AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Criminal Justice/Punishments/The Death Penalty

**Barr v. Purkey, 140 S.Ct. 2594** (2020)

*Wesley Purkey in 1998 kidnapped, raped, and brutally murdered Jennifer Long, who was 16 years old at the time of her death (Purkey was 46 when the murder was committed). Purkey was arrested, convicted and sentenced to death by a federal jury. After a very long series of appeals, Purkey was scheduled to be executed on July 16, 2020. A federal district court on July 15, 2020 issued a temporary injunction, forbidding the government from executing Purkey until a hearing was held to determine whether Purkey, who was suffering from brain damage and numerous psychiatric disorders, was competent to be executed. William Barr, the Attorney General of the United States appealed to the Supreme Court.*

 *The Supreme Court by a 5-4 vote vacated the preliminary injunction. Justices Stephen Breyer and Ruth Bader Ginsburg dissented from that decision on the ground that the process by which Purkey’s death sentence was imposed and reviewed further demonstrated that the death penalty could not be constitutionally implemented. Justice Sonya Sotomayor’s dissent objected to the removal of the preliminary injunction. Under what conditions does Sotomayor claim a court can vacate a preliminary injunction issued by a lower federal court? Why does she believe the judicial decision in this case does not meet that standard? Can you imagine a death penalty case in which the Supreme Court would be justified in vacating a preliminary injunction issued by a lower federal court? Does this demonstrate that Sotomayor’s standard is too high or that the death penalty cannot be imposed equitably and consistently with contemporary notions of due process?*

The application for stay or vacatur presented to THE CHIEF JUSTICE and by him referred to the Court is granted. The District Court's July 15, 2020 order granting a preliminary injunction is vacated.

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idca90427c1ef11eabea4f0dc9fb69570), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idca90427c1ef11eabea4f0dc9fb69570) joins, dissenting.

Two days ago, the Federal Government conducted its first execution in nearly two decades. Today, it will conduct its second. Both cases have come before us with the defendants pointing to what I believe are serious legal defects of a kind that have long plagued the administration of the death penalty in the United States. See *Glossip* v. *Gross* (2015) (BREYER, J., dissenting).

The first case, that of Daniel Lewis Lee, revealed the inherent arbitrariness of the death penalty. Lee was sentenced to death and his codefendant to life even though the two men committed the same crime. Lee's case also implicated the problem of excessive delay and the risk of severe and unnecessary suffering brought about by the Government's chosen method of execution.  Today's case, that of Wesley Purkey, raises similar problems.

Consider the problem of delay. Wesley Purkey was sentenced to death over 16 years ago for a crime committed six years before that. Purkey is now 68 years old, frail, and suffering from [Alzheimer's disease](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ibdafedd2475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and other psychiatric conditions. He has undergone many years of what this Court has called the “immense mental anxiety” of confinement on death row awaiting an uncertain date of execution.

The delay itself undermines the penological rationales for the death penalty: deterrence and retribution.  I have previously explained that prolonged delays likely reduce the death penalty's deterrent effect. *Glossip*. And after so many years have passed, executing the offender may not serve the interest in retribution either. In Lee's case, for example, the victims’ relatives explained that Lee's execution would only “ ‘bring [the] family more pain.’ ” And Purkey alleges that, in the years since his sentencing, his mental condition has deteriorated to the point where he no longer understands why he is being executed. We have “question[ed] the retributive value of executing a person” under such circumstances.

Purkey's case also raises serious problems of proper procedure. Simplifying the problem, imagine that a death-sentenced defendant's trial or sentencing suffered from his lawyer's constitutionally inadequate performance. Suppose too that his lawyer in his initial habeas proceeding was himself inadequate because he failed to raise the trial lawyer's initial constitutional inadequacy. Can the defendant bring the matter up in a later habeas proceeding, say, a proceeding where he now has a better lawyer? He can sometimes do so where a state conviction is at issue. But can he do so where, as here, a federal conviction is at issue? In my view, the question, as presented here, is difficult. On the one hand, we ought not to have a procedural system where challenges to a conviction can go on endlessly. On the other hand, is it consistent with criminal justice principles to allow the execution of a defendant whose conviction rests upon the constitutional inadequacy of a lawyer, when no court has ever adjudicated that inadequacy?

The question reflects the heightened need for reliability in the death penalty context. The risk of error that we may accept as necessary to the functioning of the system more generally is less tolerable when the punishment is, by definition, irreparable. Yet the requisite opportunities to challenge and then correct errors necessarily entail delay that, in turn, undercuts the penological rationale for the death penalty. In this context, it is especially difficult to reconcile the competing values of finality and accuracy.

. . . . A modern system of criminal justice must be reasonably accurate, fair, humane, and timely. Our recent experience with the Federal Government's resumption of executions adds to the mounting body of evidence that the death penalty cannot be reconciled with those values. I remain convinced of the importance of reconsidering the constitutionality of the death penalty itself.

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idca90427c1ef11eabea4f0dc9fb69570), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idca90427c1ef11eabea4f0dc9fb69570), Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idca90427c1ef11eabea4f0dc9fb69570), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idca90427c1ef11eabea4f0dc9fb69570) join, dissenting.

In a matter of hours, the Government plans to put to death Wesley Purkey, a 68-year-old federal inmate who has [Alzheimer's disease](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ibdafedd2475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and, according to a recent in-person evaluation by a forensic psychiatrist, “lack[s] a rational understanding of the basis for his execution.” Due to these developments and rapid deteriorations in Purkey's mental state, his counsel filed an action in the United States District Court for the District of Columbia. The complaint alleges that under *Ford v. Wainwright* (1986), Purkey is mentally incompetent to be executed and, at minimum, is entitled to an evidentiary hearing to evaluate his mental competence before the Government proceeds with his execution. The District Court below preliminarily enjoined Purkey's execution, finding that the evidence Purkey has put forth thus far established a likelihood of success on the merits of his claims. The Government now seeks a stay or vacatur of that preliminary injunction.

Such a stay is available “only under extraordinary circumstances.”  Accordingly, “[w]hen a matter is pending before a court of appeals, it long has been the practice of Members of this Court to grant stay applications only ‘upon the weightiest considerations.’ ” Given the District Court's thorough analysis, and the serious questions that court raised, I do not believe the Government has carried its “especially heavy” burden here.

The Government devotes much of its application to arguing that Purkey's complaint alleges “core habeas” claims that he was required to bring in his district of confinement, the Southern District of Indiana, rather than the district in which several federal officers responsible for his execution are located, the District of Columbia. That is not clearly correct: When an individual advances a [*Ford*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986132787&pubNum=0000780&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))claim, “the only question raised is not whether, but when, his execution may take place.”  That seems to make Purkey's allegations more akin to a method-of-execution claim than a “core habeas” claim challenging the validity of his death sentence. In any event, the Government's objection here is not that Purkey failed to raise a valid claim prohibiting his execution. Instead, the Government quibbles principally with the venue in which Purkey filed that claim. In this posture, that protest does not reflect an “extraordinary circumstanc[e ]” that justifies overturning a preliminary injunction. Nor does it support this Court's decision to shortcut judicial review and permit the execution of an individual who may well be incompetent.

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. . . . “[T]he question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue” rather than of subject-matter jurisdiction.  Whether Purkey should have filed in the District of Columbia or the Southern District of Indiana, it would be passingly strange to maintain, in the final hours before his capital sentence is to be carried out, that his selection of venue should automatically prevent him from developing what the District Court found to be a likely meritorious [*Ford*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986132787&pubNum=0000780&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) claim and request for a competency hearing. At a minimum, the Government has not carried its “especially heavy” burden of demonstrating that its “core habeas” argument presents a jurisdictional impediment to the District Court's preliminary injunction.

. . . . [T]the Government has not come close to showing that the District Court erred in finding Purkey likely to succeed on the merits of his [*Ford*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986132787&pubNum=0000780&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))claim and his request for a competency hearing. As noted, a forensic psychiatrist who conducted an in-person evaluation of Purkey in late 2019 averred that “[i]n [his] opinion, to a reasonable degree of medical certainty, at the time of the evaluation, Mr. Purkey lacked a rational understanding of the basis for his execution.” There is extensive evidence that Purkey earnestly and steadfastly believes that the Government plans to execute him not as punishment for murder, but in retaliation for his “protracted jailhouse lawyering” to expose prison abuses. Purkey even believes his counsel to be “part of the conspiracy against him and his efforts to litigate against the prison.” Consistent with such evidence, individuals have described Purkey's history of delusions, hallucinations, and paranoia. . . .

Against that extensive body of evidence, the Government principally maintains that the forensic psychiatrist, who unequivocally opined that Purkey lacked a rational understanding of the basis for his execution, was confused. According to the Government, the psychiatrist misinterpreted Purkey's failure to understand the reason for the scheduling of his execution as an inability to grasp the basis for his execution altogether. But even a cursory review of the psychiatrist's report reveals no such muddling of concepts. While the psychiatrist acknowledged that Purkey could “recite the fact that his execution is for the murder of Jennifer Long,” the psychiatrist continued that Purkey “lacks rational understanding of that fact” and can only “parro[t]” it “rather than hav[e] a rational understanding” of it.

The Government then insists that, even accepting as true Purkey's evidence of “a history of mental illness” and “paranoid delusional thinking,” such evidence “does not demonstrate incompetency under [*Ford*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986132787&pubNum=0000780&originatingDoc=Idca90427c1ef11eabea4f0dc9fb69570&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).” But the question before the District Court at the preliminary-injunction stage was not whether Purkey conclusively is unable to comprehend the basis for his punishment. Instead, the District Court needed only conclude that Purkey would be likely to succeed in establishing a “ ‘substantial threshold showing’ ” of incompetence to warrant a competency hearing, or his actual incompetence to be executed. On this record, the District Court correctly concluded that Purkey met this preliminary burden. The Government's cursory arguments regarding the ultimate merits of Purkey's claims do not reveal this case to be an “extraordinary” one justifying the Court's second-guessing of the District Court's highly factbound assessment.

Finally, there can be no serious dispute that the remaining equitable considerations at issue heavily favor Purkey. Although the Government and the family members of the victim have a legitimate interest in punishing the guilty, that interest must be measured against Purkey's and the public's interest in ensuring that such punishment comports with the Constitution. At the same time, proceeding with Purkey's execution now, despite the grave questions and factual findings regarding his mental competency, casts a shroud of constitutional doubt over the most irrevocable of injuries.

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