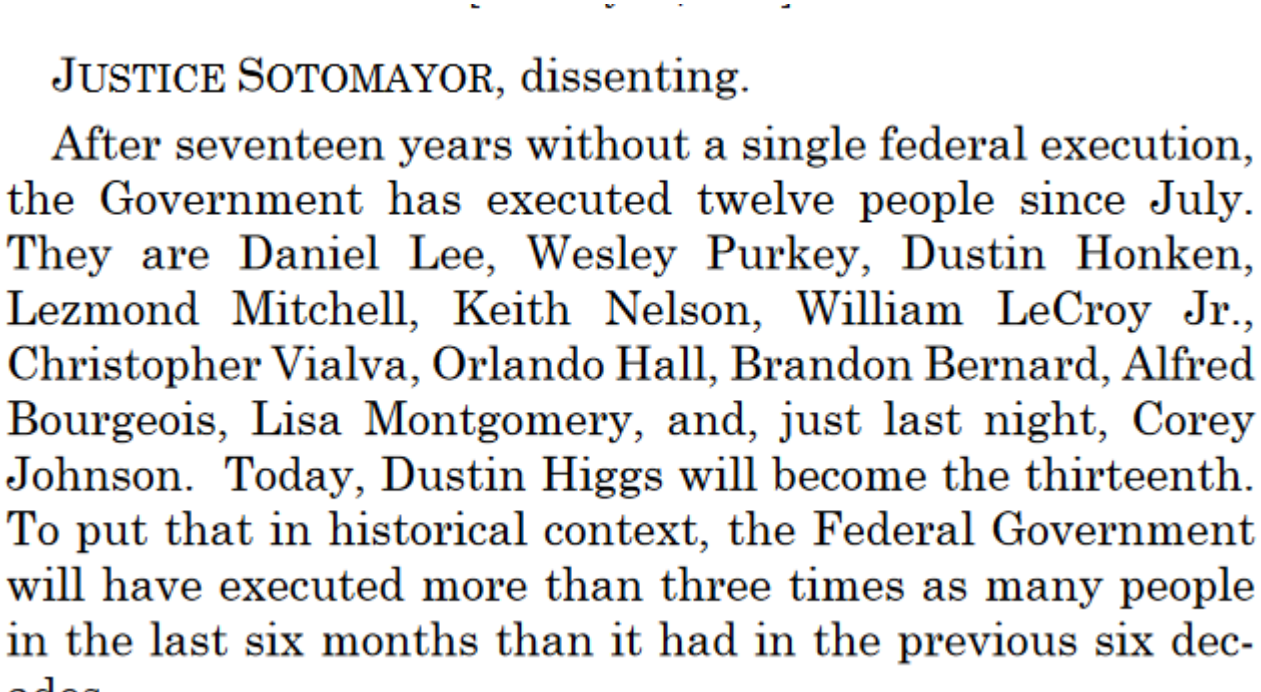
Twitter Thread by Scott Lemieux

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Tonight we have dissents from both Sotomayor and Breyer in the last instance of the Supreme Court waving the matador's cape for Trump's machinery of death without so much as a word of reasoned justification



JUSTICE SOTOMAYOR, dissenting.

After seventeen years without a single federal execution, the Government has executed twelve people since July. They are Daniel Lee, Wesley Purkey, Dustin Honken, Lezmond Mitchell, Keith Nelson, William LeCroy Jr., Christopher Vialva, Orlando Hall, Brandon Bernard, Alfred Bourgeois, Lisa Montgomery, and, just last night, Corey Johnson. Today, Dustin Higgs will become the thirteenth. To put that in historical context, the Federal Government will have executed more than three times as many people in the last six months than it had in the previous six decades.

Trump's DOJ has moved with unseemly haste in order to preempt credible legal challenges, and the Court has happily gone along

Against this backdrop of deep legal uncertainty, the DOJ did not tread carefully. Simultaneous with the announcement of the 2019 Protocol, it scheduled five executions; eight would follow in the months to come. This rapid pace required those facing execution to fast-track challenges to their sentences. Rather than permit an orderly resolution of these suits, the Government consistently refused to postpone executions and sought emergency relief to proceed before courts had meaningful opportunities to determine if the executions were legal.

"This is not justice"

Throughout this expedited spree of executions, this Court has consistently rejected inmates' credible claims for relief. The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale.

This is not justice. After waiting almost two decades to resume federal executions, the Government should have proceeded with some measure of restraint to ensure it did so lawfully. When it did not, this Court should have. It has not. Because the Court continues this pattern today, I dissent.

