United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5199 **September Term, 2019**

1:19-mc-00145-TSC

Filed On: July 13, 2020

In re: In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

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James H. Roane, Jr., et al.,

Appellees

v.

William P. Barr, Attorney General, et al.,

Appellants

BEFORE: Tatel, Griffith, and Millett, Circuit Judges

O R D E R

Upon consideration of the emergency motion to immediately stay or vacate preliminary injunction barring four federal executions, the opposition thereto, and the reply, it is

ORDERED that the emergency motion for a stay pending appeal of the district court's order enjoining plaintiffs' executions be denied and consideration of the motion to vacate be deferred pending further order of the court.

Plaintiffs are four federal death-row inmates. Just shy of a month ago, the Federal Bureau of Prisons announced that three – Daniel Lewis Lee, Wesley Purkey, and Dustin Lee Honken – would be executed this week, on Monday, Wednesday, and Friday, respectively. See Notice, In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases ("In re FBOP"), No. 19-mc-145 (D.D.C. June 15, 2020). It scheduled the execution of the fourth, Keith Dwayne Nelson, for late August. See id. Four days later, the inmates moved for a preliminary injunction, arguing, among other things, that the government's plan for their executions, the 2019 Protocol, violates the Eighth Amendment's prohibition on "cruel and unusual punishments," U.S. Const. amend. VIII. See Pls.' Mot. for a Prelim. Inj., In re FBOP, No. 19-mc-145 (D.D.C. June 19, 2020). This morning, the district court, finding that the inmates were likely to succeed on the merits of their Eighth Amendment claim, enjoined the government from carrying out the executions until further order of that court. See In re FBOP, No.

19-mc-145, slip op. at 22 (D.D.C. July 13, 2020). The government now seeks a stay of that order to permit it to carry out the executions.

To make out an Eighth Amendment method-of-execution claim, a death-row inmate must show that the government's proposed method carries a "substantial risk of severe pain" that would be "significantly reduce[d]" by adoption of a "feasible and readily implemented alternative method . . . that the [government] has refused to adopt without a legitimate penological reason." Bucklew v. Precythe, 139 S. Ct. 1112, 1125 (2019). The inmates argued before the district court that the lethal substance the government plans to use to execute them, a large dose of pentobarbital, is likely to cause "flash pulmonary edema," a condition that interferes with breathing, "'produc[ing] sensations of drowning and asphyxiation' [that] result[] in 'extreme pain, terror and panic.'" In re FBOP, slip op. at 10 (quoting Expert Decl. of Mark Edgar ¶¶ 5, 80). They further contended that such severe pain would be significantly reduced were the government to instead execute them using either of the alternative methods they proposed, namely, a two-drug protocol composed of an "opioid pain medication . . . such as morphine or fentanyl" plus pentobarbital, or a firing squad. Id. at 13,15. In concluding that plaintiffs were likely to succeed on the merits of this claim, the district court, crediting the expert declaration of Dr. Mark Edgar, found that "the majority of inmates executed via pentobarbital injection suffered flash pulmonary edema during the procedure." Id. at 9-10 (citing Edgar Decl. ¶ 74). And crediting the declaration of Dr. Gail Van Norman, the district court also found "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." Id. at 10 (quoting Expert Decl. of Gail A. Van Norman, M.D. ¶ 18).

In determining whether to grant "the exceptional remedy of a [stay] pending appeal," John Doe Co. v. CFPB, 849 F.3d 1129, 1131 (D.C. Cir. 2017), we consider four factors: "(1) whether the [government] has made a strong showing that [it] is likely to succeed on the merits; (2) whether [the government] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties; and (4) where the public interest lies," Nken v. Holder, 556 U.S. 418, 434 (2009) (alteration omitted). At this stage and given the timeframe in which the government requests a ruling, we cannot say that the government has made "a strong showing" that it is "likely to succeed" in demonstrating that the district court abused its discretion in granting the preliminary injunction. Id. at 434.

To start, the government has not persuaded us that Bucklew v. Precythe, 139 S. Ct. 1112 – which involved different allegations and a summary-judgment, rather than a preliminary-injunction, record – controls this case. Resolution of the merits of the inmates' claim thus involves "novel and difficult constitutional questions" that require

"the benefit of further factual and legal development." Gordon v. Holder, 721 F.3d 638, 644-45 (D.C. Cir. 2013). The other three factors favor leaving the district court's order untouched. Although "the State and the victims of crime have an important interest in the timely enforcement of a sentence," Bucklew, 139 S. Ct. at 1133, "[a] stay will substantially injure the other parties interested in the proceeding," Nken, 556 U.S. at 434, by subjecting plaintiffs to executions that may violate the Eighth Amendment, see Karem v. Trump, 960 F.3d 656, 667 (D.C. Cir. 2020) (explaining that "prospective violation[s] of . . . constitutional right[s] constitute[] irreparable injury for [equitable-relief] purposes" (internal quotation marks omitted)). Finally, "[t]he public interest is surely served by treating this case with the same time for consideration and deliberation that we would give any case. 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, No. 19-3318, 2020 WL 3603779, at *11 (7th Cir. July 2, 2020).

We reiterate that our decision is based on the traditional stay factors outlined in Nken v. Holder, 556 U.S. 418. At this stage, we cannot conclude that "the circumstances justify an exercise of [our] discretion" to issue a stay. Id. at 434. We also note that the government's motion to vacate the preliminary injunction merges with its appeal and remains pending. Although there is "substantial overlap between [the stay factors] and the factors governing preliminary injunctions," those factors "are [not] one and the same." Id. The government remains free to advance arguments in support of its motion to vacate the district court's preliminary injunction pursuant to the expedited briefing schedule established below. It is

FURTHER ORDERED, on the court's own motion, that this appeal be expedited. It is

FURTHER ORDERED that the following briefing schedule, or such other schedule as the parties may agree upon and that is workable for the court, will apply:

Appellants' Brief	July 17, 2020
Appellees' Brief	July 22, 2020
Appellants' Reply Brief	July 24, 2020

An expedited date for oral argument will be scheduled shortly.

All issues and arguments must be raised by appellants in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 43 (2019); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties must hand deliver the paper copies of their briefs to the Clerk's office on the date due. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk