FEDERAL CAPITAL HABEAS PROJECT

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Co-Chair Bauer, Co-Chair Rodriguez, and Distinguished Members of the Commission:

I. Introduction

Regardless of their ideology or political leanings, lawmakers and jurists generally agree on the crucial role the Supreme Court plays in our constitutional democracy. It provides the final word on what the law is and gives needed direction to lower courts. It takes few cases, allowing legal questions to percolate below in the first instance. As the leader of the Third Branch, the legitimacy of the Supreme Court is of paramount importance. Its credibility hinges on public confidence that it will faithfully attend to cases and controversies of national importance and reach its decisions in a principled manner. Key to the Court's institutional legitimacy are transparency and accountability in its decision making, both of which are generally provided to the American public through the release of reasoned written opinions.

When the Supreme Court makes consequential decisions without such explanations, or as part of a "shadow docket,"[1] that legitimacy is at risk. The Court's actions during the recent sweep of federal executions raise just that concern.

The resumption of executions in July 2020 took place against the backdrop of myriad unresolved legal disputes about the federal death penalty. Time and again, the Court acted summarily—stepping in to preclude review of these questions rather than adjudicating them, and issuing unsigned orders with no analysis or guidance to lower courts or litigants, often at odd hours of the night. Its unwillingness to substantively engage with unsettled matters in this critical area of the law, while repeatedly reversing lower appellate federal courts without

explanation, inspired more confusion than confidence in the Court's performance of its function.

The Federal Capital Habeas Project plays a unique role in the litigation for federal prisoners condemned to death. Our program was established in 2006 by the Judicial Conference of the United States to recruit, train, and guide counsel representing death-sentenced federal prisoners in post-conviction proceedings pursuant to 28 U.S.C. § 2255. In addition to representing our own capital clients, we monitor and track every case on federal death row, identify and train counsel to represent those under federal death sentence, and engage directly in constitutional and statutory issues affecting federal capital defendants. We represented the first federal prisoner to be executed in nearly two decades, on July 14, 2020, and worked closely with lawyers for the twelve individuals who followed, a surge that ended early in the morning of January 16, 2021. Our Project is thus well positioned to comment on the Supreme Court's role in these federal execution cases.[2]

II. The Federal Death Penalty

The death penalty is an area of the law where it is understandably important for the Supreme Court to speak—and where it has, in fact, routinely spoken. In the modern era, it has determined who is subject to capital punishment,[3] which jurisdictions' procedures satisfy constitutional requirements,[4] and what evidence may be considered at sentencing,[5] to name but a few examples. It has also regularly opined on habeas corpus,[6] a thorny and evolving area of the law governed by intricate rules, multi-faceted statutes, and a complex (and still developing) jurisprudence that is applicable to all prisoners seeking federal review.

While the modern era of the death penalty began in 1976,[7] capital punishment was not reinstated at the federal level until 1988.[8] As Congress expanded the penalty,[9] its use accelerated: The federal death row is now bigger than more than half the states' death row populations[10] and includes cases from 10 of the 11 federal judicial circuits.

The federal death penalty scheme operates according to distinct rules and circumstances that apply to the country as a whole as a unitary federal jurisdiction. Yet despite its national reach and rapid growth, the Supreme Court has offered scant guidance in federal capital cases—just one opinion, issued over two decades ago.[11] And it has never heard a capital post-conviction case brought by a federal prisoner, leaving substantial questions about the application of the Antiterrorism and Effective Death Penalty Act (AEDPA) to federal capital habeas cases, which are governed by a separate statute and rules, unanswered.[12]

Beginning in 2020 and continuing into 2021, the federal government took the leading role in carrying out death sentences, executing more individuals than the rest of the country combined. These were the first federal executions in seventeen years. They went forward despite timely challenges to a newly created

federal execution protocol and in the face of unsettled questions about matters of first impression concerning the Federal Death Penalty Act (FDPA) and the application of various provisions of habeas law to federal capital proceedings. The Court's refusal to take up these issues has left them unresolved, and with the lower courts lacking direction for future cases. Moreover, it has left the public to question whether the Court intends to undertake any meaningful review of any aspect of the federal government's use of the death penalty.

III. Federal Executions and the Supreme Court

Despite the number of novel issues raised, the Court officially issued only a single *per curiam* opinion, just hours prior to the first federal execution.[13] Nearly every other case that came before it was disposed of on its so-called "shadow docket" in unexplained, unsigned orders. Most often, it acted only to summarily vacate stays—issued by a range of courts in a variety of jurisdictions[14]—without addressing the errors it had found in the reasoning below.

