's circulation, yet sufficient to prevent the inmate from manipulating the catheter and IV lines.</p> <p>A microphone will be affixed to the inmate's shirt to enable the IV Team or the Special Operations Team Leader to hear any utterances or noises made by the inmate throughout the procedure. The Special Operations Team Leader will confirm the microphone is functioning properly, and that the inmate can be heard in the chemical room.</p> <p>The Restraint Team members will attach the leads from the electrocardiograph to the inmate's chest once the inmate is secured. The IV Team Leader shall confirm</p>	<p>The leads of a cardiac monitor will be attached by qualified personnel.</p> <p>(Addendum 7/25/2019 at G.)</p>

ARIZONA	DOJ PROTOCOL(S)
<p>that the electrocardiograph is functioning properly and that the proper graph paper is used.</p> <p>An IV Team member shall be assigned to monitor the EKG, and mark the EKG graph paper at the commencement and completion of the administration of the lethal chemical(s).</p> <p>Throughout the procedure, the IV Team Leader shall monitor the inmate's level of consciousness and electrocardiograph readings utilizing direct observation, audio equipment, camera and monitor as well as any other medically approved method(s) deemed necessary by the IV Team Leader. The IV Team Leader shall be responsible for monitoring the inmate's level of consciousness.</p> <p>(AZ Protocol, Attachment D at 4.)</p>	

Life-Saving Measures

ARIZONA	DOJ PROTOCOL(S)
<p>An Automated External Defibrillator (AED) will be readily available on site in the event that the inmate goes into cardiac arrest at any time prior to dispensing the chemicals; trained medical staff shall make every effort to revive the inmate should this occur. Trained</p>	<p>An individual identified by the Warden will prepare contingency plans related to an emergency occasioned by the execution, such as an institution disturbance, hostage taking, outside demonstration, outside assault on the facility, etc.</p>

<p>medical personnel and emergency transportation, neither of which is involved in the execution process, shall be available in proximity to respond to the inmate should any medical emergency arise at any time before the order to proceed with the execution is issued by the Director.</p> <p>If at any point any team member determines that any part of the execution process is not going according to procedure, they shall advise the IV Team Leader who shall immediately notify the Director. The Director may consult with persons deemed appropriate and will determine to go forward with the procedure, limited to the option provided in Attachment D, §F(6), or to stand down. If the Director determines to stand down, then trained medical staff shall make every reasonable effort to revive the inmate. (AZ Protocol, Attachment D at 6.)</p>	<p>All plans will be reviewed and approved by the Warden and the Regional Director.</p> <p>(DOJ Protocol at 27.)</p>
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Declaring Death

ARIZONA	DOJ PROTOCOL(S)
When all electrical activity of the heart has ceased as shown by the electrocardiograph, the IV Team Leader will confirm the inmate is deceased and the inmate's death shall be announced by the Director.	<p>The Warden will finalize arrangements for a qualified person to be present at the execution and to declare the executed individual deceased.</p> <p>(DOJ Protocol at 9.)</p>

<p>(AZ Protocol, Attachment D at 6.)</p> <p>The Director shall announce death when it has occurred.</p> <p>(AZ Protocol at 18.)</p> <p>A Medical Examiner shall take custody of the body and issue a Certificate of Death.</p> <p>(AZ Protocol at 18.)</p> <p>An IV Team member will clamp and cut the IV lines leaving them connected to the inmate for examination by a Medical Examiner.</p> <p>A Criminal Investigations Unit Investigator and a Medical Examiner will take photos of the inmate's body:</p> <ul style="list-style-type: none"> <input type="checkbox"/> While in restraints prior to being placed in the body bag, <input type="checkbox"/> Without restrains prior to being placed in the body bag, <input type="checkbox"/> Sealed in the body bag, and <input type="checkbox"/> A photo of the seal in place on the bag. <p>The inmate's body will be placed on a Medical Examiner's gurney and released into the custody of a Medical Examiner's Office.</p> <p>(AZ Protocol, Attachment D at 7.)</p>	<p>After the lethal injection has been administered:</p> <ul style="list-style-type: none"> a. The EKG will be monitored until apparent signs of life have ceased; b. The time of death will be announced prior to the drapes being closed. <p>The Designated United States Marshal will complete and sign the Return described in Section 26.2(b) of 28 C.F.R. and will file such document with the sentencing court.</p> <p>(DOJ Protocol at 21.)</p> <p>The condemned individual will be examined by a specified qualified person following the administration of the lethal substances to ensure that death has occurred;</p> <p>When the qualified individual is satisfied that death has occurred, the time of death will be announced to the witnesses.</p> <p>(DOJ Protocol at 22.)</p>
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Attorney Access During Execution

