No. 20-927

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DUSTIN JOHN HIGGS
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Respondent's position is that the courts below should be permitted to thwart the United States from carrying out a lawful capital sentence on the scheduled date by adopting an untenable statutory interpretation and doing so on a schedule that obstructs timely review by this Court. Indeed, respondent candidly admits (see Br. in Opp. 1) that he is simply trying to run out the clock until the next Administration, which he envisions will be more favorably disposed toward him than the one that sought and secured nine death sentences for his triple murder (President Clinton's) and the three that have faithfully defended those sentences against his many challenges (President Bush's, President Obama's, and President Trump's).

The Court should not countenance such gamesmanship. This case should be decided in a timely manner under the law. And the law is clear: because Maryland

"does not provide for implementation of a sentence of death," the district "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).

Respondent has no answer to that straightforward statutory command. His only textual argument (Br. in Opp. 30-32) is that the prior sentence of Section 3596(a) includes the phrase "sentence is imposed," which he contends could mean that an alternate State can be designated only at the time of sentencing. But that is not what the prior sentence says or means. The prior sentence provides the default rule to apply "[w]hen the sentence is to be implemented." 18 U.S.C. 3596(a). There is no plausible construction under which that sentence temporally limits the designation of an alternate State under the next sentence to the time of sentencing. Moreover, respondent effectively concedes (Br. in Opp. 34) that his position would mean that Congress allowed States effectively to commute federal death sentences simply by repealing their own death penalties. Yet he ignores that every interpretive principle militates against construing the statute to provide such an absurd windfall to federal capital defendants.

Respondent's other arguments likewise lack merit. Designating an alternate State, pursuant to specific statutory command, for "implementation" of a death sentence, 18 U.S.C. 3596, does not modify the sentence at all, much less in contravention of the general rules governing sentence modification that respondent invokes (Br. in Opp. 23-30) to no avail. And he fares no better with his half-hearted contention (Br. in Opp. 16-18) that the district court's order is unreviewable. The

order finally resolved an issue separate from the main course of the prosecution and is therefore appealable under 28 U.S.C. 1291. At a minimum, mandamus is available for its classic function: directing a lower court to perform a nondiscretionary judicial act. See 28 U.S.C. 1651(a).

Respondent's opposition ultimately comes down to his contention (Br. in Opp. 12-16) that the Court should not act in this posture. It is true that grants of certiorari before judgment or mandamus are reserved for extraordinary cases. But this is such a case. The district court blocked a lawful, scheduled execution on a statutory reading that it recognized would grant an inexplicable windfall to capital defendants, after not ruling on the government's motion for months. If the court of appeals had affirmed that decision, there is little doubt that summary reversal by this Court would have been warranted. Respondent should not be rewarded because a divided court of appeals panel abdicated its role to timely decide the case, by setting argument for two weeks after the scheduled execution. See Pet. App. 28a, 30a (Richardson, J., dissenting).

The district court acknowledged that, if it has the authority to designate an alternate State at all, Indiana—the site of the federal execution chamber and the place where respondent has long been incarcerated—is "appropriate" to designate, and respondent does not and could not dispute that conclusion. Pet. App. 17a. Thus, because the district court plainly has that authority—indeed, that duty—this Court should direct the district court to designate Indiana and make clear that respondent's scheduled execution for egregious federal crimes can proceed as planned on January 15, 2021.

A. The District Court's Decision Is Plainly Wrong

The Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, provides a straightforward command that should have been followed months ago: because "the law of the State in which the sentence is imposed," Maryland, "does not provide for implementation of a sentence of death," the district "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); see Pet. 14-23. Respondent offers no sensible reading of the statute that would permit the district court to decline to make an alternate-State designation based on the fortuity that the default State repealed its own death penalty after the sentence became final. And respondent's contention that the FDPA's requirements are immaterial—because a post-sentencing designation would constitute an improper modification of his sentence despite being statutorily compelled—is equally nonsensical.

1. The FDPA requires designation of an alternate State because Maryland "does not provide for implementation of a sentence of death." 18 U.S.C. 3596(a). Respondent barely grapples with that plain statutory language, going so far as to criticize (Br. in Opp. 23) the government for "focus[ing] almost entirely on the text of 18 U.S.C. 3596(a)." As the government has detailed in the petition (Pet. 18-20) and respondent essentially ignores, respondent's lone textual argument—that the isolated phrase "sentence is imposed" in the preceding sentence somehow limits the designation of an alternate State to the time of sentencing—is refuted by both the grammar and structure of Section 3596(a). Moreover, the argument is irreconcilable with the function of the

alternate-State provision, which (as respondent does not dispute) was "specifically designed to prevent the choices of an individual state from effectively nullifying the federal death penalty." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 120 (D.C. Cir.) (Katsas, J., concurring), cert. denied, 141 S. Ct. 180 (2020). This Court has refused to interpret the FDPA and its predecessor to make it impossible to administer the federal death penalty throughout the Nation. See *Andres* v. *United States*, 333 U.S. 740, 745 & n.6 (1948); see also *Barr* v. *Roane*, 140 S. Ct. 353, 353 (2019) (statement of Alito, J.). That sound principle applies after sentencing no less than before it.

