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

9 United States of America,

10 Plaintiff,

11 v.

12 Lezmond Mitchell,

13 Defendant.
14

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

ORDER

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

21 **I. Procedural History.**

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

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

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

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

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

19 On July 25, 2019, T.J. Watson, the warden of the Federal Correctional Complex at
20 Terre Haute, Indiana, served Mr. Mitchell with a letter indicating that, pursuant to 28
21 C.F.R. § 26.3(a)(1), the Director of the Bureau of Prisons ("BOP") had set December 11,
22 2019, as Mr. Mitchell's execution date ("2019 Letter"). The same day, in four pending
23 federal lethal injection lawsuits in the District Court for the District of Columbia, the
24 Government filed a notice indicating that it had adopted a revised lethal injection protocol
25 for federal death penalty sentences. Doc. 606-1, BOP Addendum.

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

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

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

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

3 **II. Motion to Stay.**

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

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

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

11 **A. Timeliness.**

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

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

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

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

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

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

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

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

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

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

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

28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 ///

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

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

12 Judge Tatel writes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 Doc. 606-4 at 7.

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

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

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

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

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

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

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

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

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

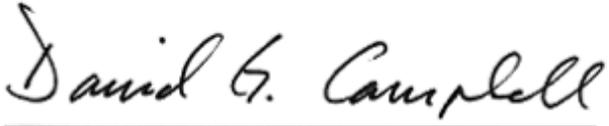
15 Mr. Mitchell identifies no procedures in Arizona statutes or criminal rules
16 concerning the means for effectuating death that conflict with the BOP protocol. The Court
17 therefore concludes that the government’s planned method of execution is not inconsistent
18 with the salient provisions of Arizona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

19 **IT IS ORDERED:**

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

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

23 Dated this 13th day of August, 2020.

24 

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

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