The Court frequently issued these orders in the middle of the night, after the original execution date for a prisoner had already passed. Even where lower courts were sensitive to the need to resolve issues swiftly, in some cases entering expedited briefing schedules,[15] their orders were abruptly overturned without discussion. As a result of these dead-of-night vacaturs, the government raced to carry out executions moments later,[16] while judges were asleep and courts were unable to hear any remaining challenges.[17] These continued, unexplained late-night orders threatened the Court's legitimacy and fostered the impression that the Justice Department could proceed with any federal execution under any set of circumstances without scrutiny.

Among the most egregious examples of this occurred in the case of the last man to be executed, Dustin Higgs. After his execution was stayed by the United States Court of Appeals for the Fourth Circuit, the Court took the "extremely rare" step of granting the government's request for certiorari before judgment[18]—intervening to decide the case without full briefing and before the Court of Appeals even had a chance to consider the underlying claim. Mr. Higgs's case raised an issue peculiar to the federal system: Federal law provides that a federal execution shall be carried out in accordance with the laws of the state in which the defendant was sentenced.[19] But Maryland, where Mr. Higgs was sentenced in 2001, had since abolished the death penalty. Although that occurred in 2013, the government did not seek an amended judgment designating alternate state law for the execution until seven years later. In a detailed opinion, United States District Judge Peter J. Messitte determined extant law precluded him from granting the motion.[20]

The Court of Appeals for the Fourth Circuit ordered expedited briefing and argument within 20 days, taking it past the scheduled execution date,[21] but denied the government's request to dispense with oral argument or expedite the matter further "in light of the novel legal issues presented."[22] The government went

straight to the Supreme Court, seeking certiorari before the appellate court could even render judgment. The Fourth Circuit *sua sponte* stayed Mr. Higgs's execution,[23] signaling its desire to consider the matter in the first instance. Nevertheless, the Court issued a two-sentence order granting certiorari, reversing the district court, and remanding with instructions for the "prompt designation" of Indiana law in carrying out the execution. Mr. Higgs was executed hours later.

The Court offered no explanation as to why the exceedingly rare[24] step of granting cert before judgment was warranted. It failed to articulate how the district court had erred on the merits and provided no explanation as to why the Fourth Circuit was wrong to require full briefing on a novel but consequential issue where the condemned could not be held responsible for any delay. The public was left with the distinct—and damaging—impression that the Court's extraordinary action was motivated by other considerations: Had Mr. Higgs's January 15th execution been delayed, it was possible the newly-elected President might halt it altogether.[25]

Yet the Higgs case is just one example of a broader pattern by the Court of foregoing deliberation over novel and important legal issues in the federal capital context. There are others.

The cases of Alfred Bourgeois from Texas and Corey Johnson out of Virginia are also illustrative. Each raised claims and presented substantial evidence that they were intellectually disabled under current diagnostic standards. Although he had previously been denied § 2255 relief under now outdated diagnostic measures, Mr. Bourgeois argued that the FDPA requires courts to evaluate such claims at the time of execution based on prevailing standards.[26] Mr. Johnson – who had never had his strong case of intellectual disability presented in any court – raised a similar challenge seeking time-of-execution review.[27] This question about the federal execution statute at issue[28] had not been resolved. And it remains unresolved; the Court refused to take it up, which only served to spur additional questions about whether the government had illegally executed two intellectually disabled men.[29]

Similarly, Wesley Purkey and Lisa Montgomery were put to death even though lower courts concluded they were incompetent to be executed under federal law, and found the relevant evidence sufficiently compelling to preliminarily enjoin their executions. In Mr. Purkey's case, the evidence indicated that he suffered from Alzheimer's disease and dementia.[30] As to Mrs. Montgomery, the district court concluded her "current mental state is so divorced from reality she cannot understand the government's rationale for her execution."[31] Both cases raised complicated procedural questions about the proper forum in which a federal prisoner (differently situated from a state litigant) might raise such claims—questions the Supreme Court ignored. The public was left wondering whether the government, despite the considerable questions raised, had unconstitutionally

executed individuals so mentally ill they had no rational understanding of what was happening to them at the time of their deaths.[32]

