No. 20A-_____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., APPLICANTS

v.

WESLEY IRA PURKEY

(CAPITAL CASE)

APPLICATION FOR A STAY OR VACATUR OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are William P. Barr, in his official capacity as Attorney General of the United States, Michael Carvajal, in his official capacity as Director of the U.S. Bureau of Prisons, and John Does 1-10, in their official capacities. (Respondent sued as John Does 1-10 the individuals employed or retained by the Bureau of Prisons to carry out his execution.)

Respondent (plaintiff-appellee below) is Wesley Ira Purkey.

RELATED PROCEEDINGS

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

Purkey v. Barr, No. 19-cv-3570 (July 15, 2020)

IN THE SUPREME COURT OF THE UNITED STATES

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Around 5 a.m. this morning, July 15, 2020, the United States District Court for the District of Columbia preliminarily enjoined respondent's execution, which the Bureau of Prisons (BOP) had scheduled to occur later today, based on respondent's claim of incompetence to be executed. Order, Purkey v. Barr, 19-cv-03570; see App., infra, 1a-14a. Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of applicants William P. Barr et al., respectfully applies for an order staying the injunction pending appeal or vacating it effective immediately. See pp. 12, infra

(citing orders of this Court providing such relief in the capital and non-capital context).[1]

Respondent is a federal death-row inmate convicted in 2003 following his confession to the gruesome rape and murder of a 16-year-old girl. Respondent's direct appeal ended in 2006, and proceedings challenging his conviction and sentence under 28 U.S.C. 2255 ended in 2014. In July 2019, following its completion of a comprehensive process of revising the federal execution protocols, the government scheduled respondent's execution for December 13, 2019. Respondent then filed multiple additional legal actions, both in the Southern District of Indiana (where he is incarcerated) and the District of Columbia. Two previous injunctions of his execution by the D.C. district court that entered the preliminary injunction at issue here have been vacated on appellate review; an application to vacate an additional preliminary injunction entered by that court on different grounds is being filed contemporaneously with this application; and an application to vacate a stay entered by the Seventh Circuit is

[1] The government has filed a similar motion to stay or vacate the injunction in the court of appeals. The government has urged the court of appeals to rule promptly and will notify this Court immediately if it acts on that request. Given the time constraints caused by the district court's ruling, the government has no choice but to request relief from this Court at the same time.

currently pending with this Court. His execution is currently scheduled for 7 p.m. today, July 15, 2020.

The injunction on appeal here arises in a suit, styled as a freestanding claim under the Constitution not tied to any statutory cause of action, asserting incompetency to be executed under Ford v. Wainwright, 477 U.S. 399 (1986). Respondent asserted his Ford claims in the D.C. district court, rather than the Indiana district court with jurisdiction over his district of confinement, shortly after the D.C. court had granted him preliminary relief in a challenge to the execution protocol and the Indiana court had rejected a renewed collateral attack on his conviction.

The district court's last-minute injunction is meritless, and this Court should stay or summarily vacate it, effective immediately. As an initial matter, respondent has not shown that he has a significant probability of success on the merits. The district court lacks authority to grant any relief on respondent's claims, which he was required to file in a habeas action under 28 U.S.C. 2241 in the Southern District of Indiana, where he is confined. The court here had no basis for circumventing that requirement by inferring a new, unwritten cause of action directly from the Eighth Amendment (and, indeed, never even acknowledged that it was doing so). And even if the district court could entertain his suit, respondent has failed to demonstrate that he is likely to succeed on the merits of his claims that he is

incompetent to be executed or that his due process rights will be violated absent a competency hearing. A prisoner must make "a substantial threshold showing" of incompetency before he is entitled to a hearing on his competency, Panetti v. Quarterman, 551 U.S. 930, 949 (2007) (citation omitted), which respondent has never done. Indeed, on his own account, respondent understands the reason for his execution: "he kn[ows] what an execution [is] and * * * accept[s] that he [is] going to be executed for the murder of Jennifer Long." D. Ct. Doc. 1-1, at 12 (Nov. 26, 2019).[2]

In addition, the equitable factors weigh heavily against injunctive relief. The last-minute injunction undermines the public interests in "punishing the guilty," Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted), and "timely enforcement of a [death] sentence," Bucklew v. Precythe, 139 S. Ct. 1112, 1131 (2019) (citation omitted). And allowing it to stand would erode the public interest in "preventing forum shopping by habeas petitioners," Rumsfeld v. Padilla, 542 U.S. 426, 447 (2004), by rewarding a prisoner's commencement of litigation in an inappropriate -- but apparently favored -- forum. This Court should immediately stay or vacate the district court's preliminary injunction and permit respondent's execution to proceed as scheduled.

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[2] Unless otherwise noted, citations to the district court docket refer to entries in case number 19-cv-3570.

STATEMENT

1. On the morning of January 22, 1998, respondent, who had recently been released from prison, encountered 16-year-old high school student Jennifer Long on a sidewalk in Kansas City, Missouri. See Purkey v. United States, 729 F.3d 860, 866 (8th Cir. 2013) (Purkey V). Respondent engaged Long in conversation and invited her to "party" with him. Ibid. According to respondent, Long then got into respondent's pickup truck. Ibid. After stopping at a liquor store to buy orange juice and gin, respondent told Long that he needed to go to his home, which was across state lines in Lansing, Kansas. Ibid. Long then asked to be let out of the truck. Ibid. Respondent indicated his refusal by grabbing a boning knife from the glove box and placing it under his thigh. Ibid.

