UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,	)	
LEAD CASE: *Roane, et al. v. Barr*	)	Case No. 19-mc-145 (TSC)
THIS DOCUMENT RELATES TO:	)	
Lee v. Barr, et al., 19-cv-2559	)	
Purkey v. Barr, et al., 19-cv-3214	)	
Nelson v. Barr, et al., 20-cv-557	)	

MEMORANDUM OPINION

In *Callins v. Collins*, Justice Blackmun, writing in dissent, declared that he would "no longer . . . tinker with the machinery of death." 510 U.S. 1141, 1145 (1994). More than twenty-five years later, this court is tasked with doing just that, in addressing challenges to the manner in which the federal government seeks to execute inmates who have been sentenced to death under federal statutes.

After a hiatus in federal executions of more than fifteen years, on July 25, 2019, the U.S. Department of Justice (DOJ) announced plans to execute five inmates who had been sentenced to death under the federal death penalty statute.[1] *See* Press Release, Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-

[1] Plaintiffs Bourgeois, Mitchell, Lee, and Purkey were sentenced under the Federal Death Penalty Act, 18 U.S.C. §§ 3591–3599. Plaintiff Honken was sentenced under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e).

decade-lapse. To implement these executions, the Federal Bureau of Prisons (BOP) adopted a new execution protocol: the 2019 Protocol. (ECF No. 39-1, Admin. R. at 1021–75.)

On November 20, 2019, the court preliminarily enjoined the executions of four inmates: Alfred Bourgeois, Daniel Lewis Lee, Dustin Lee Honken, and Wesley Ira Purkey. (ECF No. 50, Mem. Op. (2019 Order), at 15.) The court found that these four Plaintiffs had demonstrated a likelihood of success on the merits of their claims that the 2019 Protocol violates the Federal Death Penalty Act (FDPA), but the court did not rule on their other statutory and constitutional claims. (*Id.* at 13–14.) In April of this year, a divided D.C. Circuit panel vacated the preliminary injunction. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 113 (D.C. Cir. 2020), *cert. denied sub nom. Bourgeois v. Barr*, No. 19-1348, 2020 WL 3492763 (June 29, 2020). That Court based its ruling solely on the Plaintiffs' claims under the FDPA and the APA, and noted that "regardless of our disposition, several claims would remain open on remand." *Execution Protocol Cases*, 955 F.3d at 113 (per curiam).

On June 15, 2020, the DOJ and BOP scheduled new execution dates for three of the four Plaintiffs whose executions had been preliminarily enjoined by the 2019 Order. (ECF No. 99, Defs. Notice Regarding Execution Dates.) Defendants intend to execute Lee on July 13, 2020, Purkey on July 15, 2020, and Honken on July 17, 2020. (*Id.*) Keith Dwayne Nelson is scheduled for execution on August 28, 2020. (*Id.*)

Because these four Plaintiffs are scheduled to be executed before their claims can be fully litigated, they have asked this court, pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65.1, to preliminarily enjoin Defendants from executing them while they litigate their remaining claims. (ECF No. 102, Pls. Mot. for Prelim. Inj.)

On July 2, 2020, the Seventh Circuit stayed Purkey's execution, and at the time of this filing, that stay remains in place.[2] *Purkey v. United States*, No. 19-3318, 2020 WL 3603779 (7th Cir. July 2, 2020). On July 10, 2020, the Southern District of Indiana preliminarily enjoined Lee's execution, *see Peterson v. Barr*, No. 2:20-cv-350 (S.D. Ind. July 10, 2020), ECF No. 21, but on July 12, 2020, the Seventh Circuit vacated the injunction. *See Peterson v. Barr*, No. 20-2252 (7th Cir. July 12, 2020).

The last-minute nature of this ruling is unfortunate, but no fault of the Plaintiffs. *Cf. Bucklew v. Precythe*, 139 S. Ct. 112, 1134 (2019) ("the last-minute nature of an application that could have been brought earlier . . . may be grounds for denial of a stay.") (internal quotations omitted). The succession of last-minute rulings is the result of the Government's decision to set short execution dates even as many claims, including those addressed here, were pending.[3] The Government is entitled to choose dates, but the court cannot take short cuts in its obligations in order to accommodate those dates. As the Seventh Circuit wrote last week, "just because the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so." *Purkey v. United States*, 2020 WL 3603779, at *11.

I. BACKGROUND

The Eighth Amendment to the Constitution provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.

[2] Because the Seventh Circuit affirmed the district court's denial of Purkey's petition for writ of habeas corpus, and only temporarily stayed his execution "pending the completion of proceedings in the Seventh Circuit," this court finds it appropriate to preliminarily enjoin his execution as well as those of the other Plaintiffs. *Id.* at *11.

[3] Three Plaintiffs filed complaints shortly after the DOJ announced the 2019 Protocol, months before their initially scheduled executions, and Nelson filed his complaint before Defendants even announced his execution date.

CONST. amend. VIII. The Supreme Court declared capital punishment constitutional in 1976, in *Gregg v. Georgia*. 428 U.S. 153, 187 (1976) (lifting a *de facto* moratorium on the death penalty). Therefore, "there must be a constitutional means of carrying it out." *Glossip v. Gross*, 135 S. Ct. 2726, 2732–33 (2015) (citation omitted). Balancing the constitutional legitimacy of capital punishment with the Eighth Amendment's prohibition on cruel and unusual methods of execution has long been the subject of intense debate and litigation since the advent of hanging, electrocution, and, most recently, lethal injection. *Baze v. Rees*, 553 U.S. 35, 41–42 (2008).

The Supreme Court first addressed the application of the Eighth Amendment to lethal injection in *Baze*, upholding Kentucky's then-practice of execution by injection with a three-drug combination: (1) sodium thiopental, a fast-acting barbiturate sedative; (2) pancuronium bromide, a paralytic agent that paralyzes the body and stops the lungs; and (3) potassium chloride, which induces cardiac arrest. *Id.* at 44. The plaintiffs in that case conceded that, if administered properly, the three drugs in combination eliminated any "meaningful risk" that the inmate would experience severe pain but argued that the risk of improper administration was so significant that the protocol violated the Eighth Amendment. *Id.* at 49.

Although the Court upheld Kentucky's use of the three-drug injection in *Baze*, state methods have changed in recent years. Many of the companies that manufacture drugs such as sodium thiopental have either ceased production or declined to sell them to states for use in executions. *Glossip*, 135 S. Ct. at 2733. Some states have sought to maintain their three-drug protocols while replacing sodium thiopental with sedatives such as propofol, pentobarbital sodium, and midazolam, the latter of which was upheld by the Supreme Court in *Glossip*. *Id.* at 2731. Other states have opted to conduct executions with a single-drug protocol consisting of a lethal dose of a single sedative. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1120 (2019).

