ORAL ARGUMENT NOT YET SCHEDULED
No. 20-5252

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

JAMES H. ROANE, et al.,
Plaintiffs-Appellees,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia, No. 19-mc-145
Before the Honorable Judge Tanya S. Chutkan

PLAINTIFF-APPELLANT KEITH NELSON'S EMERGENCY MOTION FOR STAY OF EXECUTION PENDING APPEAL

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August 21, 2020

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INTRODUCTION

Plaintiff, Keith Nelson, is scheduled to be executed next Friday, August 28, 2020. On August 15, 2020, the district court dismissed Count II of Mr. Nelson's Amended Complaint which alleged that the execution would violate Mr. Nelson's Eighth Amendment right to an execution free of cruel and unusual punishment. Mr. Nelson immediately asked the district court to certify its decision for immediate appeal, and the district court granted that request just yesterday. In dismissing Mr. Nelson's Eighth Amendment claim, the district court misconstrued and misapplied Supreme Court precedent, and ignored the well-established rules governing pleadings. Under these emergency circumstances and given that the current execution date is one-week away, moving with the district court would have been impracticable. Fed. R. App. P. 8(a)(2)(A)(i). And so, Mr. Nelson respectfully requests that this Court: (1) stay Mr. Nelson's imminent execution pending an expedited appeal; and (2) expedite both the briefing and consideration of this motion. As explained below, Mr. Nelson is likely to succeed on the merits of his appeal, and executing him before that appellate process can be completed would indisputably result in profound and irreparable harm.[1]

The parties have agreed to the following briefing schedule for this

[1] In accordance with D.C. Cir. Rule 8, the undersigned have notified counsel for Defendants-Appellees of the intent to file this motion, which Defendants-Appellees have acknowledged.

motion: Defendants' opposition will be filed by 5 pm (ET) on Sunday, August 23, 2020, and Mr. Nelson will file his reply by 2 pm (ET) on Monday, August 24, 2020.

RELEVANT BACKGROUND

By Judgment dated March 11, 2002, Mr. Nelson was sentenced to death.

On June 1, 2020, Mr. Nelson (and others) filed an Amended Complaint for injunctive and declaratory relief based on, *inter alia*, violations and threatened violations of their right to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution. Dist. Ct. Dkt. No. 92.

By letter dated June 15, 2020, T.J. Watson, Complex Warden of United States Penitentiary Terre Haute, informed Mr. Nelson that "the Director of the Federal Bureau of Prisons has set August 28, 2020, as the date for your execution by lethal injection." Dist. Ct. Dkt. No. 101-3.[2]

On June 19, 2020, Mr. Nelson (and three other Plaintiffs who had dates set for execution, Messrs. Lee, Purkey, and Honken) moved for a preliminary injunction based on several of their constitutional and statutory claims. Dist. Ct.

[2] Mr. Nelson believed that notice and the scheduling of Mr. Nelson's execution, however, was defective because it failed to satisfy and violates the express 90-day advance notice requirement set forth in Paragraph II.C. of Chapter 1 of the BOP Execution Protocol. Accordingly, on June 19, 2020, Mr. Nelson moved to strike Defendants' notice of execution and to vacate the putative execution date referenced therein. Dist. Ct. Dkt. No. 101. That motion was fully briefed on June 29, 2020, and denied by the district court just yesterday. Dist. Ct. Dkt. No. 209.

Dkt. No. 102. By Memorandum Opinion dated July 13, 2020, the district court granted a preliminary injunction on the ground that Plaintiffs were likely to succeed on their claim that the proposed method of execution violates the Eighth Amendment, that Plaintiffs would suffer irreparable harm absent injunctive relief, and that the equitable factors favored Plaintiffs. Dist. Ct. Dkt. No. 136. This Court denied the government's motion to stay or vacate the preliminary injunction, and ordered expedited briefing and oral argument on the government's appeal. *Roane v. Barr*, USCA Case No. 20-5199, ECF No. 1851483 (D.C. Cir. July 13, 2020).