After respondent drove Long to Lansing, respondent took Long into his basement, forced her at knifepoint to strip, and raped her. See Purkey V, 729 F.3d at 867. Long attempted to escape, but respondent grabbed her and forced her to the ground. Ibid. Long and respondent struggled briefly, and then respondent stabbed Long repeatedly in the chest, neck, and face, eventually breaking the knife blade inside her body. Ibid.

After the murder, respondent stored Long's body in a toolbox, stopped at a bar to drink for several hours, and went to a store and purchased an electric chainsaw. Purkey V, 729 F.3d at 867.

He then spent several days dismembering Long's body with the chainsaw before dividing Long's body parts into bags and burning the remains. Ibid. He dumped the charred remnants into a septic pond, where they were eventually recovered by investigators. Ibid.

Authorities learned that respondent had murdered Long when respondent was arrested nine months later for the unrelated murder of 80-year-old Mary Ruth Bales. Purkey V, 729 F.3d at 867. Respondent had visited Bales's home on a service call for a plumbing company. Ibid. He told Bales that he was willing to return later to complete the job for a lower price if Bales paid him $70 up front. Ibid. Bales agreed, and she paid him the money. Respondent used the money to hire a prostitute and purchase cocaine. Ibid. After using the cocaine, he returned to Bales's home with the prostitute. Ibid. While the prostitute waited in respondent's car, respondent entered Bales's home and bludgeoned Bales to death in her bedroom with a claw hammer. Ibid. He returned to the house the following day with cans of gasoline to burn the house down. Ibid. A neighbor saw respondent in the yard and called police, leading to respondent's arrest. Ibid.

While awaiting state trial for the murder of Bales, respondent contacted federal authorities concerning the Long murder. Purkey V, 729 F.3d at 868. Respondent -- who eventually received a sentence of life imprisonment in state prison in the Bales case -- gave a full confession to the earlier murder because he hoped

that his confession would enable him to serve his life sentence in what he believed would be the more comfortable conditions of a federal prison. Ibid.

2. Following a jury trial in the United States District Court for the Western District of Missouri, respondent was convicted of interstate kidnapping for the purpose of forcible rape, resulting in death, in violation of 18 U.S.C. 1201(a), 18 U.S.C. 1201(g) (1994), and 18 U.S.C. 3559 (Supp. IV 1998). See United States v. Purkey, 428 F.3d 738, 744 (8th Cir. 2005). The jury recommended that respondent be sentenced to death, and the district court imposed that sentence. See id. at 746. The Eighth Circuit affirmed respondent's conviction and sentence, id. at 744, and this Court denied certiorari, Purkey v. United States, 549 U.S. 975 (2006).

In 2007, respondent filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence, which the district court denied. Purkey v. United States, No. 06-cv-8001, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009). The Eighth Circuit affirmed, Purkey V, 729 F.3d 860, and this Court again denied certiorari, Purkey v. United States, 574 U.S. 933 (2014).

3. On July 25, 2019, the federal government announced the completion of an "extensive study" it had undertaken to consider possible revisions to the BOP's lethal injection protocol. See In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d

106, 110 (D.C. Cir. 2020) (per curiam) (Execution Protocol Cases). Following a comprehensive and years-long investigation, the government published a revised addendum to its protocol, in which it adopted a single-drug procedure that would allow the federal government to resume executions. Ibid.

Alongside its adoption of this revised lethal injunction protocol, the government also set execution dates for five federal inmates who had previously received capital sentences, including respondent. Execution Protocol Cases, 955 F.3d at 111. Initially, the government scheduled respondent's execution for December 13, 2019. After respondent and several of the other capital prisoners filed a challenge to the federal execution protocol, the United States District Court for the District of Columbia entered a preliminary injunction in November 2019, barring the government from carrying out the scheduled executions. Ibid.

On April 7, 2020, the United States Court of Appeals for the District of Columbia Circuit vacated that injunction. Execution Protocol Cases, 955 F.3d at 108. This Court declined to stay the court of appeals' mandate and denied certiorari. Bourgeois v. Barr, No. 19-1348 (June 29, 2020). On June 15, 2020, shortly after the D.C. Circuit's mandate issued, the federal government set July 15, 2020, as the new date for respondent's execution.

On June 19, 2020, respondent and several other prisoners filed another motion for a preliminary injunction in the protocol

litigation. On July 13 -- the date that one of the other plaintiff prisoners was scheduled to be executed -- the district court entered a second preliminary injunction barring the government from carrying out the scheduled executions. Order, No. 19-mc-145, (July 13, 2020). This Court vacated that injunction. Barr v. Lee, 591 U.S. __ (2020) (per curiam), slip op. 1-3. Shortly after 5 a.m. this morning, immediately after entering the preliminary injunction at issue in this application, the district court entered a third preliminary injunction in the protocol litigation, again barring the government from carrying out the executions scheduled for respondent and the other plaintiffs. Order, No. 19-mc-145, (July 15, 2020). The government is seeking to stay or vacate that preliminary injunction in separate filings in the court of appeals and in this Court.

4. At the same time that respondent was seeking to enjoin his scheduled execution through his challenge to the federal lethal injection protocol, he also initiated several other actions seeking to preclude his execution on other grounds.