The federal government has likewise changed its execution protocol. In 2005, three federal death row inmates sued, alleging that their executions were to be administered under an unlawful and unconstitutional execution protocol. *Roane v. Gonzales*, 1:05-cv-02337 (D.D.C.), ECF No. 1 ¶ 2. The court preliminarily enjoined their executions. *Roane*, ECF No. 5. Four other death row inmates intervened, and their executions were enjoined as well. *See Roane*, ECF Nos. 23, 27, 36, 38, 67, and 68. During this litigation, the government produced a 50-page document (2004 Main Protocol) outlining BOP execution procedures. *Roane*, ECF No. 179-3. The government then produced two three-page addenda to the 2004 Main Protocol. *See Roane*, ECF No. 177-3 (Addendum to Protocol, July 1, 2007) (the 2007 Addendum); ECF No. 177-1 (Addendum to Protocol, Aug. 1, 2008) (the 2008 Addendum). In 2011 the DOJ announced that the BOP did not have the drugs it needed to implement the 2008 Addendum. *See* Letter from Office of Attorney General to National Association of Attorneys General, (Mar. 4, 2011), https://files.deathpenaltyinfo.org/legacy/documents/2011.03.04.holder.letter.pdf. The government informed the court that the BOP "has decided to modify its lethal injection protocol but the protocol revisions have not yet been finalized." *Roane*, ECF No. 288 at 2. In response, the court stayed the *Roane* litigation.

No further action was taken in the cases for over seven years. On July 24, 2019, the DOJ announced a new addendum to the execution protocol, (Admin. R. at 874–78), replacing the three-drug protocol of the 2008 Addendum with a single drug: pentobarbital sodium. (*Id.* at 879–80.) The BOP also adopted a new protocol to replace the 2004 Main Protocol. (*Id.* at 1021–72.) The 2019 Protocol provides for three injections, the first two containing 2.5 grams of pentobarbital in 50 milliliters of diluent each, and the third containing 60 milliliters of a saline flush. (*Id.* at 880.) The 2019 Protocol makes no reference to the form or source of the drug, or

measures of quality control, and its description of the intravenous administration of the drug simply provides that the Director or designee "shall determine the method of venous access" and that "[i]f peripheral venous access is utilized, two separate lines shall be inserted in separate locations and determined to be patent by qualified personnel." (*Id.*)

Following this announcement, the court held a status conference in *Roane* on August 15, 2019. (*See* Minute Entry, Aug. 15, 2019.) In addition to the *Roane* plaintiffs, the court heard from counsel for three other death row inmates, all of whom cited the need for additional discovery on the new protocol. (*See* ECF No. 12, Status Hr'g Tr.) The government indicated that it was unwilling to stay the executions, and the court bifurcated discovery and ordered Plaintiffs to complete 30(b)(6) depositions by February 28, 2020, and to file amended complaints by March 31, 2020. (*See* Minute Entry, Aug. 15, 2019.)

Four inmates with scheduled execution dates filed complaints or motions to intervene in the *Roane* action challenging the 2019 Protocol, and they each subsequently moved to preliminarily enjoin their executions.[4] On November 20, 2019, the court granted the four Plaintiffs' motions for preliminary injunction, finding that they had demonstrated a likelihood of success on their claims that the 2019 Protocol exceeds statutory authority. (Mem. Op. at 13, 15.) The court did not rule on Plaintiffs' other claims, including that the 2019 Protocol is arbitrary and capricious under the Administrative Procedure Act (APA), that it violates the Food, Drug,

[4] Lee filed his complaint on August 23, 2019 (*see Lee v. Barr*, 1:19-cv-02559 (D.D.C.), ECF No. 1), and his motion for a preliminary injunction on September 27, 2019. (ECF No. 13, Lee Mot. for Prelim. Inj.) On August 29, 2019, Bourgeois moved to preliminarily enjoin his execution. (ECF No. 2, Bourgeois Mot. for Prelim. Inj.) Honken filed an unopposed motion to intervene in *Lee v. Barr*, which was granted. (ECF No. 26, Honken Mot. to Intervene.) He then moved for a preliminary injunction on November 5, 2019. (ECF No. 29, Honken Mot. for Prelim. Inj.) Purkey filed a complaint and a motion for a preliminary injunction under a separate case number, 1:19-cv-03214, which was consolidated with *Roane*. (ECF No. 34, Purkey Mot. for Prelim. Inj.)

and Cosmetic Act (FDCA) and the Controlled Substances Act (CSA), that it violates Plaintiffs' right to counsel in violation of the First, Fifth, and Sixth Amendments, and that it is cruel and unusual in violation of the Eighth Amendment. (*Id.* at 13.) Following the court's order, three additional death row inmates filed complaints under separate case numbers, which in turn were consolidated with *Roane*.[5] Defendants moved to stay the court's preliminary injunction, which the court denied. (*See* Minute Order, Nov. 22, 2019.) The D.C. Circuit likewise denied Defendants' motion to stay, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-5322 (D.C. Cir. Dec. 2, 2019), as did the United States Supreme Court on December 6, 2019. *Barr v. Roane*, 140 S. Ct. 353 (2019). However, three Justices issued a statement indicating their belief that Defendants were likely to prevail on the merits. *Id.*

Defendants also filed an interlocutory appeal of the court's 2019 Order on November 21, 2019. (*See* ECF No. 52.) On April 7, 2020, the D.C. Circuit reversed. *Execution Protocol Cases*, 955 F.3d at 108. Neither of the two judges on the panel who voted to reverse agreed on the FDPA's statutory requirements. *Id.* at 112 (per curiam). Nonetheless, they agreed that Plaintiffs were unlikely to prevail on the merits of their claims that the 2019 Protocol exceeds statutory authority. *Id.* The panel expressly declined to rule on Plaintiffs' remaining statutory and constitutional claims, as "the government did not seek immediate resolution of all the plaintiffs' claims" and the claims "were neither addressed by the district court nor fully briefed in this Court." *Id.* at 113. The Court of Appeals denied Plaintiffs' petition for rehearing en banc on May 15, 2020, and the Supreme Court denied Plaintiffs' application for a stay of the mandate and petition for a writ of certiorari on June 29, 2020. *Bourgeois*, 2020 WL 3492763.

[5] These plaintiffs are Norris G. Holder, Jr., 1:19-cv-3520; Brandon Bernard, 1:20-cv-474; and Keith Dwayne Nelson, 1:20-cv-557.

Meanwhile, Plaintiffs filed their Amended Complaint on June 1, 2020, (ECF No. 90, Am. Compl.), the same day Holder filed a separate supplemental complaint. (ECF No. 94, Holder Compl.)