On July 14, 2020, the United States Supreme Court vacated the district court's preliminary injunction in a 5-4 decision, holding that the prisoners were not likely to succeed on the merits of their Eighth Amendment claim. *See Barr v. Lee*, No. 20A8, 2020 WL 3964985, *4 (U.S. July 14, 2020) (per curiam). In dissent, Justice Sotomayor (for herself and Justice Kagan) noted that this "outcome is hard to square with th[e] Court's denial of a similar request by the Government seven months ago in this very litigation," explaining that "because of the Court's rush to dispose of this litigation in an emergency posture, there will be no meaningful judicial review of the grave, fact-heavy challenges respondents bring to the way in which the Government plans to execute them." *Id.* at *3-4 (Sotomayor, J., dissenting).

Defendants executed Messrs. Lee, Purkey, and Honken on July 14, 16 and

17, respectively.

On July 31, 2020, Defendants, *inter alia*, moved to dismiss Count II of Plaintiffs' Amended Complaint (Eighth Amendment), and moved for summary judgment on the FDCA-related causes of action contained in the Amended Complaint. Dist. Ct. Dkt. Nos. 169 & 170.

On the same day, July 31, 2020, Mr. Nelson moved for an expedited trial on Count II (Eighth Amendment) of the Amended Complaint (Dist. Ct. Dkt. No. 174). Mr. Nelson then cross-moved for summary judgment on the FDCA-related causes of action, on August 4, 2020. Dist. Ct. Dkt. No. 180. The motion for expedited trial raised significant questions concerning the constitutionality of Mr. Nelson's execution that were left open by the Supreme Court, and, significantly, new evidence that refutes Defendants' assertion (made in opposition to Mr. Nelson's motion) that the executions of Messrs. Lee, Purkey, and Honken "were implemented without any pentobarbital-related complications." (Dist. Ct. Dkt. No. 178 at 1). Specifically, the autopsy of Mr. Purkey, who was executed by Defendants pursuant to the 2019 Federal Execution Protocol (and the only prisoner whose family sought an autopsy), confirmed that Mr. Purkey suffered from "severe bilateral acute pulmonary edema." Dist. Ct. Dkt. No. 183 at 2; Dist. Ct. Dkt. No. 183-2, ¶ 19. That new evidence was "consistent with, and affirm[s]" the expert opinion submitted by one of Mr. Nelson's experts that (1) "premortem flash

pulmonary edema is a virtual medical certainty in any execution carried out in accordance with the Federal Execution Protocol," (Dist. Ct. Dkt. No. 183-2, ¶ 6) and (2) "prisoners executed by lethal injection in accordance with the Federal Protocol remain sensate and able to experience the extreme pain and suffering related to the occurrence of flash pulmonary edema." *Id.*, ¶ 7.

By Order dated August 15, 2020, the district court granted Defendants' motion to dismiss Count II of the Amended Complaint, and denied Mr. Nelson's motion for an expedited trial (Dist. Ct. Dkt. No. 193, the "Order"). In doing so, the district court relied upon a flawed, expansive reading of the Supreme Court's denial of a preliminary injunction in *Lee*, which it deemed tantamount to a merits adjudication of Count II. *Id.* at 2-5. According to the district court, "*Lee* suggests that no amount of new evidence will suffice to prove that the pain pentobarbital causes reaches unconstitutional levels." *Id.* at 4. Recognizing, however, the possibility that it might "ha[ve] read *Lee* too broadly," the district court noted that if that were the case it would "expedite trial on remand." *Id.* at 5.

Mr. Nelson immediately filed a motion on August 17, 2020 asking the district court to certify its decision as a partial, final judgment for appeal. Dist. Ct. Dkt. No. 196. On August 20, 2020, the district court granted that motion. Dist. Ct. Dkt. No. 205.

ARGUMENT

This Court must consider four factors in evaluating whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (similar).

A. Mr. Nelson is Likely to Succeed on the Merits

The premise of the district court's decision is that the Supreme Court's decision in *Lee* conclusively established not simply that Mr. Nelson was not likely to succeed on the merits of his Eighth Amendment claim, but that Mr. Nelson could not possibly succeed on that claim even if new relevant evidence became available. As explained below, that is not what the Supreme Court said, and could not possibly have been what the Supreme Court meant. Mr. Nelson is thus likely to succeed on merits for several independent reasons.