On August 27, 2019, respondent filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Southern District of Indiana, alleging eight claims. See Purkey v. United States, No. 19-cv-414, 2019 WL 6170069, at *3 (S.D. Ind. Nov. 20, 2019). On November 20, 2019, the Indiana district court denied respondent's petition, id. at *12, and the

Seventh Circuit affirmed, Purkey v. United States, No. 19-3318, 2020 WL 3603779 (7th Cir. July 2, 2020). Despite agreeing with the district court that respondent's claims were unavailing, the Seventh Circuit panel "temporarily stayed" respondent's July 15, 2020, execution "pending the completion of proceedings in the Seventh Circuit." Id. at *11. An application to vacate that stay is pending in this Court. See Watson v. Purkey, No. 20A4 (July 11, 2020).

On November 26, 2019 -- six days after the Southern District of Indiana dismissed respondent's Section 2241 petition and also six days after the D.C. district court's first injunction in the protocol litigation -- respondent filed his complaint in this case in the D.C. district court. D. Ct. Doc. 1. The complaint alleges freestanding claims purportedly based on the Constitution that respondent is incompetent to be executed and that his execution would violate the Eighth Amendment to the U.S. Constitution under Ford v. Wainwright, 477 U.S. 399 (1986). See App., infra, 7a. Respondent also alleges that he is entitled to a hearing on his Ford claim and that denial of a hearing would violate his right to Due Process under the Fifth Amendment. Ibid.

On December 4, 2019, respondent moved for a preliminary injunction; a few days later, he sought and received leave to withdraw that motion. On February 24, 2020, the government moved to dismiss respondent's complaint, moving in the alternative to

transfer the case to the Southern District of Indiana. The parties' briefing on the government's motion to dismiss concluded on March 30.

On June 22, 2020, one week after the government set a revised date for respondent's execution, respondent filed two new motions, one requesting expedited discovery on his Ford claim and another seeking a preliminary injunction based on that claim. The parties concluded briefing on those motions on July 2. This morning, the district court granted respondent's motion for a preliminary injunction. See App., infra, 1a-14a. The court concluded that it could entertain respondent's freestanding constitutional claims, on the view that they are not habeas claims that he is required to bring under 28 U.S.C. 2241 in his district of confinement. App., infra, 6a-9a.

The court then "credit[ed]" the attachments submitted by respondent and opined that he had made a substantial showing that he is not competent to be executed. App., infra, 10a-11a. And, taking the view that the remaining preliminary injunction factors weighed in favor of enjoining respondent's execution, the court denied the government's long-pending motion to dismiss and enjoined respondent's execution. Id. at 11a-14a. Finally, the court ordered respondent to show cause, no later than July 31, why the court should not transfer his freestanding constitutional

claims to the Southern District of Indiana as a matter of discretion. Id. at 13a-14a.

ARGUMENT

Under Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court may stay a district-court order pending appeal to a court of appeals, or may summarily vacate the order. See, e.g., Department of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (granting stay pending appeal); Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019) (same); Dunn v. Price, 139 S. Ct. 1312 (2019) (vacating stay of execution); Mays v. Zagorski, 139 S. Ct. 360 (2018) (same); Barr v. Lee, 591 U.S. __ (2020) (vacating injunction barring execution); Dunn v. McNabb, 138 S. Ct. 369 (2017) (same); Brewer v. Landrigan, 562 U.S. 996 (2010) (same); see also Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2083 (2017) (per curiam) (staying a preliminary injunction in part, even though the injunction would become moot before the Court could review its merits). In considering whether to stay an injunction pending appeal, the three questions are, first, "whether four Justices would vote to grant certiorari" if the court below ultimately rules against the applicant; second, "whether the Court would then set the order aside"; and third, the "balance" of "the so-called 'stay equities.'" San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers)

(citation omitted). All of those factors counsel in favor of a stay or vacatur of the injunction here, given the overwhelming likelihood that the injunction will not withstand appellate review and the profound public interest in implementing respondent's lawfully imposed sentence without further delay.

I. THE DISTRICT COURT'S INJUNCTION IS UNLIKELY TO WITHSTAND APPELLATE REVIEW

The district court's injunction lacks merit and is exceedingly unlikely to withstand appellate review. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). In the capital context, as in others, a plaintiff must first "establish that he is likely to succeed on the merits." Glossip v. Gross, 135 S. Ct. 2726, 2736 (2015) (quoting Winter, 555 U.S. at 20) (emphasis added). For two separate dispositive reasons -- because respondent's claims can be brought only in the district of his confinement under Section 2241 and because respondent has not demonstrated that he is likely to be found incompetent to be executed -- respondent cannot make the required showing here. Allowing such a legally baseless injunction to further delay respondent's lawful execution "would serve no meaningful purpose and would frustrate the [federal government's] legitimate interest in carrying out a sentence of death in a timely manner." Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion).