2. Respondent next contends (Br. in Opp. 26) that "what the FDPA in theory requires do[es] not matter." In his view, the FDPA's specific, directly applicable command must give way to a background rule that criminal judgments "may not be modified by a district court except in limited circumstances." *Id.* at 24 (quoting *Dillon* v. *United States*, 560 U.S. 817, 824 (2010)). That is wrong multiple times over.

Most obviously, as the government has explained (Pet. 24-25), the judgment here, by its own terms, does not expressly fix Maryland as the designated State, and instead specifically incorporates Section 3596, including its requirement that the court make an alternate-State designation "[w]hen the sentence is to be imposed." 18 U.S.C. 3596(a). Respondent never even attempts to explain how following Section 3596(a)'s requirements would be inconsistent with or modify a judgment that mandates adherence to those very requirements.

Instead, respondent retreats to his argument that "[u]nder § 3596, the implementation of a death sentence must occur 'in the manner prescribed by the law of the

State in which the sentence is imposed,'" from which he reasons that by explicitly referencing Section 3596, the district court "enshrined in the sentencing judgment [a] designation of the law of the State of Maryland as governing." Br. in Opp. 23-24 (quoting 18 U.S.C. 3596(a)). But this response proves that what the FDPA requires *does* matter. And as explained above, what respondent describes is the *opposite* of what the FDPA requires.

Even apart from the judgment's express incorporation of the FDPA here, respondent is wrong that an alternate-State designation under the FDPA modifies the judgment. As the government has explained (Pet. 24), the designation under Section 3596(a) does not result in "[i]mposition of" a new or modified "sentence of death." 18 U.S.C. 3594 (emphasis omitted). Such imposition occurs at the time of sentencing under Section 3594, and the "sentence of death" imposed remains the same before and after the alternate-State designation. *Ibid.* (emphasis omitted). Instead, that designation concerns only the "[i]mplementation of a sentence of death," which Congress dealt with in the separate section of the FDPA at issue here. 18 U.S.C. 3596 (emphasis omitted). Respondent's refusal (Br. in Opp. 29-30) to acknowledge that the designation concerns an issue of sentence implementation rather than imposition of a new sentence ignores the structural and linguistic distinction Congress drew between Sections 3594 and 3596. His only response (*id.* at 29-30) is that if courts could assign prisoners to specific correctional facilities, then moving a prisoner from one facility to another would likewise constitute an impermissible modification of his sentence. But respondent offers no support for that naked assertion, and it is beside the point in light of Congress's express distinction in the FDPA between

issues of sentence imposition and sentence implementation.

Finally, respondent's argument ignores the fact that Congress's specific enactment of Section 3596(a) in 1994 post-dates adoption of 18 U.S.C. 3582, the general provision about imposition of "term[s] of imprisonment" upon which his rule against sentence modifications is based (Br. in Opp. 25-26). Even if Section 3582 would have generally barred modifications to the implementation of a *capital* sentence at the time Section 3582 was adopted (though it would not have), respondent offers no authority for his view that the provision would somehow trump the different rule that Congress specifically adopted in the FDPA a decade later. See Pet. 25-26; *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

For all of those reasons, respondent's assertion (Br. in Opp. 26) that "what the FDPA in theory requires do[es] not matter" is plainly incorrect. And because the FDPA unambiguously requires the district court to make an alternate-State designation given Maryland's repeal of its own death penalty law after respondent's sentence became final, the district court's refusal to do so was a clear and indisputable abdication of duty.

B. Respondent's Contentions That This Court Lacks Authority To Correct The District Court's Error Are Similarly Baseless

Lacking any plausible defense of the district court's late-breaking refusal to act, respondent focuses instead (Br. in Opp. 12-23) on an argument that this Court cannot or should not correct the district court's manifest error. This argument, too, is baseless.

1. There is no serious dispute that this case is properly "in the court[] of appeals," and thus subject to

certiorari review in this Court "before or after rendition of judgment or decree." 28 U.S.C. 1254(1). The district court's order readily qualifies as a "final decision[] of the district court[]" appealable under 28 U.S.C. 1291. See Pet. 29. Respondent does not dispute that the order at issue is a final decision on the government's post-judgment motion, or otherwise contend that the terms of Section 1291 do not apply. Instead, he claims that a historic presumption against government appeals from judgments of acquittal or sentences, see Pet. 29-31, renders the application of Section 1291's clear text here "uncertain," Br. in Opp. 16. That claim finds no support in this Court's cases.