First, the district court's reliance on *Lee* and the Supreme Court's vacatur of its July 13 preliminarily injunction to deny Mr. Nelson the opportunity to prove his well-pleaded allegations ignored the fact that a motion for a preliminary injunction and a motion to dismiss are subject to very different standards.

Lee was issued in the context of a motion for a preliminary injunction,

where the burden was to demonstrate a "*substantial likelihood of success*" on the merits—a standard which the Court viewed as substantially heightened by what the Court described as the "last-minute" nature of the intervention. *Lee*, 2020 WL 3964985, at *2 ("Last-minute stays like that issued this morning should be the extreme exception, not the norm." (citation omitted)). In contrast, a motion to dismiss under Rule 12(b)(6) seeks to test the legal sufficiency of a complaint, *not* "a plaintiff's ultimate likelihood of success on the merits." *United States v. Ghana Soc. Mktg. Found.*, No. CV-11-418 (RC), 2012 WL 13076832, at *1 (D.D.C. Aug. 8, 2012); *Beck v. U.S. Gov't*, 318 F. Supp. 3d 55, 60 (D.D.C. 2018) (Chutkan, J.), *aff'd*, 777 F. App'x 525 (D.C. Cir. 2019). "In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court must construe the complaint in the light most favorable to the plaintiffs and 'must *assume the truth* of all well-pleaded allegations.'" *Odom v. Dist. of Columbia*, 248 F. Supp. 3d 260, 264 (D.D.C. 2017) (Chutkan, J.) (emphasis added) (citation omitted). In addition, on a 12(b)(6) motion to dismiss, the court "may consider the facts alleged in the complaint, documents . . . incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the parties." *Judicial Watch, Inc. v. FBI*, Civil Action No. 18-2316 (RC), 2019 WL 4194501, *5 (D.D.C. Sept. 4, 2019) (citations omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56

(2007); Fed. R. Civ. P. 12(b)(6).

The Supreme Court's conclusion that the preliminary injunction had not demonstrated a substantial likelihood of success—which was based on an incomplete record that included matters from outside the four corners of the Amended Complaint—simply does not bear on whether Plaintiff Mr. Nelson's claim is sufficient to survive a motion to dismiss. *See Ramirez v. U.S. Immigr. & Customs Enf't*, 338 F. Supp. 3d 1, 20 n.1 (D.D.C. 2018) ("[T]he Court does not regard its prior [preliminary injunction] determinations as binding for purposes of assessing Defendants' Motion to Dismiss. Rather, . . . the Court finds dismissal unwarranted based on consideration of the record and arguments presently before the Court."). In fact, the Supreme Court in *Lee* expressly acknowledged that the parties had presented "competing expert testimony" regarding Plaintiffs' Eighth Amendment claim in litigating the preliminary injunction. *Lee*, 2020 WL 3964985, at *3. Even if Defendants' "competing" evidence could be accepted for purposes of the motion to dismiss (it cannot), at the very most, it presents factual disputes that defeat Defendants' motion. *See Jannazzo v. United States*, No. 15-CV-3506 (ADS)(AYS), 2016 WL 1452392, at *4 (E.D.N.Y. Apr. 13, 2016) (refusing to consider a report submitted by defendants at the motion to dismiss phase).

Indeed, the district court's presumption that the Supreme Court's view of

likelihood of success reflected a decision on the merits was incorrect. In reviewing a district court's conclusion as to likelihood of success, "[t]here are occasions . . . when it is appropriate [for an appellate court] to proceed further and address the merits" directly. *Munaf v. Geren*, 553 U.S. 674, 691 (2008). Since the Supreme Court could have, but did not, "address the merits" of Plaintiffs' Eighth Amendment violation, it was inappropriate for the district court to rely on the Supreme Court's opinion to conclude that Mr. Nelson has not stated a claim as a matter of law. If the Supreme Court had reached that conclusion, it could and would have simply addressed the claim, but it did not do so.