A. The Injunction Rests On Legal Error

1. The district court had no authority to grant respondent relief

As a threshold matter, because respondent's claims of incompetency to be executed under Ford v. Wainwright, 477 U.S. 399 (1986), are cognizable only in a petition for a writ of habeas corpus under 28 U.S.C. 2241, filed in the district where he is confined (the Southern District of Indiana), the District Court for the District of Columbia has no authority to entertain such claims as freestanding equitable causes of action asserted under the Constitution.

a. Congress has the authority to limit a court's power to provide equitable relief, including for alleged violations of constitutional rights. "The power of federal courts in equity to enjoin unlawful executive action is subject to express and implied statutory limitations." Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015). The principle is "well-established" that, "in most contexts, a precisely drawn, detailed statute pre-empts more general remedies." Hinck v. United States, 550 U.S. 501, 506 (2007) (internal quotation marks omitted). And "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right," this Court has "refused to supplement that scheme with one created by the judiciary." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 74 (1996).

Relying on similar principles, this Court has recognized that the federal habeas statute precludes resort to more general causes of action -- even where the more general causes of action are statutory, unlike respondent's here. In Nelson v. Campbell, 541 U.S. 637, 643 (2004), for example, the Court explained that constitutional claims by state prisoners under 42 U.S.C. 1983 "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence," as opposed to "merely challeng[ing] the conditions of [his] confinement." "It would wholly frustrate explicit congressional intent," this Court has explained, to permit prisoners to evade the habeas statute's procedural requirements "by the simple expedient of putting a different label on their pleadings." Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973).

In the context of claims related to the death penalty, if "a grant of relief to the inmate would necessarily bar the execution," it is treated like a challenge to the conviction or to the duration of a sentence, and may not be brought as a civil claim outside the context of federal collateral review. Hill v. McDonough, 547 U.S. 573, 583 (2006); see Nelson, 541 U.S. at 643-644. A suit to enjoin a particular means of carrying out the execution, but not to enjoin the execution altogether, may be the proper subject of a civil

suit. See Nelson, 541 U.S. at 644 (allowing such a civil claim); Hill, 547 U.S. at 580 (similar). But a Ford claim like the one at issue here seeks to bar the execution altogether while the asserted incompetence continues, and is therefore treated as a postconviction habeas claim. See, e.g., Dunn v. Madison, 138 S. Ct. 9, 11 (2017) (considering a state prisoner's Ford claim brought under the federal habeas statute); Panetti v. Quarterman, 551 U.S. 930, 947 (2007) (same).

b. Respondent's Ford claims here plainly seek a form of relief that would preclude his execution altogether. Respondent asks the court to declare that "executing him in his present condition violates his rights as guaranteed by the Eighth Amendment to the United States Constitution" and "[e]nter an injunction preventing his execution during any period of incompetency, and lasting until such time as his competency may be restored." D. Ct. Doc. 1, at 57. Because respondent's incompetency claim would, if successful, "necessarily bar [his] execution," the claim (along with the subsidiary due process claim) must be brought in postconviction review, not as a separate civil action. Hill, 547 U.S. at 583.

The proper vehicle for a federal prisoner to seek the relief that respondent requests is not a freestanding constitutional claim in a district court of his choosing, naming the Attorney General as the defendant, but instead a petition for a writ of

habeas corpus under 28 U.S.C. 2241 in the district of confinement, naming the prison warden as the respondent. Although postconviction claims by federal prisoners are generally channeled exclusively into a single motion in the court of conviction under 28 U.S.C. 2255, a claim that a prisoner became incompetent to be executed only after Section 2255's one-year time limit had expired may be brought as a habeas petition under Section 2241. See 28 U.S.C. 2255(e). Such a habeas petition, like any habeas petition, must be filed "in the district of confinement." Rumsfeld v. Padilla, 542 U.S. 426, 447 (2004).

Section 2241(a) provides that courts may grant writs of habeas corpus "within their respective jurisdictions." 28 U.S.C. 2241(a). As this Court has explained, that means that "jurisdiction lies in only one district: the district of confinement," Padilla, 542 U.S. at 443 (emphasis added). And as with an analogous "habeas challenges to present physical confinement," the "proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." Id. at 435. Respondent has therefore asserted the wrong cause of action, against the wrong parties, in the wrong court.

Respondent is confined at the United States Penitentiary in Terre Haute, Indiana, and T.J. Watson is the warden of respondent's prison. His claims must therefore be filed in the Southern

District of Indiana, where he is confined, and name the warden as the respondent. See Webster v. Daniels, 784 F.3d 1123, 1144 (7th Cir. 2015) (holding that the District Court for the Southern District of Indiana is the "one and only proper venue" for the Section 2241 claim of a federal prisoner held at the United States Penitentiary at Terre Haute). He did neither, and the district court below erred in allowing him to circumvent those requirements by instead inferring a novel cause of action directly from the Eighth Amendment.

c. The rule that a habeas petition must be filed in the district of confinement and name the warden "serves the important purpose of preventing forum shopping by habeas petitioners." Padilla, 542 U.S. at 447. Respondent has recognized the proper jurisdiction and defendant in other litigation -- namely, the Section 2241 petition that he filed in the Southern District of Indiana in August 2019 and that named Watson as a defendant. See pp. 9-10, supra. And respondent apparently contemplated bringing his Ford claim in that same forum but decided not to. Respondent's counsel informed the Southern District of Indiana that they were "diligently preparing a petition that [respondent] is incompetent to be executed." See D. Ct. Doc. 7-30, at 6 (Dec. 4, 2019). Respondent also sought an ex parte order from the Southern District of Indiana directing that respondent undergo certain brain imaging tests that "will also bear on the question of whether [respondent]

is competent to be executed, an issue that is ripe in his case." See D. Ct. Doc. 7-22, at 2 (Dec. 4, 2019). According to respondent's counsel, that ex parte motion was denied by the Southern District of Indiana because respondent had not filed a Ford claim. See D. Ct. Doc. 23-6, at 8 (June 22, 2020).