The Supreme Court did not meet the standard required to grant cert before a judgment by the lower court

imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." This Court's Rule 11. The Government falls far short of meeting this strict standard. Whether district courts can amend final orders and judgments in this situation is an open and novel question on which none of the courts of appeals have spoken. After failing to act since Higgs' sentence was imposed in 2001, the Government gives no compelling reason why it suddenly cannot wait a few weeks while courts give his claim the consideration it deserves. Certainly, there is no "imperative public importance" behind the Government's request. I would deny the Government's petition.

The actual reason for the extraordinary haste is that the people have chosen a president who opposes the death penalty, and the 6 bloodthirsty Republican-nominated justices want the executions to happen. But this is not a *legal* reason.

And this is a consistent theme with Trump's flurry of last-minute executions. People are executed with important and material legal questions being unresolved because the Court won't allow them to be

II

Sadly, it is not surprising that the Court grants this extraordinary request. Over the past six months, this Court has repeatedly sidestepped its usual deliberative processes, often at the Government's request, allowing it to push forward with an unprecedented, breakneck timetable of executions. With due judicial consideration, some of the Government's arguments may have prevailed and some or even many of these executions may have ultimately been allowed to proceed. Others may not have been. Either way, the Court should not have sanctioned these executions without resolving these critical issues. The stakes were simply too high.

A

The Supreme Court, without explanation, allowed the execution of two prisoners who the state allowed to get COVID-19, increasing the risk that lethal injection tortured them to death.

This Court repeated this error just this week. On December 16, 2020, both Corey Johnson and Dustin Higgs tested positive for COVID–19. They quickly moved to enjoin their executions, arguing that lung damage caused by the virus substantially increased the likelihood they would suffer torturous effects if executed with pentobarbital. The District Court held an evidentiary proceeding and agreed. *In re Federal Bureau of Prisons' Execution Protocol Cases*, ___ F. Supp. 3d ___, ___–___, 2021 WL 106576, *5–*9 (DDC, Jan. 12, 2021). This time, the Court of Appeals stayed the injunction, relying on this Court's flawed decision in *Lee*. Order in *Roane* v. *Rosen*, No. 21–5004, p. 4 (CADC, Jan. 13, 2021) (Katsas, J., concurring). This Court left that ruling in place, again allowing these executions to proceed despite the District Court's careful fact-finding and the risk of needless and significant pain.

Brandon Bernard did not kill anybody, and almost certainly only got a capital sentence because the prosecution withheld evidence and elicited false testimony, but was unable to get these claims adjudicated before Trump, Barr, and the Roberts 6 killed him.

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Two of the Trump/Barr/Roberts executions almost certainly violated the federal statutory prohibition on executing mentally handicapped people

Another outstanding question concerns the FDPA's provision that "[a] sentence of death shall not be carried out upon a person who is [intellectually disabled]." 18 U. S. C. §3596(c). Alfred Bourgeois and Corey Johnson presented substantial evidence that they were intellectually disabled

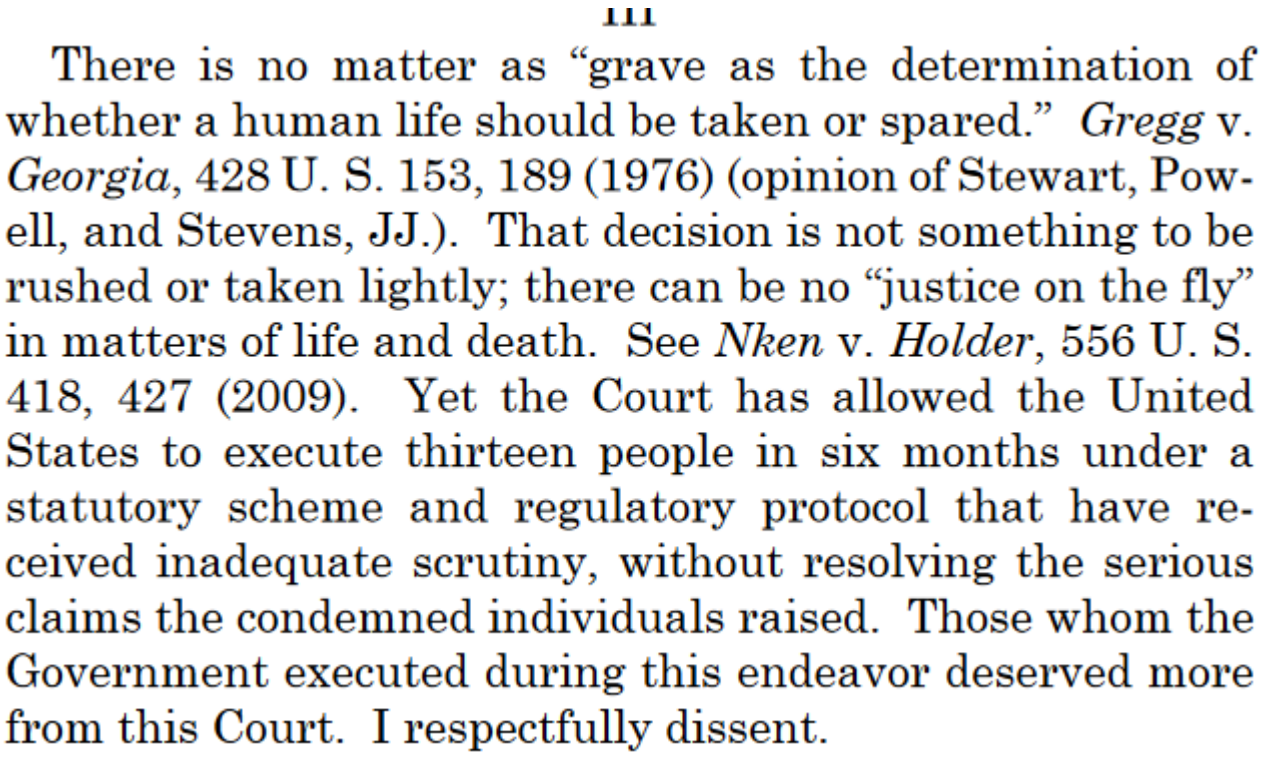
More on Corey Johnson's case here: https://t.co/GOZEvujyrU