On June 15, 2020, the DOJ announced new execution dates for Plaintiffs. (Defs. Notice Regarding Execution Dates.) Four days later, Plaintiffs filed a joint motion for a preliminary injunction on the basis of their unresolved claims. (Pls. Mot. for Prelim. Inj.) Plaintiffs thus ask the court to preliminarily enjoin Defendants from executing Lee, Purkey, Honken, and Nelson while they litigate their claims.

II. ANALYSIS

The court's 2019 Order sets forth the legal standard for considering a motion for a preliminary injunction, which is an "extraordinary remedy" requiring courts to assess four factors: (1) the likelihood of the plaintiff's success on the merits, (2) the threat of irreparable harm to the plaintiff absent an injunction, (3) the balance of equities, and (4) the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008) (citations omitted); *John Doe Co. v. Consumer Fin. Prot. Bureau,* 849 F.3d 1129, 1131 (D.C. Cir. 2017). The D.C. Circuit has traditionally evaluated claims for injunctive relief on a sliding scale, such that "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius,* 644 F.3d 388, 392 (D.C. Cir. 2011). It has been suggested, however, that a movant's showing regarding success on the merits "is an independent, free-standing requirement for a preliminary injunction." *Id.* at 393 (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)).

A. Likelihood of Success on the Merits of Plaintiffs' Eighth Amendment Claims

Plaintiffs bringing an Eighth Amendment challenge to the method of execution face a high bar. They must demonstrate that the 2019 Protocol presents a "substantial risk of serious harm," and they must identify an alternative method of execution that will significantly reduce the risk of serious pain and that is feasible and readily implemented. *Glossip*, 135 S. Ct. at 2737; *see also Bucklew*, 139 S. Ct. at 1129 (confirming that "anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test.").

1. Substantial Risk of Serious Harm

It is not enough for Plaintiffs to argue that Defendants' planned use of pentobarbital will potentially cause pain. "[B]ecause some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain." *Glossip*, 135 S. Ct. at 2733. For the 2019 Protocol to constitute cruel and unusual punishment in violation of the Eighth Amendment, Plaintiffs must show that it presents a risk of severe pain that is "sure or very likely to cause serious illness and needless suffering" and gives rise to "sufficiently imminent dangers," such that prison officials cannot later plead "that they were subjectively blameless." *Baze*, 553 U.S. at 49–50 (citations omitted). Although the Supreme Court has cautioned against federal courts becoming "boards of inquiry charged with determining 'best practices' for executions," *id.* at 51, this question necessarily requires some weighing of scientific evidence. *See, e.g.*, *Glossip*, 135 S. Ct. at 2739 (affirming district court's findings that midazolam was "highly likely" to render inmates unable to feel pain during execution).

The scientific evidence before the court overwhelmingly indicates that the 2019 Protocol is very likely to cause Plaintiffs extreme pain and needless suffering during their executions. The declarations submitted by Plaintiffs' experts illustrate that the majority of inmates executed

via pentobarbital injection suffered flash pulmonary edema during the procedure. (*See* ECF No. 26-12, Expert Decl. of Mark Edgar, ¶ 74; ECF No. 24, Expert Decl. of Gail Van Norman, Autopsy Findings, at 85.) Pulmonary edema, which interferes with breathing, "produces sensations of drowning and asphyxiation" resulting in "extreme pain, terror and panic." (Edgar Decl., ¶¶ 78–80.)

Eyewitness accounts of executions using pentobarbital describe inmates repeatedly gasping for breath or showing other signs of respiratory distress, and indicate that flash pulmonary edema is common and extremely painful. (*Id.*) Dr. Gail Van Norman concluded that it is a "virtual medical certainty that most, if not all, prisoners will experience excruciating suffering, including sensations of drowning and suffocation" during an execution conducted in accordance with the 2019 Protocol. (Van Norman Decl. ¶ 18.)

Defendants urge the court to disregard these findings. They first contend that the Supreme Court has already upheld similar methods of execution, and that the pain associated with pulmonary edema is not severe enough to render the 2019 Protocol unconstitutional. (*See* ECF No. 113-1, Defs. Opp. to Pls. Mot., at 22–25.) But the cases upon which Defendants rely are inapposite. Neither *Baze* nor *Glossip* involved a single-drug protocol or the use of pentobarbital, and the fact that some plaintiffs in those and other cases suggested that pentobarbital would be a constitutional alternative does not invalidate the expert testimony before the court, which indicates otherwise. *Glossip*, 135 S. Ct. at 2738; *Baze*, 553 U.S. at 56–57. *Bucklew* did involve a challenge to pentobarbital, but one unique to that plaintiff's medical condition—he argued that vascular tumors caused by his cavernous hemangioma would prevent the pentobarbital from working as intended, and thus brought an as-applied challenge to a procedure that he conceded was "constitutional in most applications." 139 S. Ct. at 1118, 1120.

Plaintiffs, of course, concede no such thing, and in fact allege the opposite. (*See* Pls. Mot. for Prelim. Inj. at 34.)

Defendants also urge the court to follow the Sixth Circuit's recent decision, *In re Ohio Execution Protocol Litigation*, which rejected an Eighth Amendment claim based on the risk of pulmonary edema during execution, and which Plaintiffs claim misinterpreted *Bucklew*. 946 F.3d 287 (6th Cir. 2019), (Pls. Mot. for Prelim. Inj. at 35 n.12.) Defendants initially relied on the Sixth Circuit's holding that "neither pulmonary edema nor the symptoms associated with it qualify as the type of serious pain prohibited by the Eighth Amendment," but after the first round of briefing in this case last year, the Sixth Circuit issued an amending and superseding opinion omitting this language. *Compare* 937 F.3d 759, 762 (6th Cir. 2019), *with* 946 F.3d at 290. Although the Sixth Circuit's amended opinion does suggest that the risk of pain associated with sensations of drowning and suffocation is akin to that of hanging, it does not reach a conclusion as to whether pulmonary edema can result in pain that is so severe as to violate the Eighth Amendment. 946 F.3d at 290.

In any event, this case is factually distinct from *Ohio Execution Protocol.* That case not only involved a different execution protocol using a different drug—a three-drug protocol employing midazolam as the first drug rather than a one-drug protocol relying exclusively on pentobarbital—but it held that the plaintiff had failed to provide "evidence showing that a person deeply sedated by a 500 milligram dose of midazolam is still 'sure or very likely' to experience an unconstitutionally high level of pain." *Id.* Here, Plaintiffs have amassed an extensive factual record, and their experts have concluded that there is a "virtual medical certainty" that the 2019 Protocol will result in "excruciating suffering." (Van Norman Decl. at 7.)