Despite respondent's apparent awareness that the Ford claim could be brought in the Southern District of Indiana, he chose not to file it there, but instead filed freestanding constitutional claims against the Attorney General and others in the District Court for the District of Columbia. That choice may well have been strategic. Six days earlier, the Indiana district court had dismissed his existing Section 2241 claims on the ground -- not applicable to his Ford claim -- that they should have been brought earlier as part of his prior motion for collateral relief under Section 2255. Purkey v. United States, No. 19-cv-00414, 2019 WL 6170069, at *1 (S.D. Ind. Nov. 20, 2019). And that same day, the District Court for the District of Columbia had granted him preliminary relief in his suit challenging the execution protocol. Matter of Federal Bureau of Prisons' Execution Protocol Cases, No. 12-cv-0782, 2019 WL 6691814, at *1 (D.D.C. Nov. 20, 2019).

Furthermore, although the government has consistently maintained throughout this case that respondent could seek relief on his Ford claim in the Southern District of Indiana, he has until now resisted doing so. See D. Ct. Doc. 20, at 10 (Mar. 16, 2020)

("[Respondent] respectfully requests that this Court * * * find that [it] has jurisdiction over [respondent]'s claims * * * and that venue in D.C. is proper."); D. Ct. Doc. 29, at 4 (July 2, 2020) ("[T]his Court has jurisdiction to hear this civil rights case."). Yesterday, however, he filed a motion before a district judge in that court -- not the judge who dismissed his previous Section 2241 claims, but a different one handling a different set of civil claims -- to stay his execution indefinitely in case his Ford claims are filed or transferred there. Mot. to Preserve Jurisdiction and to Stay Execution, No. 19-cv-00517 (S.D. Ind. July 14, 2020). That motion was denied on the ground that he had not actually filed a Ford claim there. Order Denying July 14, 2020 Motion to Stay Execution, No. 19-cv-517 (S.D. Ind. July 14, 2020).

Because respondent filed in the wrong court on the basis of a novel inferred constitutional cause of action that does not exist, he is not likely to succeed on his claim. Allowing the injunction to remain in place would fail to respect Congress's choice to confer jurisdiction over Ford claims only on the district court for the district in which a federal prisoner is confined, and would encourage (and, apparently, reward) forum shopping by federal prisoners. See Padilla, 542 U.S. at 447.

d. The district court's contrary analysis has no basis in this Court's decisions. The court took the view that a Ford claim

speaks to "when execution would be appropriate" and thus "does not see to bar [a prisoner's] execution or challenge his sentence." App., infra, 8a. The court misunderstood the relevant temporal considerations; this Court determines the exclusivity of habeas based on the immediate effect that relief would have on the government. For example, in Hill v. McDonough, supra, the primary case on which the district court relied, this Court found that the challenge to the lethal-injection protocol in that case could proceed under Section 1983 rather than habeas because, "at this stage of the litigation, the injunction Hill seeks would not necessarily foreclose the State from implementing the lethal injection sentence under present law." Hill, 547 U.S. at 583 (emphases added).

Respondent's claim, in contrast, would bar the government from implementing the sentence under present law. It is therefore -- like other Ford claims that this Court has previously considered, see p. 16, supra -- a habeas claim. The possibility that respondent's asserted incompetence would only be temporary does not allow him to bring his claim instead as a freestanding action in a self-selected court anywhere in the Nation, seeking relief against the Attorney General. And respondent's due process claim, which is entirely derivative of his Ford claim, does not change that analysis. As discussed below, respondent has no entitlement to any specific process until he makes the threshold

showing of incompetency, see pp. 23-24, 29-31, infra, and any request for such process is proper only in the Indiana district court with authority to consider his Ford claim.

The district court also suggested that the government "waived" any objection to the court's adjudication of respondent's core habeas claims because the government did not file a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) and conceded that personal jurisdiction and venue as to the named defendants was appropriate. App., infra, 9a. That suggestion is misplaced. From its very first filing in the case below, the government consistently argued (among other things) that respondent's Ford claim "could be (and must be) brought through a habeas petition in the Southern District of Indiana * * * and therefore cannot be brought in this Court." D. Ct. Doc. 10, at 2 (Dec. 11, 2019); see D. Ct. Doc. No. 15-1, at 1 (January 21, 2020) (arguing that respondent's "claims are core habeas claims that he must bring under 28 U.S.C. § 2241 in the Southern District of Indiana"); see id. at 5 ("[Respondent's] challenge lies within the core of habeas and can only be heard in the Southern District of Indiana."). Even assuming the district court "would still have jurisdiction" if respondent's claims constitute core habeas claims, App., infra, 9a, the court had no license to create an inferred cause of action under which respondent could pursue those claims, and was instead required to dismiss respondent's claims

under the principles this Court articulated in Armstrong. See 575 U.S. at 327-328.