ARIZONA	DOJ PROTOCOL(S)
<p>In the event the inmate has designated one of his attorneys to witness the execution, temporary office space will be provided for the inmate's counsel in the Administration Building during the scheduled day of execution.</p> <p>One attorney and two additional members of the legal team may be permitted to remain in the office space during the execution. The inmate's legal team will be permitted to bring into the temporary office space one mobile phone, one tablet, and one laptop.</p> <p>While the attorney witness is in the witness room, a member of the Witness Escort Team shall hold one mobile phone designated by the attorney, to be made available to the attorney in exigent circumstances. The mobile phone may not be used inside the witness room.</p> <p>(AZ Protocol at 17.)</p>	[Not specified]

Video/Audio Recording

ARIZONA	DOJ PROTOCOL(S)
Unclear, but reference to closed-circuit television (and audio) monitoring throughout protocol (very likely real-time).	<p>No photographic or other visual or audio recording of the execution shall be permitted.</p> <p>(28 C.F.R. § 26.4(f))</p>

Secrecy Provisions

ARIZONA	DOJ PROTOCOL(S)
<p>The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2.</p> <p>If a person who participates or performs ancillary functions in an execution is licensed by a board, the licensing board shall not suspend or revoke the person's license as a result of the person's participation in an execution.</p> <p>Ariz. Rev. Stat. Ann. § 13-757(C-D)</p> <p>The anonymity of any person, as defined in A.R.S. §1-215(28) and A.R.S. §13-105(30), who participates in or performs any ancillary function(s) in the execution, including the source of the execution chemicals, and any information contained in records that would identify those persons are, as required by statute, to remain confidential and are not subject to disclosure. A.R.S. §13-757(C).</p> <p>(AZ Protocol at 2.)</p>	<p>The identities of personnel considered for and/or selected to perform death sentence related functions, any documentation establishing their qualifications and the identities of personnel participating in federal judicial executions or training for such judicial executions shall be protected from disclosure to the fullest extent permitted by law.</p> <p>(DOJ Addendum 7/25/2019 at B.)</p>

Modification of the Protocol

ARIZONA	DOJ PROTOCOL(S)
<p>This Department Order establishes procedures for planning and carrying out the execution of a person convicted of a capital offense and sentenced to death. These procedures shall be followed as written, except that the Director of the Arizona Department of Corrections (Director) is allowed to make limited deviations from or adjustments to these procedures when required to address certain unexpected or otherwise unforeseen contingencies, subject to the limitations on the Director's discretion as set forth herein.</p> <p>Except as expressly permitted herein, the Director shall not have any authority to deviate from or make adjustments to any material aspects of the execution process, including, but not limited to, the execution chemicals or dosages, consciousness checks, the access of the press and the inmate's counsel to the execution, and the timeframes established by this Department Order.</p> <p>(AZ Protocol at 1, but <i>see</i> Dkt. No. 606-4.)</p>	<p>The purpose of this manual is to outline BOP policy and procedures for planning and carrying out the execution of a person convicted of a capital offense. These procedures should be observed and followed as written unless deviation or adjustment is required, as determined by the Director of the BOP or the Warden.</p> <p>(DOJ Protocol at 1.)</p> <p>The procedures utilized by the BOP to implement federal death sentences shall be as follows unless modified at the discretion of the Director or his/her designee, as necessary to (1) comply with specific judicial orders; (2) based on the recommendation of on-site medical personnel utilizing their clinical judgment; or (3) as may be required by other circumstances.</p> <p>(DOJ Addendum 7/25/2019 at A.)</p>