Defendants do not contest Plaintiffs' evidence that the majority of individuals executed via pentobarbital suffer flash pulmonary edema, but they have submitted expert testimony arguing that the pulmonary edema occurs either post-mortem or after the inmate has been rendered insensate. (*See* Defs. Opp. to Pls. Mot. at 12–13; ECF No. 111-4, Expert Decl. of Joseph Antognini, ¶ 8.) Thus, the question of whether the 2019 Protocol is significantly likely to cause serious pain turns on the narrower question of whether the pentobarbital is likely to render inmates insensate or dead before they experience the symptoms of pulmonary edema.

Plaintiffs have the better of the scientific evidence on this question. Dr. Van Norman demonstrates that flash pulmonary edema can only occur in still-living subjects, and that it develops "almost instantaneously" following injection. (ECF No. 117-1, Supp. Decl. of Gail Van Norman, ¶¶ 19–24.) Defendants argue that Plaintiffs concede that pentobarbital renders patients insensate very rapidly, (Defs. Opp. to Pls. Mot. at 12), but the evidence indicates no such concession. Dr. Van Norman specifically states that barbiturates like pentobarbital render patients "unresponsive" but still conscious and capable of experiencing the severe pain associated with flash pulmonary edema. (Van Norman Supp. Decl. ¶¶ 10–13, 21.) While Dr. Antognini disputes these findings, he does not undermine them. (*See* ECF No. 122-2, Supp. Decl. of Joseph Antognini, ¶¶ 20–23.) Dr. Van Norman's conclusion is also supported by eyewitness accounts of previous executions using pentobarbital, in which inmates visibly gasped for breath, and autopsies that revealed "foam or froth" in the inmates' airways, a phenomenon that occurs when the edema fluid mixes with air while the inmate is still attempting to breathe. (*See, e.g.*, Edgar Decl. ¶¶ 78–79.)

While it is difficult to weigh competing scientific evidence at this relatively early stage, the factual record indicates that Plaintiffs are likely to succeed on the merits of their claims that

the 2019 Protocol poses a substantial risk of serious pain. They have thus met the first prong of their burden on their Eighth Amendment claims.

2. Known and Available Alternatives

Plaintiffs argue that several alternative methods of execution will significantly reduce the substantial risk of serious pain. (Pls. Mot. for Prelim. Inj. at 36–40.)

Procedural safeguards. Plaintiffs claim Defendants could implement a number of procedural safeguards, including (1) requiring the use of two functioning peripheral IV lines and placing limits on the use of a central line, (2) administering the lethal-injection protocol bedside, and (3) implementing additional procedures to respond to unexpected occurrences. (*Id.* at 37–39.)

Defendants correctly characterize these proposals as mere "failsafes" that do not render the planned method of execution unconstitutional. *Baze*, 553 U.S. at 60–61. Plaintiffs' proposal regarding the placement of IV lines is the type of "slightly or marginally safer alternative" that the Supreme Court has previously rejected. *Id.* at 51. Moreover, the vague suggestion of adding procedures to better respond to problems that may arise during the execution seems aimed at an "isolated mishap," rather than the substantial risk of serious pain from the use of pentobarbital. *See id.* at 50. The alleged benefits of bedside administration of pentobarbital are likewise aimed at reducing the risk of maladministration. (*See* Pls. Mot. for Prelim. Inj., at 38–39.) In sum, it appears likely that implementing these measures would result in a "minor reduction in risk" at best. *Bucklew*, 139 S. Ct. at 1130.

Pre-dose of opioid pain or anti-anxiety medication. Plaintiffs have demonstrated that a pre-dose of certain opioid pain medication drugs, such as morphine or fentanyl, will significantly reduce the risk of severe pain during the execution. (Pls. Mot. for Prelim. Inj. at 36–37; ECF No.

25, Expert Decl. of Craig Stevens, ¶¶ 15–16.) Defendants argue that this proposal lacks sufficient detail, that no state currently uses analgesics in its execution procedures, and that pentobarbital alone is sufficiently painless. (Defs. Opp. to Pls. Mot. at 32.)

This court has already found that pentobarbital alone poses an unconstitutionally significant risk of serious pain, and it finds Defendants' remaining arguments to be unavailing. While *Bucklew* emphasized that a proposed alternative method of execution must be not just "theoretically feasible but also readily implemented," this simply means that the proposal must be "sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly." 139 S. Ct. at 1129 (internal quotation marks omitted). *See also id.* at 1128 (noting that the burden of identifying an alternative means of execution "can be overstated."). The class of medications identified by Plaintiffs, and the proposed dosage of morphine and fentanyl more specifically, meet this standard. (Stevens Decl. ¶¶ 7–16.)

The fact that other states have not adopted Plaintiffs' proposed method of using pain medication is also not dispositive. *See Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) ("I write to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law. . . . Importantly, all nine Justices today agree on that point.").

Defendants argue that as in *Bucklew and Baze*, Plaintiffs' proposed alternative has "no track record of successful use," *id.* at 1130, and is "untried and untested." *Baze*, 553 U.S. at 41. But this case presents a different scenario. In *Bucklew*, the plaintiff proposed execution by nitrogen hypoxia, but even after "extensive discovery," he provided only a "bare-bones" proposal premised on "unsupported, if not affirmatively contradicted" assertions regarding its effectiveness. 139 S. Ct. at 1121, 1129–30. In *Baze*, the plaintiff's proposal of a one-drug

protocol was offered "without any findings on [its] effectiveness" and relied heavily on comparisons to animal euthanasia. 553 U.S. at 56–58. Here, Plaintiffs' proposal is simpler, and is supported by substantial scientific evidence of its effectiveness in non-lethal human treatment. Moreover, the parties agree that Nebraska recently used a pre-dose of fentanyl for the precise purpose of reducing the risk of serious pain during an execution. In sum, Plaintiffs have not proposed a complex medical procedure, lacking in detail and possibly requiring years of further research, but a simple addition to the execution procedure that is likely to be as effective as it is easily and quickly administered. *See Bucklew*, 139 S. Ct. at 1129.

Finally, Defendants contend that the BOP already considered and rejected using fentanyl in executions, in part due to speculation that manufacturers would refuse to supply it. (Defs. Opp. to Pls. Mot. at 32.) Although Defendants do not make the same argument regarding the availability of morphine, it is true that the government cannot be faulted for failing to use a drug it has been unable to obtain through good-faith efforts. *Glossip*, 135 S. Ct. at 2738. But Defendants have provided no evidence of such efforts; they merely assert that manufacturers would "most likely" resist efforts to use fentanyl in executions. (Admin. R. at 869.) This is a far cry from showing that they are unable to procure fentanyl for Plaintiffs' executions.