2. Respondent's incompetency claims lack merit

Had respondent brought his claims in the correct judicial district and named the correct defendant, he still would not be likely to succeed on the merits of either his Eighth Amendment Ford claim or his derivative Fifth Amendment due process claim.

a. The district court's preliminary injunction is unlikely to survive appellate review because respondent has not made the threshold showing that he is entitled to a hearing on his competency. A prisoner is incompetent to be executed only if he is unable to "reach a rational understanding of the reason for his execution." Madison v. Alabama, 139 S. Ct. 718, 723 (2019) (brackets and quotation marks omitted). And a prisoner is not entitled to a hearing on whether he is competent to be executed unless he makes "a substantial threshold showing" of incompetency. Panetti, 551 U.S. at 949 ("Once a prisoner seeking a stay of execution has made a substantial threshold showing of insanity, the protection afforded by procedural due process includes a fair hearing in accord with fundamental fairness.") (internal quotation marks omitted); see Ford, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment) ("The [government] * * * may properly presume that [a prisoner] remains sane at the time sentence is to be carried out, and may require a substantial

threshold showing of insanity merely to trigger the hearing process.") (footnote omitted). Respondent never made the required showing here.

b. The only direct support respondent has offered for his incompetency claim is the report of Dr. Bhushan Agharkar, a psychiatrist who interviewed respondent in November 2019. D. Ct. Doc. 1-1, at 3. Although Dr. Agharkar opined that respondent is incompetent to be executed, his report is fundamentally flawed on its face because it conflates respondent's understanding of the reason for his execution (which could prevent him from being executed under Ford), with his understanding of the reason for scheduling his execution date (which has no bearing on his competency under Ford). See id. at 2-14.

Dr. Agharkar acknowledged that respondent is able to articulate the reason for his execution. "When I was finally able to shift the topic to [respondent's] execution, [respondent] first stated that he knew what an execution was and said that he accepted that he was going to be executed for the murder of Jennifer Long." D. Ct. Doc. 1-1, at 12. But, "[a]s the visit continued, * * * [respondent] began to talk about the 'real reason' he was going to be executed. He told me that he was actually being executed because he is filing lawsuits for other people's cases." Ibid. Dr. Agharkar wrote that "[w]hen I inquired further, [respondent] also told me that he was given a date for execution unfairly and

for reverse discrimination. He told me that we didn't need to talk about this because I could just read his filings." Ibid. From that discussion, Dr. Agharkar opined that respondent "lacked a rational understanding of the basis for his execution." Id. at 13.

Respondent's discussion of "his filings," D. Ct. Doc. 1-1, at 12, was apparently a reference to a pro se civil rights action that he brought in the Southern District of Indiana in October 2019, see Purkey v. Barr, No. 19-cv-517 (S.D. Ind. Oct. 28, 2019), and that is still pending in that court. He attached that pro se complaint to his complaint in this case. See D. Ct. Doc. 1-18, at 12-24 (Nov. 26, 2019). Respondent's pro se complaint alleges that government defendants have violated his constitutional rights by arbitrarily and discriminatorily scheduling his execution before other death row prisoners who exhausted their appellate rights before he did. Id. at 19-20. He claims that the reason for his selection was his "jailhouse lawyering activities" and the fact that he is white. Id. at 20-22.

The evidence that respondent has submitted thus appears to support that respondent believes that his execution date was scheduled for unfair and discriminatory reasons. But such a belief is irrelevant to his Ford claim. The Eighth Amendment does not prohibit executing a prisoner who lacks a rational understanding of the reason for scheduling his execution date, or for not

executing other inmates first. As this Court recently made clear, "the sole inquiry for the court remains whether the prisoner can rationally understand the reasons for his death sentence." Madison, 139 S. Ct. at 728 (emphasis added). Neither rationale for the bar on the execution of incompetent prisoners -- the lack of "retributive value when a prisoner cannot appreciate the meaning of a community's judgment" and the impropriety of "execut[ing] a person so wracked by mental illness that he cannot comprehend the meaning and purpose of the punishment," id. at 727 (internal quotation marks omitted) -- has any bearing on a prisoner who objects to the scheduling of the execution, but understands the reasons why he has been sentenced to death.

Respondent is still able to appreciate -- and, indeed, accepts -- that he will be executed for kidnapping, raping, and murdering Jennifer Long. And he is still able to comprehend the meaning and purpose of his punishment. Dr. Agharkar's report thus does not help respondent make the necessary substantial showing of incompetency. If a belief that the particular scheduling of an execution is unfair were itself enough to bar the execution on Eighth Amendment grounds, many prisoners might be able to block their executions indefinitely. This Court has never endorsed such an approach.

c. None of respondent's other allegations indicate that he is unable to rationally understand the reason for his execution.

Respondent alleges that he has "a history of mental illness, trauma, and paranoid delusional thinking." D. Ct. Doc. 1, at 16. Taking these allegations as true, they do not in themselves establish the specific claim of incompetency required under Ford -- namely, that respondent is incapable of rationally understanding the reason for his execution. See Madison, 139 S. Ct. at 728. Respondent relatedly alleges that his "delusions and paranoia" about retaliation from BOP personnel "are predominately featured in the countless grievances he has regularly filed for over a decade." D. Ct. Doc. 1, at 27. Again, however, this does not demonstrate incompetency under Ford. Even if the allegations of retaliation were made in good faith, rather than strategically, they do not show that he fails to comprehend the basis for his punishment.