Autopsy/Post-Mortem

ARIZONA	DOJ PROTOCOL(S)
<p>The Warden shall advise the inmate that his/her body shall not be used for organ donation.</p> <p>(AZ Protocol at 4.)</p> <p>The Warden shall summarize the options available with the inmate for release and disposition of their body after the autopsy is performed. The Warden shall direct the inmate to review the previously completed Disposition of Remains, Form 710-3, and update as necessary no later than 14 days prior to the execution. If the inmate provides no information or the information is insufficient or incorrect the deceased shall be disposed in accordance with Department Order #711, Notification of Inmate Hospitalization or Death.</p> <p>(AZ Protocol at 4.)</p>	<p>After the execution has been carried out, qualified personnel selected by the Warden shall conduct an examination of the body of the prisoner to determine that death has occurred and shall inform the Marshal and Warden of his determination. Upon notification of prisoner's death, the Marshal shall complete and sign the Return described in § 26.2(b) or any similar document and shall file such document with the sentencing court.</p> <p>The remains of the prisoner shall be disposed of according to procedures established by the Director of the Federal Bureau of Prisons</p> <p>(28 C.F.R. § 26.4(g-h))</p> <p>The condemned individual's body will not be used for organ donation.</p> <p>(DOJ Protocol at 6.)</p> <p>The Warden will review options available to the condemned individual following the release of the body to the Vigo County Coroner. The Warden will ask the condemned individual to provide instructions concerning the disposition of his/her body no later than 14 days prior to the execution. If the condemned individual fails to</p>

ARIZONA	DOJ PROTOCOL(S)
	<p>provide instructions, the body will be handled in accordance with the Accounting Management Manual. (DOJ Protocol at 6-7.)</p> <p>After the witnesses have departed, the restraints will be removed from the condemned individual's body. The Vigo County Coroner or designee will be escorted into the Execution Facility. The body will be removed by the Vigo County Coroner, who will place it in a coroner's vehicle for transportation. (DOJ Protocol at 23.)</p>

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEZMOND C. MITCHELL,

Defendant-Appellant.

No. 20-99009

D.C. No.

3:01-cr-01062-DGC-1

District of Arizona,

Phoenix

ORDER

BEFORE: THOMAS, Chief Judge and Capital Case Coordinator

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc within the internal time limits for making a request. Fed. R. App. P. 35(b).

The petition for rehearing en banc is denied. En banc proceedings are concluded. Any remaining matters will be addressed by the three judge panel.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JULIUS ROBINSON,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. 07-2145 (TSC)
)	
WILLIAM BARR, Attorney General,)	
U.S. Department of Justice, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
_____)	

NOTICE OF ADOPTION OF REVISED PROTOCOL

Pursuant to the Court's January 13, 2012, Minute Order, Defendants hereby notify the Court that the government has adopted a revised addendum to the Federal Bureau of Prisons' execution protocol that provides for the use of pentobarbital sodium as the lethal agent. *See* Exhibit A. Defendants will confer with Plaintiff about an appropriate schedule for further proceedings in this matter and submit a status report advising the Court of the status of this matter and the parties' proposed schedule.

Dated: July 25, 2019

JOSEPH H. HUNT
Assistant Attorney General

JAMES M. BURNHAM
Deputy Assistant Attorney General

JOHN R. TYLER
Assistant Branch Director
Federal Programs Branch

DANIEL HALAINEN
Trial Attorney

Respectfully submitted,

JESSIE K. LIU
United States Attorney

DANIEL F. VAN HORN
Civil Chief
U.S. Attorney's Office

/s/ Denise M. Clark
DENISE M. CLARK, D.C. Bar No. 479149
Assistant United States Attorney
U.S. Attorney's Office
Civil Division

Civil Division, Federal Programs Branch
U.S. Department of Justice
1100 L Street NW
Washington, DC 20530