A third instance arose in the cases of Daniel Lee and Brandon Bernard. Years after their respective § 2255 proceedings had concluded, they each discovered that the government had suppressed *Brady*[33] information undermining key aggravating evidence relied upon to secure their death sentences. In Mr. Lee's case, the government told the jury that he had "gotten away" with a prior murder as a juvenile thanks to an inexplicably generous plea agreement by local prosecutors, but this was not true. In fact, two different federal judges preliminarily reviewing this evidence opined that, but for this false evidence, the jury would not have sentenced Mr. Lee to death,[34] and one granted a stay of execution for further consideration of the issue.[35] In Mr. Bernard's case, the government failed to turn over exculpatory evidence contradicting its expert witness, and elicited false information about Mr. Bernard's alleged leadership role in a gang, a fact central to its case for future dangerousness and death.

Both cases raised the same critical question: Should prosecutorial misconduct claims – especially in federal cases, where there is one post-conviction proceeding rather than two and no state court potentially still available to address the violation – be subject to the strict bar on second-or-successive habeas petitions, even though that same misconduct prevented them from being raised in the initial § 2255 proceeding? The Court refused to hear either case, essentially leaving in place a rule that rewards the government for suppressing exculpatory information until after the sole post-conviction proceeding to which a federal prisoner is entitled has concluded.

These are just a few examples. Collectively, the executed federal prisoners raised a host of important issues, likely to recur, for which lower courts still have no guidance. These include:

- If a federal prisoner failed to raise a meritorious ineffective-assistance-of-trial-counsel claim in his initial § 2255 proceeding because his post-conviction counsel also performed incompetently, can federal courts review the original Sixth Amendment violation as it can with state prisoners?[36]

- Is there an impermissible suspension of the writ where prosecutorial misconduct instrumental in securing a death sentence is exempt from judicial review, so long as the government successfully withholds evidence of that misconduct until after the conclusion of post-conviction proceedings under § 2255?[37]

- Given the governing federal statute, must the Department of Justice adhere to state requirements for how much advance notice federal prisoners receive of their executions?[38]

• What does it mean to "implement" a federal death sentence "in the manner prescribed by the law of the State"?[39]

• Does a federal prisoner have a due process right to obtain and present material evidence from Bureau of Prisons (BOP) correctional officers in support of a petition for executive clemency? And do correctional officers have a First Amendment right to provide information in support of a petition for executive clemency, notwithstanding contrary BOP policies?[40]

IV. Conclusion

The irrevocability of a death sentence makes it our most severe sanction. Given that "death is different,"[41] capital punishment frequently gives rise to some of the most significant and complicated issues in our legal system. To safeguard the legitimacy and credibility of the Court, it is necessary that it engage such issues in a manner that is disinterested—but not *uninterested*.

Over the course of thirteen executions, a number of important and unresolved legal disputes about the federal death penalty reached the Court. That these claims were serious and worthy of consideration is evidenced by the range of opinions issued by lower courts, as well as the numerous stays granted below. But instead of ensuring that these novel and weighty legal questions would be answered, the Court sidestepped them altogether. It repeatedly vacated stays in response to the government's emergency applications—often without full briefing, frequently requiring prisoners to respond in a matter of hours. And it regularly issued its decisions in the middle of the night, rarely accompanied by any public explanation.

The work of the Court should be done in daylight, in every sense. Its failure to do so in the context of these serious federal cases risked diminishing not only its status as an institution dedicated to resolving significant legal matters but also its credibility as a neutral arbiter in the justice system. We hope the Commission will look carefully at these federal execution proceedings as it considers the vital role our Supreme Court plays moving forward.

Federal Capital Habeas Project
July 26, 2021

Endnotes

[1] *See William Baude, Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

[2] Our staff attorneys also have years of experience defending prisoners sentenced to death in various state systems.

[3] *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782 (1982) (prohibiting execution of those who neither kill nor attempt or intend to kill); *Ford v. Wainwright*, 477 U.S. 399 (1986) (prohibiting execution of prisoners whose mental state precludes an understanding of the punishment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting execution of intellectually disabled defendants); *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting execution of juveniles); *Panetti v. Quarterman*, 200 U.S. 321 (2007) (state prisoner may bring second petition for habeas corpus where *Ford* issue raised); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting execution of one who has not killed); *Moore v. Texas*, 581 U.S. ___ (2017) (courts must apply legitimate scientific criteria in ruling on intellectual disability exclusion).