Respondent also claims that he has dementia and was diagnosed with Alzheimer's disease. D. Ct. Doc. 1, at 40-45. But, if true, the allegation that respondent has dementia does not establish incompetency, because although dementia "can cause such disorientation and cognitive decline as to prevent a person from sustaining a rational understanding of why the [government] wants to execute him * * * dementia also has milder forms, which allow a person to preserve that understanding." Madison, 139 S. Ct. at 729. Similarly, a diagnosis of Alzheimer's would not establish incompetency. Dr. Jonathan DeRight, the neuropsychologist who

diagnosed respondent with Alzheimer's disease, does not opine that respondent's condition has advanced to such a stage that he is unable to rationally understand the reason for his execution. D. Ct. Doc. 1-1, at 23-31.

Respondent has also alleged that his "long-term inability to effectively communicate with counsel is evidence of his present incompetence." D. Ct. Doc. 1, at 46 (emphasis omitted). But as numerous decisions from the courts of appeals have correctly recognized, a prisoner's competency to be executed does not depend on his ability to assist his counsel. See Walton v. Johnson, 440 F.3d 160, 172 (4th Cir.) (en banc), cert. denied, 547 U.S. 1189 (2006) ("[W]e conclude that there is no Constitutional requirement under Ford that [a prisoner] be able to assist counsel to be deemed competent to be executed.") (footnote omitted); Coe v. Bell, 209 F.3d 815, 826 (6th Cir. 2000) ("We agree that a prisoner's ability to assist in his defense is not a necessary element to a determination of competency to be executed."); see also Madison, 139 S. Ct. at 731 ("The sole question on which * * * competency depends is whether [the prisoner] can reach a rational understanding of why the [government] wants to execute him.") (internal quotation marks omitted). Respondent's alleged inability to cooperate with counsel does not bear upon his ability to understand the reason for his execution.

d. Respondent's own statements contained in documents attached to his complaint directly contradict his claim of incompetency. As discussed above, respondent told Dr. Agharkar "that he knew what an execution was and said that he accepted that he was going to be executed for the murder of Jennifer Long." D. Ct. Doc. 1-1, at 12. Similarly, on May 13, 2019, respondent filed a handwritten pro se "Petition to Expedite Execution of Petitioner's Death Sentence Pursuant to 28 U.S.C. § 2241" in the Southern District of Indiana, in which he recognized that "[o]n January 23, 2004 U.S. District Judge Gaitan sentenced [respondent] to death after a jury found him guilty of kidnapping resulting in death and recommended a sentence of death." Id. at 47-48 (capitalization omitted).

Other filings that respondent has made also undercut his claims of incompetence, albeit more indirectly. Respondent's pro se complaint in the Southern District of Indiana, for example, is legally deficient, but coherent. The same is true of the motion for a preliminary injunction barring his execution that he filed pro se in that case. See Motion for a Prelim. Inj., No. 19-cv-517 (S.D. Ind. July 2, 2020).

e. As a fallback position to his primary Eighth Amendment claim under Ford, respondent asserts a Fifth Amendment claim challenging the adequacy of the process for assessing his

competency. But his failure to make a substantial threshold showing of incompetency precludes that claim as well.

Ford and Panetti v. Quarterman, supra, make clear that no process -- including information-sharing or discovery -- is required until the prisoner has made the substantial threshold showing. See Panetti, 551 U.S. at 950 ("Petitioner was entitled to these protections once he had made a substantial threshold showing of insanity.") (emphasis added; internal quotation marks omitted). Respondent himself has acknowledged as much. See D. Ct. Doc. 1, at 55 (complaint) ("Because [respondent] has * * * made a substantial showing of his incompetence to be executed, he is entitled to a hearing under Due Process and the Eighth Amendment.") (emphasis added); D. Ct. Doc. 23-1, at 25 (June 22, 2020) (motion for a preliminary injunction) ("In a Ford inquiry, a prisoner who makes a sufficient threshold showing of incompetency is entitled to the protection afforded by procedural due process.") (emphasis added; internal quotation marks omitted). Any due process claim thus rises and falls with respondent's Ford claim. And because respondent has not made a substantial showing of incompetency, see pp. 24-29, supra, he has no further due process rights.

Contrary to respondent's argument that there is no "federal process at all to allow for the adequate review of [his] Ford competency claim," D. Ct. Doc. 23-1, at 25, the appropriate and

available process for adjudicating this claim is a habeas petition under 28 U.S.C. 2241. If respondent had filed a Ford claim as a Section 2241 petition, and if respondent had made the threshold substantial showing of incompetency, the district court could order good-cause discovery, conduct an evidentiary hearing, and provide respondent with an opportunity to present evidence and argument. See Rules Governing Section 2254 Cases in the United States District Courts R. 1(b), 2, 6, 8. Any alleged deficiencies in the process that he has received are due to his own litigation strategy and deficient production of proof. They are not due process violations.

f. The district court erred in summarily concluding that respondent has made the required substantial showing of incompetency. The district court's conclusory analysis -- which consists of a single paragraph -- solely (1) cites allegations in respondent's complaint; (2) states that "Plaintiff's counsel submitted a series of reports and declarations regarding Plaintiff's conditions, which the court credits"; and (3) cites Dr. Agharkar's report. App., infra, 10a. But this does not consist of a substantial showing of incompetency; as just discussed in detail, neither Dr. Agharkar's statement nor other documents submitted by respondent meet that threshold. There is thus no basis for the district court's finding that respondent is likely to succeed on the merits of either of his claims.