Firing squad. Alternatively, Plaintiffs proffer execution by firing squad. (Pls. Mot. for Prelim. Inj. at 39–40.) Because that method of execution is feasible, readily implemented, and would significantly reduce the risk of severe pain, it satisfies the *Blaze-Glossip* requirements for proposed alternatives. Execution by firing squad is currently legal in three states, Utah, Oklahoma, and Mississippi, and can hardly be described as "untried" or "untested" given its historical use as a "traditionally accepted method of execution." *Bucklew*, 139 S. Ct. at 1125.

Furthermore, the last execution by firing squad in the United States occurred just over a decade ago, on June 18, 2010, in Utah.

Both the historical use of firing squads in executions and more recent evidence suggest that, in comparison to the 2019 Protocol, execution by firing squad would significantly reduce the risk of severe pain. *See, e.g.*, Deborah Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 688 (1994) ("A competently performed shooting may cause nearly instant death"); Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* 117, App. A. (2014) (calculating that, of all executions conducted since 1900, executions by firing squad had the lowest rate of "botched" executions—zero out of thirty-four—of any method).

Defendants point to several cases from other Circuits in which courts appeared skeptical of these conclusions. (Defs. Opp. to Pls. Mot. at 34–35.) Again, however, they overlook the Supreme Court's guidance in *Bucklew* that a plaintiff's burden in identifying an alternative method of execution "can be overstated" and that there is "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." 139 S. Ct. at 1128–29. Indeed, members of the Court, including at least one Justice in the *Bucklew* majority, have opined that the firing squad may be an immediate and sufficiently painless method of execution. *See, e.g.*, *id.* at 1136 (Kavanaugh, J., concurring); *Arthur v. Dunn*, 137 S. Ct. 725, 734 (2017) (Sotomayor, J., dissenting from denial of cert.) ("In addition to being near instant, death by shooting may also be comparatively painless."). Moreover, given that use of the firing squad is "well established in military practice," *Baze*, 553 U.S. at 102 (Thomas, J., concurring), Defendants are, if anything, more capable than state governments of finding "trained marksmen

who are willing to participate," and who possess the skill necessary to ensure death is near-instant and comparatively painless. *McGehee v. Hutchinson*, 854 F.3d 488, 494 (8th Cir. 2017).

Defendants also argue that execution by firing squad is not a "readily available" method of execution. It is true that, compared to the relative ease with which opioids could be added to the existing execution protocol, execution by firing squad would mean a complete transformation of the government's method of execution. Therefore, Defendants argue, the court should defer to the government's "legitimate reasons" for choosing not to adopt the firing squad as a method of execution—that legitimate reason being that the firing squad is so rarely used. (Defs. Opp. to Pls. Mot. at 36.)

Defendants' logic is somewhat circular. *See, e.g.*, *Arthur*, 137 S. Ct. at 729 (Sotomayor, J., dissenting from denial of cert.) (reasoning that allowing a state to conduct an unconstitutional execution simply because it declines to authorize any alternative "cannot be right"). *See also Bucklew*, 139 S. Ct. at 1128 ("The Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes."). Indeed, Defendants' argument implicitly asks the court to follow the Eleventh Circuit's holding that a proposed alternative method of execution must be authorized by law. *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1317–18 (11th Cir. 2016). Yet the Eleventh Circuit acknowledged last year that *Bucklew* "demonstrates our conclusion in *Arthur* was incorrect." *Price v. Comm'r, Ala. Dep't of Corr.*, 920 F.3d 1317, 1326 (11th Cir. 2019), *cert. denied sub nom. Price v. Dunn*, 139 S. Ct. 1542 (2019).

The court declines to opine on whether the firing squad would be an acceptable alternative method of execution in every case. However, it finds that Defendants could readily adopt Plaintiffs' proposal. Even if *Bucklew* is read as requiring Plaintiffs to plead a method of

execution that is currently authorized by at least one state, the firing squad is currently authorized by three states and was used relatively recently in one. More importantly, the federal government is uniquely capable of consulting with Utah and adopting its existing protocol. Defendants' final argument is that Plaintiffs' stated preference for execution by firing squad is insincere. (Defs. Opp. to Pls. Mot. at 37.) But the court notes that Plaintiffs have argued for it at length, and have adequately shown that it is readily implemented, available, and would significantly reduce the risk of severe pain. *Cf. Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) (rejecting possibility of execution by firing squad where the plaintiff had chosen not to plead it as an alternative).

Plaintiffs have identified two available and readily implementable alternative methods of execution that would significantly reduce the risk of serious pain: a pre-dose of opioid pain or anti-anxiety medication, or execution by firing squad. Thus, they have established a likelihood of success on the merits of their claims that the 2019 Protocol's method of execution constitutes cruel and unusual punishment in violation of the Eighth Amendment. Given this finding, the court need not reach Plaintiffs' other remaining claims.[6]

[6] The court is mindful of the prudential rule that when a case can be decided on purely statutory grounds, courts should avoid constitutional questions. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). But this "is a rule of prudence, not an absolute command." *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 351 (4th Cir. 2018) (Harris, J., concurring) (citations omitted), *vacated on other grounds*, 138 S. Ct. 2710 (2018); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2434 (2018) (Sotomayor, J., dissenting) ("That rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one."). Plaintiffs' remaining statutory claims raise novel and complex questions that, as Defendants themselves note repeatedly, could result in far-reaching and unpredictable consequences. In contrast, Plaintiffs' Eighth Amendment claims require the court to preliminarily enjoin the 2019 Protocol for the "more fundamental reason" that it creates an unconstitutionally significant risk of serious pain. *Id.*

B. Irreparable Harm

The court's analysis of irreparable harm is unchanged from its 2019 Order. In order to prevail on a request for preliminary injunction, irreparable harm "must be certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm," and it "must be beyond remediation." *League of Women Voters of U.S. v. Newby,* 838 F.3d 1, 7–8 (D.C. Cir. 2016) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)) (internal quotation marks and brackets omitted). Here, without injunctive relief, Plaintiffs would be unable to pursue their remaining claims, including the claims that the method of planned execution under the 2019 Protocol is cruel and unusual in violation of the Eighth Amendment, and would therefore be executed under a procedure likely to be unconstitutional. This harm is manifestly irreparable.