555 4th Street, N.W.
Washington, D.C. 20530
202-252-6605
Denise.Clark@usdoj.gov

Counsel for Defendants

ADDENDUM TO BOP EXECUTION PROTOCOL
FEDERAL DEATH SENTENCE IMPLEMENTATION PROCEDURES
EFFECTIVE JULY 25, 2019

- A. Federal death sentences are implemented by an intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director, Federal Bureau of Prisons (BOP) and to be administered by qualified personnel selected by the Warden and acting at the direction of the United States Marshal. 28 CFR 26.3. The procedures utilized by the BOP to implement federal death sentences shall be as follows unless modified at the discretion of the Director or his/her designee, as necessary to (1) comply with specific judicial orders; (2) based on the recommendation of on-site medical personnel utilizing their clinical judgment; or (3) as may be required by other circumstances.
- B. The identities of personnel considered for and/or selected to perform death sentence related functions, any documentation establishing their qualifications and the identities of personnel participating in federal judicial executions or training for such judicial executions shall be protected from disclosure to the fullest extent permitted by law.
- C. The lethal substances to be utilized in federal lethal injections shall be Pentobarbital Sodium.
- D. Not less than fourteen (14) days prior to a scheduled execution, the Director or designee, in conjunction with the United States Marshal Service, shall make a final selection of qualified personnel to serve as the executioner(s) and their alternates. See BOP Execution Protocol, Chap. 1, §§ III (F) and IV (B) & (E). Qualified personnel includes currently licensed physicians, nurses, EMTs, Paramedics, Phlebotomists, other medically trained personnel, including those trained in the United States Military having at least one year professional experience and other personnel with necessary training and experience in a specific execution related function. Non-medically licensed or certified qualified personnel shall participate in a minimum of ten (10) execution rehearsals a year and shall have participated in at least two (2) execution rehearsals prior to participating in an actual execution. Any documentation establishing the qualifications, including training, of such personnel shall be maintained by the Director or designee.
- E. The Director or designee shall appoint a senior level Bureau employee to assist the United States Marshal in implementing the federal death sentence. The Director or designee shall appoint an additional senior level Bureau employee to supervise the activities of personnel preparing and administering the lethal substances.

ADDENDUM TO BOP EXECUTION PROTOCOL
FEDERAL DEATH SENTENCE IMPLEMENTATION PROCEDURES
EFFECTIVE JULY 25, 2019

- F. The lethal substances shall be prepared by qualified personnel in the following manner unless otherwise directed by the Director, or designee, on the recommendation of medical personnel. The lethal substances shall be placed into three sets of numbered and labeled syringes. One of the sets of syringes is used in the implementation of the death sentence and two sets are available as a backup.
- G. Approximately thirty (30) minutes prior to the scheduled implementation of the death sentence, the condemned individual will be escorted into the execution room. The condemned individual will be restrained to the execution table. The leads of a cardiac monitor will be attached by qualified personnel. A suitable venous access line or lines will be inserted and inspected by qualified personnel and a slow rate flow of normal saline solution begun.
- H. Lethal substances shall be administered intravenously. The Director or designee shall determine the method of venous access (1) based on the training and experience of personnel establishing the intravenous access; (2) to comply with specific orders of federal courts; or (3) based upon a recommendation from qualified personnel.

A set of syringes will consist of:

Syringe #1 contains 2.5 grams of Pentobarbital Sodium in 50 mL of diluent
Syringe #2 contains 2.5 grams of Pentobarbital Sodium in 50 mL of diluent
Syringe #3 contains 60 mL of saline flush,

Each syringe will be administered in the order set forth above when directed by supervisory personnel.

If peripheral venous access is utilized, two separate lines shall be inserted in separate locations and determined to be patent by qualified personnel. A flow of saline shall be started in each line and administered at a slow rate to keep the line open. One line will be used to administer the lethal substances and the second will be reserved in the event of the failure of the first line. Any failure of a venous access line shall be immediately reported to the Director or designee.