[4] *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Harris v. Alabama*, 513 U.S. 504 (1995); *Ring v. Arizona*, 536 U.S. 584 (2002); *Hurst v. Florida*, 577 U.S. 92 (2016); *Ramos v. Louisiana*, 509 U.S. ___ (2020).

[5] *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586 (1978); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Payne v. Tennessee*, 501 U.S. 808 (1991); *Tennard v. Dretke*, 542 U.S. 274 (2004).

[6] *See, e.g.*, *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Murray v. Carrier*, 477 U.S. 478 (1986); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Schlup v. Delo*, 512 U.S. 298 (1995); *Felker v. Turpin*, 518 U.S. 651 (1996); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

[7] *See Gregg v. Georgia*, 428 U.S. 153 (1976) (reversing *Furman v. Georgia*, 408 U.S. 238 (1972), and upholding constitutionality of death penalty).

[8] See 21 U.S.C. § 848(e) *et seq.*, the Anti-Drug Abuse Act of 1988 (commonly referred to as the "drug king-pin" statute).

[9] The passage of the Federal Death Penalty Act of 1994, *see* 18 U.S.C. § 3591 *et* seq., broadened the scope of the federal death penalty and made it applicable to considerably more homicides.

[10] *See Death Row Overview*, Death Penalty Information Center, https://deathpenaltyinfo.org/death-row/overview (last visited July 26, 2021).

[11] *Jones v. United States*, 527 U.S. 373 (1999). Although the Supreme Court recently granted certiorari in *United States v. Tsarnaev*, 141 S. Ct 1683 (2021), it should be noted that the questions presented are limited to case-specific jury selection and evidentiary claims, not broader unresolved issues concerning the structure and operation of the FDPA. *See United States v. Tsarnaev*, No. 20-443 (Oct. 6, 2020) (United States' Petition for a Writ of Certiorari).

[12] Both *Jones* and *Tsarnaev* were granted certiorari from the direct appeal and do not involve any habeas issues or implicate the application of AEDPA to federal capital cases. The Supreme Court has never addressed any habeas issue raised by a federal capital prisoner.

[13] *See Barr, et al. v. Lee, et al.*, No. 20A8, 591 U.S. ___ (2020) (July 14, 2020) (*per curiam*) (vacating district court's order granting preliminary injunction to consider lethal injection challenge).

[14] During the course of the federal execution spree, twenty-two different stays or injunctions were issued by various district and circuit court judges, appointed by a variety of

Presidents from both parties. This includes stays granted to litigants in their individual cases, as well as injunctions issued to group plaintiffs in the lethal injection litigation. In eight of these cases, the government filed emergency applications to vacate the stays, which the Court uniformly granted—and in seven of those eight, the Court provided no explanation at all for its orders.

[15] *See, e.g.*, *Montgomery v. Rosen*, No. 21-5001, 2021 WL 112524 (D.C. Cir. Jan. 11, 2021); *United States v. Higgs*, No. 20-18 (4th Cir. Jan. 1, 2021), Doc. 9; *In re: In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, No. 20-5199 (D.C. Cir. July 13, 2020), Doc. 1851483.

[16] Per federal regulations, the government is required to schedule an execution on a date certain. *See* 28 C.F.R. § 26.3(a)(1). If that date passes "by reason of a stay of execution," then the government may "promptly" designate a new date "when the stay is lifted." *Id*. The Justice Department interpreted this provision to mean that if a Supreme Court order vacating a stay was issued after midnight of the original execution date, it could immediately reset the execution date for the current day and provide notice mere hours before it intended to carry out the death sentence. The government reset dates and carried out executions in this manner for Daniel Lee (scheduled for July 13, 2020; executed on July 14, 2020 at 8:07 a.m.); Wesley Purkey (scheduled July 15, 2020; executed on July 16, 2020 at 8:19 a.m.); Lisa Montgomery (scheduled for January 12, 2021; executed on January 13, 2021 at 1:31 a.m.); and Dustin Higgs (scheduled for January 15, 2021; executed on January 16, 2021 at 1:23 a.m.).