Two of the Trump/Barr/Roberts executions involved prisoners so mentally ill they probably didn't understand wt they were being killed, and who once again did not get a fair hearing for their claims:

Finally, consider Wesley Purkey and Lisa Montgomery, whose executions this Court allowed even though the district courts concluded they were likely to succeed in showing that they had no "'rational understanding' of why the State want[ed] to execute [them]." See *Madison* v. *Alabama*, 586 U. S. ___, ___ (2019) (slip op., at 17) (quoting *Panetti*, 551 U.S., at 958). Wesley Purkey suffered from Alzheimer's disease. Thousands of pages of evidence suggested that he earnestly and steadfastly believed that the Government planned to execute him in retaliation for his "protracted jailhouse lawyering" to expose prison abuses. Electronic Case Filing in No. 1:19–cv–3570 (DDC), Doc. 1-18, p. 12; see also *Barr* v. *Purkey*, 591 U. S ___, ___–___ (2020) (SOTOMAYOR, J., dissenting) (slip op., at 4–5). The District Court therefore preliminarily enjoined Purkey's execution. Skipping over the Court of Appeals, the Government sought immediate relief from this Court, which vacated the injunction without comment.

A reminder that Lisa Montgomery's mental illnesses and disabilities were largely the product of having her spent her teenage years being gang-raped by her stepfather and abused and trafficked by her mother. Executing her is an unspeakably vile act https://t.co/u1IeJOBp98

The Republican majority of the Roberts Court has, quite simply, refused to adequately perform one of its gravest responsibilities because it fears a democratically elected president will not share their appetite for death. Absolutely appalling.



111

There is no matter as "grave as the determination of whether a human life should be taken or spared." *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). That decision is not something to be rushed or taken lightly; there can be no "justice on the fly" in matters of life and death. See *Nken* v. *Holder*, 556 U. S. 418, 427 (2009). Yet the Court has allowed the United States to execute thirteen people in six months under a statutory scheme and regulatory protocol that have received inadequate scrutiny, without resolving the serious claims the condemned individuals raised. Those whom the Government executed during this endeavor deserved more from this Court. I respectfully dissent.

And keep this in mind when Republican elites give the "but muh judges" defense of supporting 4 years of Trump's depravity. What they want judges to do is stuff like "allow the state to kill a bunch of people, many of them severely mentally handicapped, without due process."

Also worth adding that Dustin Higgs also did not kill anybody. These cases illustrate the idea that the death penalty is applied only to the most serious offenders is farcical https://t.co/3NUlc402bg

> This is my story about the case. Higgs was not the triggerman in the murder of Tamika Black, Tanji Jackson and Mishann Chinn\u2014the government concedes this. The man who was the shooter later said the prosecution\u2019s theory was \u201cbullshit.\u201d https://t.co/Za8lcSB3zN
>
> — Liliana Segura (@LilianaSegura) January 16, 2021

Dustin Higgs has officially become the 13th person executed in a last minute flurry of arbitrary violence by the worst president in American history https://t.co/7g3poxWvyG

> Dustin Higgs was pronounced dead at 1:23 a.m. Saturday, Jan. 16 at FCC-TH. His final words, \u201cFirst, I\u2019d like to state I am an innocent man.\u201d He named the three victims, then said, \u201cI am not responsible for their deaths and I did not order the murders.\u201d
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> — TribStarLisa (@TribStarLisa) January 16, 2021