Other courts in this Circuit have found irreparable harm in similar, but less dire circumstances. *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (finding irreparable injury where plaintiffs faced detention under challenged regulations); *Stellar IT Sols., Inc. v. USCIS*, No. 18-2015 (RC), 2018 WL 6047413, at *11 (D.D.C. Nov. 19, 2018) (finding irreparable injury where plaintiff would be forced to leave the country under challenged regulations); *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 126–27 (D.D.C. 2015) (finding irreparable injury where challenged regulations would threaten company's existence); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 19 (D.D.C. 2009) (finding irreparable injury where challenged regulations would limit guest workers). No member of the D.C. Circuit panel on appeal challenged the court's finding in its 2019 Order that Plaintiffs would suffer irreparable harm absent preliminary relief, and Defendants do not dispute that irreparable harm is likely.

Based on the record before it, the court finds that Plaintiffs have shown that absent injunctive relief, they will suffer the irreparable harm of being executed under a likely unconstitutional procedure before their claims can be fully adjudicated.

C. Balance of Equities

Defendants argue that if the court preliminarily enjoins the 2019 Protocol, they will suffer the harm of having to delay the scheduled execution dates. (*See* Defs. Opp. to Pls. Mot. at 57.) The government's interest in the finality of criminal proceedings, including capital cases, is compelling. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). On the other hand, the fact that the government waited eight years to establish a new protocol undermines its arguments regarding the urgency and weight of that interest. The government may have had valid reasons to proceed with caution, but it can hardly now claim that any further delay would cause it substantial harm. The court notes that while almost eight months have passed since its 2019 Order, Plaintiffs still have not been afforded sufficient opportunity to evaluate the 2019 Protocol—it was Defendants who initially declined to stay Plaintiffs' executions to allow discovery on the Protocol. (Status Hr'g Tr. at 6, 10–11.)

Indeed, where the Supreme Court has been sympathetic to the government's need for finality in capital cases, it has generally been in cases where plaintiffs waited until the last minute to bring claims that could have been brought earlier, or engaged in a clear "attempt at manipulation" of the judicial process. *Bucklew*, 139 S. Ct. at 1134 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). Here, however, three of the four Plaintiffs filed their complaints shortly after the DOJ announced the 2019 Protocol, months before their initially scheduled executions, and Nelson filed his complaint before Defendants even announced his execution

date. Plaintiffs are not raising new claims that they could have brought in their initial complaints, but rather renewing the Eighth Amendment arguments made in their initial motions.

Given this background, the court finds that the potential harm to the government caused by a delayed execution is not substantial, and is outweighed by the irreparable harm Plaintiffs would face absent an injunction.[7]

D. Public Interest

As noted in the court's 2019 Order, the public interest is not served by executing individuals before they have had the opportunity to avail themselves of the legal process to challenge the legality of their executions. "Applying the law in a way that violates the Constitution is *never* in the public's interest." *Minney v. United States Office of Pers. Mgmt.*, 130 F. Supp. 3d 225, 236 (D.D.C. 2015) (emphasis in original). *See also Purkey v. United States*, 2020 WL 3603779, at *11 ("Just because the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so."); *Cooey v. Taft*, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006) ("The public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights."); *Harris v. Johnson*, 323 F. Supp. 2d 797, 810 (S.D. Tex. 2004) ("Confidence in the humane application of the governing laws . . . must be in the public's interest."). Accordingly, the court finds that the public interest is served by preliminarily enjoining Plaintiffs' executions because it will allow judicial review of whether the United States Government's planned execution protocol complies with the Eighth Amendment, and to ensure that it does so in the future.

[7] In his separate Opinion, Judge Katsas found that this was a case in which the balance of equities favored the government. *Execution Protocol Cases*, 955 F.3d at 126 (Katsas, J., concurring). However, he noted that this was partly because the claims then before the Court presented no "colorable dispute that pentobarbital will cause anything but a swift and painless death." *Id.* at 128–29. Plaintiffs' Eighth Amendment claims now raise precisely this dispute.

III. CONCLUSION

The court finds that at least one of Plaintiffs' claims has a likelihood of success on the merits, and that absent a preliminary injunction, Plaintiffs will suffer irreparable harm. It further finds that the likely harm that Plaintiffs would suffer if the court does not grant injunctive relief far outweighs any potential harm to Defendants. Finally, because the public is not served by short-circuiting legitimate judicial process, and is greatly served by attempting to ensure that the most serious punishment is imposed in a manner consistent with our Constitution, the court finds that it is in the public interest to issue a preliminary injunction. Accordingly, having reviewed the parties' filings, the record, and the relevant case law, and for the reasons set forth above, the court will GRANT Plaintiffs' Motion for a Preliminary Injunction. A corresponding order will be issued simultaneously.

Date: July 13, 2020

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE	**.**	**MC No. 19-0145 (TSC)**
FEDERAL BUREAU OF PRISONS'	**.**	**Washington, D.C.**
EXECUTION PROTOCOL CASES.	**.**	**Saturday, July 11, 2020**
. . . . . .	**.**	**1:00 P.M.**

TELEPHONE CONFERENCE
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff Daniel Lewis Lee:	**PIETER VAN TOL, ESQ.** **Hogan Lovells US LLP** **390 Madison Avenue** **New York, NY 10017** **(212) 918-3000**
For Plaintiff Wesley Ira Purkey:	**ALAN E. SCHOENFELD, ESQ.** **Wilmer Cutler Pickering** **Hale & Dorr, LLP** **7 World Trade Center** **250 Greenwich Street** **New York, NY 10007** **(212) 230-8800**
For Plaintiff Dustin Lee Honken:	**SHAWN NOLAN, ESQ.** **Federal Community Defender** **Eastern District of Pennsylvania** **601 Walnut Street** **Suite 545 West** **Philadelphia, PA 19106** **(215) 928-0520**
For Plaintiff Keith Dwayne Nelson:	**HARRY P. COHEN, ESQ.** **Crowell & Moring, LLP** **590 Madison Avenue** **20th Floor** **New York, NY 10022** **(212) 223-4000**

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Transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, we have the consolidation of cases in the lead case, 19-MC-145, In the Matter of Federal Bureau of Prisons' Execution Protocol cases. I'll ask that lead counsel identify yourselves one at a time, followed by defense counsel. Thank you.

MR. VAN TOL: Good afternoon, Your Honor.

This is Pieter Van Tol from Hogan Lovells for Plaintiff Daniel Lewis Lee.

THE COURT: All right. Thank you.

MR. SCHOENFELD: Good afternoon, Your Honor. This is Alan Schoenfeld from Wilmer Hale for Wes Purkey.

THE COURT: Can you spell your last name, please?

MR. SCHOENFELD: Sure. It's S-C-H-O-E-N-F-E-L-D.

THE COURT: Okay. Got it. Thank you.

MR. NOLAN: Good afternoon, Your Honor. This is Shawn Nolan, Federal Defender Office in Philadelphia, for Defendant Dustin Honken.

THE COURT: Nolan, you say? Was it Shawn Nolan?