[17] Various litigants had outstanding legal challenges still pending at the time of their executions. For example, Mr. Lee's scheduled execution did not go forward on July 13, 2020 because of a preliminary injunction issued that same day in the lethal injection litigation by the District Court for the District of Columbia that was subsequently upheld by the Circuit Court. At approximately 2 a.m. on July 14, 2020, however, the Supreme Court granted the government's request to vacate the injunction. Approximately twenty minutes later, the government handed Mr. Lee a written notice, as it escorted him from his cell to the death chamber, that his execution was now scheduled for July 14. Counsel subsequently learned that the BOP intended to execute Mr. Lee at 4 a.m. – less than two hours from the issuance of the new execution notice – and filed a suit challenging the arbitrary and capricious nature of the agency's action and the lack of adequate notice. *See Lee v. Watson*, 2:20-cv-359-JPH-DLP (S.D. Ind. July 14, 2020), Docs. 2 & 3. That challenge was never adjudicated on the merits because Mr. Lee was, in fact, executed on July 14.

[18] *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers) (describing certiorari before judgment as "an extremely rare occurrence"); *see also* Kevin Russell, *Overview of Supreme Court's cert. before judgment practice*, SCOTUSblog (Feb. 9, 2011) (noting that Court has granted cert before judgment "in only a handful of cases over the past 75 years"), https://www.scotusblog.com/2011/02/overview-of-supreme-court%E2%80%99s-cert-before-judgment-practice. *See also* Stephen I. Vladeck, *The Supreme Court, 2018 Term — Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 162 tbl.3 (2019).

[19] 18 U.S.C.§ 3591(a).

[20] *See United States v. Higgs*, No. PJM 98-520, 2020 WL 7707165 (D. Md. Dec. 29, 2020).

[21] The government set the execution date for January 15, 2021, even before Judge Messitte had ruled on its motion.

[22] *United States v. Higgs*, No. 20-18 (4th Cir.), Doc. 28.

[23] *Id*., Doc. 38.

[24] The Court's action here may in fact have been unprecedented. Professor Vladeck's testimony before this Commission noted that the *Higgs* case was the first time in the history of the Court that it granted certiorari before judgment and summarily reversed. *Case Selection and Review at the Supreme Court: Hearing Before the Presidential Commission on Supreme Court of the United States*, at 9 (June 30, 2021) (Testimony of Stephen I. Vladeck), available at: https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf (last visited July 20, 2021).

[25] *See* Adam Liptak, *"Expedited Spree of Executions" Faced Little Supreme Court Scrutiny*, N.Y. Times (Jan. 1, 2021), https://perma.cc/FP66-9MN3 ("There may have been another reason for moving quickly in the federal cases: Had the court issued even brief stays, there was good reason to think the Biden administration would have halted the executions.").

[26] *See Bourgeois v. Warden*, No. 2:29-cv-392-JMS-DLP (S.D. Ind. Mar. 10, 2020), Doc. 18. As the district court found before entering a stay, Mr. Bourgeois made a strong showing that he was intellectually disabled, including IQ test results of 68 and 70, and evidence of significant deficits in communication, daily living skills, and socialization. *Id*. at 8-9.

[27] Mr. Johnson had three childhood IQ scores that placed him clearly within the range of a person with intellectual disability, and he had profound, well-documented deficits in virtually every aspect of daily living, including nearly all skills necessary for independent living. *See In re Corey Johnson*, No. 21-2 (4th Cir. Jan. 7, 2021), Doc. 2-1 at 7-9. He could not read or write beyond a third-grade level, tell time, or change money. *Id.* at 9-11.

[28] *See* 18 U.S.C. § 3596(e) ("A sentence of death shall not be carried out upon a person who *is* mentally retarded.") (emphasis added).

[29] *See* Elizabeth Bruenig, *When an I.Q. Score Is a Death Sentence*, N. Y. Times, Jan. 11, 2021, https://www.nytimes.com/2021/01/11/opinion/death-penalty-mental-disability.html.

[30] *See Purkey v. Barr*, No. 1:19-cv-03570-TSC (D.D.C. Nov. 26, 2019), Doc. 1, Exhs. 1 & 3. *See also Purkey v. Barr*, 474 F.Supp.3d 1 (D.D.C. 2020), *order vacated by Barr v. Purkey*, No. 20A9, 140 S. Ct. 2594 (2020). The district court based the stay on considerable evidence that, given Mr. Purkey's mental infirmities, he did not understand that his execution was punishment for his capital crime. The opinion noted that Mr. Purkey was repeatedly sexually abused as a child by his caregivers, suffered multiple traumatic brain injuries beginning in his teenage years, and that at the time of his execution – at age 68 – he suffered from progressive dementia, schizophrenia, complex post-traumatic stress disorder, and delusional and paranoid thinking. *Id*. at 5, 10. Other evidence presented to the court by defense counsel noted that Mr. Purkey believed his lawyers were part of the vast conspiracy against him and that he was being executed in retaliation for complaining about prison conditions. *See Purkey v. Warden*, No. 2:20-cv-365-JRS-DLP (S.D. Ind. July 15, 2020), Doc. 2 at 17-19 & Exh. A. In the days before his scheduled execution, the government provided Mr. Purkey's defense counsel with documentation—including brain scans—of his advancing dementia even as it pressed forward with its (ultimately successful) request to the U.S. Supreme Court to allow the execution to proceed without a competency hearing. *Id.* at 23-24.