B. The Equities Do Not Support Entry Of The Injunction

Additional considerations likewise weigh against injunctive relief. Glossip, 135 S. Ct. at 2736; cf. Winter, 555 U.S. at 26. This Court has held, squarely and repeatedly, that "like other stay applicants, inmates seeking [a stay of execution] must satisfy all of the requirements for a stay." Hill, 547 U.S. at 584 (emphasis added). Here, the preliminary injunction harms the public interest and is inequitable.

This Court has repeatedly emphasized that the public has "powerful and legitimate interest in punishing the guilty," Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted), and that "[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a [death] sentence," Bucklew, 139 S. Ct. at 1133 (quotation marks omitted); see Nelson, 541 U.S. at 650 (describing "the [government]'s significant interest in enforcing its criminal judgments"); Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) (per curiam) (noting that "[e]quity must take into consideration the [government]'s strong interest in proceeding with its judgment"). But the public's "interests have been frustrated in this case," Bucklew, 139 S. Ct. at 1133, by the district court's last-minute entry of a preliminary injunction.

The public also has a strong interest in "preventing forum shopping by habeas petitioners." Padilla, 542 U.S. at 447. The

circumstances here are highly suggestive of such forum shopping. Although respondent appeared to consider filing his Ford claims in the Southern District of Indiana, after an unfavorable ruling there and a favorable one in the District of Columbia, he chose to bring his claim in the D.C. district court. He has also resisted transferring or refiling his claim in the forum where the government agrees it can be brought -- until yesterday, when he asked a district judge in the Southern District of Indiana (not the one who previously ruled against him) for an indefinite stay of execution in case his Ford claims are transferred there.

"[T]he balance of equities" likewise weigh "strongly in favor of the" government and therefore against the injunction. Winter, 555 U.S. at 26. Respondent violently kidnapped, raped, and murdered a child and then dismembered her body with a chainsaw. However, he "continue[s] to litigate with a vengeance * * * with the obvious and intended effect of delaying [his execution] indefinitely." Execution Protocol Cases, 955 F.3d at 128 (Katsas, J., concurring in part and concurring in the judgment). While the district court stated that, in its view, "[t]he speed with which the government seeks to carry out these executions, and the Supreme Court's prioritization of that pace over additional legal process makes it considerably more likely that injunctions may issue at the last minute," App., infra, 2a, this Court has directly rejected that view. This Court has repeatedly made clear, including in its

vacatur of the last preliminary injunction entered by the same district court, that "[l]ast-minute stays * * * should be the extreme exception, not the norm." Lee, slip op. at 3 (quoting Bucklew, 139 S. Ct. at 1134). This is not one of the rare cases in which it is justified.

II. THE INJUNCTION SHOULD BE STAYED OR VACATED

The "balance" of the "'stay equities'" strongly favors a stay or vacatur of the injunction for many of the same reasons that it should have barred entry of the injunction in the first place. Mt. Soledad, 548 U.S. at 1302 (Kennedy, J., in chambers) (citation omitted).

Respondent is not entitled to further exploration of a claim that he has insisted upon filing in the wrong court and that lacks merit in any event. And courts handling capital cases have a responsibility to ensure that "challenges to lawfully issued sentences are resolved fairly and expeditiously." Bucklew, 139 S. Ct. at 1134. Here, however, the district court did not issue its preliminary injunction -- its third postponement of respondent's execution -- until the day the execution was scheduled to occur. That timing threatens "severe prejudice" to the government, which is fully prepared to implement today the sentences imposed many years ago in respondent's case. In re Blodgett, 502 U.S. 236, 239 (1992) (per curiam).

"To unsettle these expectations" in the final hours before the execution -- particularly after a lengthy delay arising from another meritless injunction -- would be "to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the [government] and the victims of crime alike." Calderon, 523 U.S. at 556 (citation omitted). More practically, the last-minute injunction is intensely disruptive to BOP's preparations for the execution, which have now entered their final stages, including picking up grieving family members of the victims and other witnesses at the airport and preparing to transport them to the execution facility, conducting final rehearsals with contractors and execution-team personnel, and increasing security and other precautions in and around the execution facility. See 19-mc-145 D. Ct. Doc. 139-1 ¶¶ 4-12 (July 12, 2020). There is no valid basis for disrupting this extensive process, which is ultimately designed to ensure a humane and dignified execution, based on a meritless injunction that could have been issued much sooner and has no reasonable prospect of withstanding appellate review.

In addition, it is important to recognize that respondent's execution -- unlike some state executions -- cannot be rescheduled with relative ease, for example on a date next week. As the Bureau of Prisons (BOP) has explained in a declaration, the contractors assisting in the executions this week would likely need "at least

one month's notice in order to be able to reschedule." See 19-mc-145 D. Ct. Doc. 139-1 ¶ 6. Thus, while it is possible for the BOP to conduct respondent's execution even later today, or possibly tomorrow if absolutely necessary to facilitate this Court's consideration of the application, the government cannot postpone the execution any further than that without requiring a much more significant delay. As it did earlier this week, this Court should lift the district court's latest injunction "so that [respondent's] execution[] may proceed as planned." Lee, slip op. at 3.

CONCLUSION

This Court should immediately stay or summarily vacate the district court's preliminary injunction.

Respectfully submitted.

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