MR. NOLAN: Yes. N-O-L-A-N.

THE COURT: Thank you. It's just that the connection drops a little at the end. Thank you.

MR. COHEN: And, Your Honor, this is Harry Cohen, C-O-H-E-N, with Crowell & Moring on behalf of Plaintiff Keith Nelson.

THE COURT: All right. Thank you all. I know it's a Saturday afternoon; it's the weekend. I appreciate you all being available for this. Events have changed rapidly in the last 24 hours.

So I want -- and I know you had requested a call, and I think, given the chief judge's opinion in Indiana yesterday, we probably would have needed to have this call in any event. So, as my law clerk probably told you, I anticipated filing a ruling yesterday by 6 p.m., but given a number of changing factors that need to be incorporated, I have not yet done so.

Oh, I'm sorry. The defendants. Are you on the line? I'm so sorry. We had so many people speaking, I didn't mean to forget you. Yes. Please state your name for the record.

MR. BURCH: This is Alan Burch at the U.S. Attorney's Office for the government. We also have Jean Lin with the Fed Programs Branch on behalf of the government.

THE COURT: Thank you, Mr. Burch and Ms. Lin. Thank you very much. I'm sorry about that. And thank you for taking time out of your weekend.

All right. Given the chief judge's ruling in the Lee case, I will need to incorporate some things that have just occurred, at least into the background of my opinion.

Now, Mr. Lee's counsel emailed yesterday and requested a conference to discuss two items: communication with chambers over the weekend, and pending litigation in other jurisdictions.

So let's start with communication with chambers. And I'm not sure if that's as urgent as we thought it would be yesterday morning because it looks like Mr. Lee's execution, at least, is currently enjoined. We frequently check chambers' email during the day and over the weekend.

Are there additional questions or concerns about how to contact chambers during the weekend or at night?

MR. VAN TOL: No, Your Honor. This is Pieter Van Tol. That works fine for us. And if it would be helpful to your clerks or the Court, we're happy to email our cell phone numbers in case anyone needs to reach us on an urgent basis. But I think that chambers' email worked fine.

THE COURT: I think it would be a good idea to have the cell phone numbers. As you all are aware, things have moved pretty quickly, and I don't want to miss anything; and I don't want you to not be able to reach chambers or each other, or the other side, if we do need to move quickly or if developments happen rapidly. So I think that makes sense.

And maybe Mr. Loehr, my law clerk, can give you his cell phone, although I like to keep things on the record, but I think it makes sense to have cell phones in case we need to contact each other very, very quickly. Okay?

MR. VAN TOL: Thank you, Your Honor.

THE COURT: And Mr. Nolan, Mr. Cohen, Mr. Schoenfeld, Mr. Burch, Ms. Lin, any concerns about communications with

chambers?

UNIDENTIFIED SPEAKERS: No, Your Honor.

THE COURT: Okay.

MR. BURCH: Your Honor, this is Alan with the government. No, Your Honor.

THE COURT: Okay. The next thing is counsel for plaintiffs wanted to update the Court on the pending litigation in the other jurisdictions. So let's take that in order by scheduled execution date.

Mr. Lee. Mr. Van Tol, obviously, the execution on Monday is not going forward as of right now, but is there anything else you need to let the Court know?

MR. VAN TOL: Yes, Your Honor. This morning the government filed in the Seventh Circuit the stay application. They filed that at 10:55 a.m. this morning. They've asked the Seventh Circuit to rule by today. As far as I can tell from checking the docket, there is no scheduling order, and I haven't seen any opposition by Peterson, who is the lead plaintiff for the victims' families.

THE COURT: Okay. Now, I know you'll be watching very, very carefully, and I'm going to ask that you just keep my chambers in the loop in the event that there's action by the Seventh Circuit.

MR. VAN TOL: Yes, Your Honor.

THE COURT: All right. So that's working its way

through the Seventh Circuit.

Okay. Counsel for Mr. Purkey, Mr. Schoenfeld?

MR. SCHOENFELD: Yes, Your Honor.

So, as Your Honor knows, there's both the lethal injection case and the *Ford* case in front of Your Honor for Mr. Purkey. Mr. Purkey's Wednesday execution is currently stayed by the Seventh Circuit in his 2241 appeal.

THE COURT: Right.

MR. SCHOENFELD: The government has moved *en banc* to have that stay vacated. Mr. Purkey filed his opposition to that yesterday at noon. I don't know when the Seventh Circuit is going to act on that, but I a received a call yesterday afternoon, Friday afternoon, from the Solicitor General's Office, notifying me that they intended to file an application in the Supreme Court to vacate the Seventh Circuit's stay.

THE COURT: Even while the request for *en banc* review is pending?

MR. SCHOENFELD: Correct. And so when I spoke with the assistant to the solicitor general last night, or yesterday afternoon, he said they were likely to file it last night, but it wasn't actually filed. I don't know exactly what the plan is, but I assume that we will hear something from the Seventh Circuit or the Solicitor General's Office this weekend.

THE COURT: Okay. So I think the need for the cell phone numbers becomes very clear now.

MR. SCHOENFELD: Exactly. And so we will keep the Court updated about any developments on the 2241 appeal. There's also -- sorry. Before I move on, do you have any questions about the 2241 piece?

THE COURT: No. I don't think so.

MR. SCHOENFELD: Okay. There's also a case pending in the Southern District of Indiana before Judge Magnus-Stinson brought by Mr. Hartkemeyer, who is Mr. Purkey's spiritual advisor.

THE COURT: Right. And I did see reference to that in the chief judge's opinion.

MR. SCHOENFELD: Precisely. So he's asked for a stay of the execution on the grounds that being able to provide spiritual counsel to Mr. Purkey is important to him, and it would burden his religious exercise to have to go into the prison to provide spiritual counsel during the pandemic. So that is pending in front of Judge Magnus-Stinson. I don't believe she's indicated when she intends to rule on that.

THE COURT: Is that a motion for preliminary injunction as well?

MR. SCHOENFELD: It is.

THE COURT: Okay. And when was that filed?

MR. SCHOENFELD: I think it was filed early last week, or possibly the week before, but it's been fully briefed for several days.

THE COURT: Okay. And, again, you'll notify chambers?

MR. SCHOENFELD: Yes, Your Honor.

THE COURT: All right. The next execution is scheduled for the 17th of July in Mr. Honken's case. Mr. Nolan, can you bring me up to speed on what's going on there?

MR. NOLAN: Yes, Your Honor. There are three matters pending currently in Mr. Honken's case, one in the Northern District of Iowa. The Court allowed us until Monday morning to file a reply brief in that case.

THE COURT: Is that a motion for preliminary injunction also?