[31] *Montgomery v. Watson*, No. 2:21-cv-20 (S.D. Ind. Jan. 11, 2021), Doc. 17 at 15. The district court cited evidence of childhood trauma so extreme that it was "consistent with torture." *Id*. at 5. Her stepfather "sexually assaulted her on a weekly basis for years," and her mother's "emotional abuse included sadistic acts such as taping Mrs. Montgomery's mouth shut with duct tape for speaking and beating the family dog to death" in front of her. *Id*. at 6. During her incarceration she was observed by a prison psychiatrist to be in "an acute dissociative psychotic state" at least twice, *id*., and by the time of her execution was suffering from complex post-traumatic stress disorder, complex partial seizures and brain impairment, depression, bipolar disorder, and auditory hallucinations. *Id*. at 7, 16.

[32] *See, e.g.*, Austin Sarat, *Trump Targeted the Mentally Ill With His Lame Duck Execution Spree*, Slate, Jan. 16., 2021, https://slate.com/news-and-politics/2021/01/trump-mentally-ill-lame-duck-executions.html.

[33] *Brady v. Maryland*, 373 U.S. 83 (1963).

[34] *See Lee v. Warden*, No. 2:19-cv-468, 2019 WL 6608724 at *7 (S.D. Ind. Dec. 5, 2019); *United States v. Lee*, No. 4:97-cr-243 (E.D. Ark. Feb. 26, 2019), Doc. 1313 at 14.

[35] *See Lee*, 2019 WL 6608724 at *11. The other pillar on which Mr. Lee's death sentence rested was essentially junk science: The government doctor who had concluded he was a medically diagnosed "psychopath" who would be violent in prison later testified that the test he based the diagnosis on could not be used to reach any such conclusion. *See Lee v. Warden*, No. 2:19-cv-468 (S.D. Ind. Sep. 26, 2019), Doc. 1 at 6-22 & Exh. F. That issue also was also barred from review. *See Lee v. Warden*, No. 2:19-cv-468, 2020 WL 1317449 at *1-*2 (S.D. Ind. Mar. 20, 2020), *aff'd*, 964 F.3d 663, 666-67 (7th Cir. 2020).

[36] *See Purkey v. United States*, 812 Fed. Appx. 380 (7th Cir. July 13, 2020) (although it denied relief on merits, Circuit Court denied government request to reconsider grant of stay of execution, noting that given the novelty of the legal issue, "[o]nly the Supreme Court can tell us whether this is a proper application of its decision"), *order vacated by Purkey v. United States*, 141 S. Ct. 196 (July 16, 2020).

[37] *Bernard v. United States*, 141 S. Ct. 504 (2020); *Bernard v. Watson*, 2020 WL 7230886, at *4 (S.D. Ind. Dec. 8, 2020) (acknowledging that structure of § 2255 limits judicial consideration of *Brady* claims when evidence did not become available to defendant through no fault of his own until after initial post-conviction proceding concluded; court notes access to alternate remedy of "savings clause" might then be necessary).

[38] *See Montgomery v. Rosen*, No. 21-5001, 2021 WL 112524 (Jan. 11, 2021) (granting motion for reconsideration *en banc* and granting stay of execution to consider issue pursuant to "highly expedited" schedule), *order vacated by Rosen v. Montgomery*, 141 S. Ct. 1232 (Jan. 12, 2021).

[39] *See* 18 U.S.C. § 3596(a); *see also, e.g.*, *LeCroy v. United States*, 975 F.3d 1192, 1198 (11th Cir. 2020) (recognizing conflicting interpretations by various circuit courts on "precisely what the phrase 'in the manner prescribed by the law of State in which the sentence is imposed' entails," Eleventh Circuit disposed of case on other grounds).

[40] *See Lee v. Barr*, No. 1:19-cv-3611 (D.D.C. Dec. 2, 2019), Doc. 1.

[41] *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).