The presumption on which respondent relies is inapplicable to orders that are "sufficient[ly] independen[t] from the main course of the prosecution to warrant treatment as plenary orders." *Carroll* v. *United States*, 354 U.S. 394, 403 (1957). This Court has analogized the requisite independence to the sort of independence that permits review under the collateral-order doctrine. See *ibid.* (citing *Cohen* v. *Beneficial Indust. Loan Corp.*, 337 U.S. 541 (1949)). And as the government has explained (Pet. 30-31), the order here—entered two decades after judgment and directed to a statutory question about *how* to carry out respondent's execution that is entirely distinct from the question at trial and sentencing about *whether* he should be executed—readily possesses such independence.

Respondent's sole argument to the contrary (Br. in Opp. 17-18) rests on the premise that granting the government's motion would result in a change to his sentence, and is for that reason not "independen[t] from the main course of the prosecution," *Carroll*, 354 U.S.

at 403. See Br. in Opp. 18 n.4 (collecting cases addressing the appealability of sentence modifications). As noted above, see pp. 5-7, *supra*, that premise is incorrect. And none of the prudential or constitutional concerns that have cautioned against certain government appeals from criminal trials or sentences apply to the statutory implementation question here. Pet. 30-31. Section 1291's plain terms thus control and establish the existence of appellate jurisdiction below.

2. Moreover, if appellate jurisdiction were unavailable, then mandamus relief would be warranted instead. As the government has explained (Pet. 31-32) and respondent conspicuously fails to dispute, this Court has provided relief by mandamus in the past where a district court engaged in a comparable "refusal to carry out the statute" providing for criminal punishment. *Ex parte United States*, 242 U.S. 27, 37 (1916).[*] Such relief would be warranted here as well, given the lack of any plausible basis for the lower courts' refusal to take the ministerial step the FDPA requires in a timely fashion.

Respondent's contrary arguments lack merit. He contends (Br. in Opp. 18-19) that the government's alternative request for mandamus was not sufficiently specific, but the government left no room for ambiguity: it included the order entered by "Peter J. Messitte[,] United States District Judge," Pet. App. 17a, explained why that order constituted clear and unambiguous legal error, and asked that the Court therefore issue a writ "order[ing] the district court to designate Indiana." Pet. 11. Respondent also contends (Br. in Opp. 19) that

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[*] Review by appeal of a final decision appears to have been deemed unavailable in *Ex parte United States* because the district court, after "suspend[ing]" implementation of the sentence, had "kept open" the case for re-evaluation. 242 U.S. at 37.

the government did not "'set out with particularity' why it cannot get relief from the Fourth Circuit," but the government explained that the Fourth Circuit has refused to decide the government's appeal in time to provide the requested relief (see, *e.g.*, Pet. 8-9), and *could not* decide the appeal if respondent's jurisdictional objections were meritorious (Pet. 31-32). And respondent contends (Br. in Opp. 21) that any right to relief is not "clear and indisputable," but that contention fails for the reasons already discussed.

Finally, respondent argues (Br. in Opp. 20) that this Court should, "in an exercise of its discretion," decline to correct the district court's error. Respondent should not be heard to invoke this Court's equitable discretion: his "crimes were an abomination, his central responsibility is indisputable, and he had a fair trial on both in terms of guilt and the applicability of the death penalty before a jury of his peers." Pet. App. 16a. He does not deserve to receive a "windfall" that "Congress may not have"—indeed, cannot *possibly* have—"intended," *ibid.*, based on the district court's long-delayed and incorrect order, and the inexplicable refusal of a divided panel of the court of appeals to consider that error until after the scheduled execution date has passed.

There is no reasonable dispute that the district court must designate Indiana under the FDPA. Delaying the execution would thus "serve no meaningful purpose and would frustrate the [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). The government is prepared to implement that lawful sentence. Family members of respondent's victims are prepared to be present. This Court should allow the implementation of respondent's sentence to move forward.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari before judgment, the Court should grant the petition, summarily reverse the district court's decision, and direct the district court to designate Indiana under 18 U.S.C. 3596(a) as the State whose laws shall prescribe the manner of implementation of respondent's sentence. In the alternative, the Court could treat this petition as a petition for a writ of mandamus and direct the district court likewise. Either way, the Court should promptly enter judgment making clear that respondent's execution may proceed as scheduled on January 15, 2021.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

JANUARY 2021