MR. NOLAN: It is not, Your Honor. It's a motion regarding the jurisdiction of the setting of the execution date. It's a motion to modify the date and a motion to declare the execution date null and void.

THE COURT: Okay. And is that fully -- I'm sorry. I think you just said it, but I don't remember. Is it fully briefed?

MR. NOLAN: It is not yet, Your Honor. We will file a reply on Monday morning.

THE COURT: Okay. And again I would, as with the others, ask you to keep chambers apprised of what happens there.

MR. NOLAN: Of course we will, Your Honor. And the other two matters are -- there is a motion for a preliminary injunction in the Southern District of Indiana. Father O'Keefe, who is Mr. Honken's chaplain, has moved to intervene in the

Hartkemeyer litigation. The motion to intervene was granted, and that is now fully briefed and is with the Hartkemeyer litigation.

THE COURT: Okay.

MR. NOLAN: And there's another lawsuit that was filed a week ago Friday in the Southern District of Indiana regarding Mr. Honken's access to the chaplain in the execution chamber. That motion was filed. There's been no further action on that case. It's not fully briefed. We are in the process of discussing that matter with the government.

THE COURT: Is that a motion for injunctive relief as well?

MR. NOLAN: Yes, Your Honor.

THE COURT: All right.

Counsel for Mr. Nelson, Mr. Cohen?

MR. COHEN: Yes, Your Honor.

THE COURT: Mr. Nelson's execution is scheduled for August 28th, so obviously that's much further away.

MR. COHEN: Yes. We have no matters pending in any other district, Your Honor.

THE COURT: Okay. All right.

MR. SCHOENFELD: Judge? Your Honor?

THE COURT: Yes.

MR. SCHOENFELD: I apologize for interrupting, but we've been --

THE COURT: Who's this? I'm sorry. Just for the record.

MR. SCHOENFELD: I apologize. It's Alan Schoenfeld for Mr. Purkey.

THE COURT: Yes.

MR. SCHOENFELD: We've been filing formal notices of supplemental authority or supplemental developments. Do you want us to email them to your law clerk? What is the best way to get you the most immediate notice of an intervening development?

THE COURT: An email, as long as you just have everybody on the email. You can obviously put it on the record with a docket entry after. But given how quickly things are moving, I think an email to my law clerk with all the parties on the email so there's no *ex parte* communication, and then you can put it on the docket. But email would be the fastest and most efficient way to contact us.

MR. SCHOENFELD: Okay.

THE COURT: And Mr. Loehr will give you his email address also, as well as his telephone number.

MR. SCHOENFELD: Okay. Terrific. Thank you.

THE COURT: All right. So it looks like I'm just going to continue to monitor developments in the case.

As Mr. Lee and Mr. Purkey are awaiting action from the Seventh Circuit, I'm going to incorporate the changed

circumstances into my opinion and continue to work on that. And if you all would just keep me apprised of developments as they occur, I would very much appreciate that.

UNIDENTIFIED: Yes, Your Honor.

THE COURT: Mr. Burch and Ms. Lin, do you have any additional information you'd like to give me, if you know what the Solicitor General's Office is going to do, or any matters you'd like to raise?

MR. BURCH: The only comment I would make, Your Honor, is that the government does think it would be helpful to have a decision on the pending PI in this case sooner rather than later to permit both parties to have appellate review as appropriate.

THE COURT: Of course. I understand. And I will certainly try and do that. All right.

Okay. Any other additional concerns that you all want to raise at this time while I have you all on the phone?

MR. VAN TOL: This is Pieter Van Tol for Lee. No, Your Honor. That's it for us. Thank you.

THE COURT: Mr. Schoenfeld?

MR. SCHOENFELD: No, Your Honor. Should we just wait for an email from Mr. Loehr, and then we'll all respond with cell phone information and we can use that thread for updates to the Court?

THE COURT: Yes.

MR. SCHOENFELD: Okay. Perfect. Thank you.

THE COURT: And Mr. Loehr has -- does he have all your email addresses? I think he should.

LAW CLERK: Yes, I do.

MR. SCHOENFELD: I think everything's on the docket.

THE COURT: Okay. Mr. Nolan?

MR. NOLAN: Nothing else, Your Honor. Thank you.

THE COURT: And Mr. Burch and Ms. Lin?

MR. BURCH: No, Your Honor.

THE COURT: All right. Thank you all for taking the time out of your weekend to update me. I appreciate your efforts to keep me apprised, and I will do the same. If there's an opinion about to issue, I will have my clerk let you know that it's coming down so you can also be prepared.

All right? Enjoy whatever remains of your weekend. It's very hot outside, so you all can stay in and work. Thanks very much. All right. I'll be in touch. Bye-bye.

(Proceedings adjourned at 1:17 p.m.)

* * * * * *

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Bryan A. Wayne
BRYAN A. WAYNE

Burch, Alan (USADC)

From: Chutkan Chambers <Chutkan_Chambers@dcd.uscourts.gov>
Sent: Friday, July 10, 2020 2:32 PM
To: pieter.vantol_hoganlovells.com
Cc: Burch, Alan (USADC)
Subject: RE: Request for Telephonic Status Conference Today in 19-mc-00145

Counsel,

The court intends to file a ruling related to Lee before 6 PM EST. It is therefore the preference of the court to hold any telephone conference after the parties have reviewed the ruling, either later this evening or tomorrow. However, if the parties still prefer to have a conference before 5PM, the court will do so.

Please advise of your preference.

Chambers of Judge Tanya S. Chutkan

From: Van Tol, Pieter <pieter.vantol@hoganlovells.com>
Sent: Friday, July 10, 2020 1:02 PM
To: Chutkan Chambers <Chutkan_Chambers@dcd.uscourts.gov>
Cc: Burch, Alan (USADC) (Alan.Burch@usdoj.gov) <Alan.Burch@usdoj.gov>
Subject: Request for Telephonic Status Conference Today in 19-mc-00145
Importance: High

Dear Judge Chutkan –

This firm represents Daniel Lewis Lee, whose execution is currently scheduled for Monday, July 13, 2020. For the Court's information, we believe that the time of the execution is approximately 4:00 pm.

We respectfully request, on behalf of Mr. Lee, that the Court convene a brief telephone status conference today so that we can update the Court on the status of other proceedings involving Mr. Lee that may affect the scheduled execution. We would also like to discuss the logistics of contacting the Court over the weekend in case Mr. Lee has other applications to make.

While we are submitting this request on behalf of Mr. Lee only, in light of his impending execution date, we have blind copied counsel for Messrs. Purkey, Honken and Nelson in the event the Court would like to include those parties in a telephone conference as well.

Respectfully submitted,

Pieter Van Tol
Partner

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