Second, there is a fundamentally different record now than there was when the Court vacated the district court's preliminary injunction. The autopsy of Mr. Purkey confirmed that he suffered from "severe bilateral acute pulmonary edema." Mr. Nelson's expert explained that the autopsy findings were "consistent with, and affirm[s]," her "opinion that premortem flash pulmonary edema is a virtual medical certainty in any execution carried out in accordance with the Federal Execution Protocol," (Dist. Ct. Dkt. No. 183-2, ¶ 6) and that "prisoners executed by lethal injection in accordance with the Federal Protocol remain sensate and able to experience the extreme pain and suffering related to the occurrence of flash pulmonary edema." *Id.*, ¶ 7. This brand new evidence, not previously considered by the Supreme Court, is uncontroverted, and conclusively

demonstrates that Mr. Purkey, who was executed pursuant to the 2019 Federal Execution Protocol at issue in this action, experienced excruciating pain and suffering during his execution.

Additional evidence not previously considered by the Supreme Court also raises questions about the compounded pentobarbital to be used to execute Mr. Nelson. Photographic inspection of the vials of pentobarbital from the July 2020 executions of Mr. Purkey and Mr. Honken show that the label was placed over a prior label and the new label claims a one-year shelf life for the compounded drug with temperature storage conditions of 68 to 77 degrees Fahrenheit. *See* Dist. Ct. Dkt. Nos. 190-01, 190-02. Notably, this claimed one-year shelf life exceeds the nine-month shelf life earlier claimed in the Rule 30(b)(6) deposition of Defendants.[3] *See* Dist. Ct. Dkt. No. 102-3, 30(b)(6) deposition of Defendants at 31:15-19. Moreover, expiration dates for drugs, including compounded drugs, are developed by stability studies in which the drugs are placed on stability and then periodically tested to establish at least that they remain within the required potency range for the duration of the claimed shelf life.

In the Administrative Record (AR), Defendants produced documents

[3]Although other pages from this deposition are in the district court record, the referenced page is not, but Plaintiff shall file a motion under Fed. R. App. P. 10(e)(2)(C) to supplement the record with the referenced page when such record has been transmitted and in connection with any resolution of this appeal on the merits.

related to a method validation stability study that are strikingly incomplete and raise concerns in light of the new evidence of relabeling. The AR includes a quote or proposal dated April 5, 2019 from a laboratory for a stability study, which study, means that the earliest the study began was sometime in early April. *See* Dist. Ct. Dkt. No. 39-1 at 984-1007. The AR also included results from testing related to the study that was completed in July and August 2019. *See* Dist. Ct. Dkt. No. 39-1 at 1011, 1013. Notably, only three months after the study began, pentobarbital stored under elevated temperature tested as sub-potent in July 2019. Defendants have not produced any test results or any other documentation purporting to show the drugs remain stable, and therefore within the required potency range, after one year. Moreover, there also is no evidence that Defendants maintained the dosages to be used to execute Mr. Nelson under the required storage conditions of 68 to 77 degrees Fahrenheit. Even if an appropriate study was done to establish the newly-claimed one-year shelf life for the compounded pentobarbital, such a long shelf-life for a compounded drug would necessarily be conditioned at least on the drug being stored consistent with the labeled storage conditions, because, as Defendant's own partial testing establishes, the compounded drug at elevated temperatures became unstable and sub-potent after only about three months. This new evidence raises significant concerns that the drugs intended to be used to execute Mr. Nelson will be sub-

potent and ineffective. None of this was before the Supreme Court when it vacated the preliminary injunction.

In that regard, the district court's determination that "*Lee* indicates that absent particular medical circumstances, the use of pentobarbital will withstand Eighth Amendment scrutiny, ***no matter the evidence of excruciating pain***" (Order at 5) (emphasis added) turns Supreme Courts precedent on its head. As the Supreme Court has explained, "the requirements of an Eighth Amendment method-of-execution claim" necessitate that "the condemned prisoner establish[] that the . . . lethal injection protocol creates a demonstrated risk of severe pain." *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008)). The notion that the Supreme Court would countenance an execution "no matter the evidence of excruciating pain" flies in the face of that authority. Quite simply, if a method of execution would result in the prisoner experiencing excruciating pain, that method of execution *ipso facto* violates the Eighth Amendment prohibition against cruel and unusual punishment. Accordingly, contrary to the district court's holding, the new evidence from Mr. Purkey's autopsy clearly supports, if not demonstrates, that executions pursuant to the 2019 Federal Execution Protocol violate the Eighth Amendment.

Third, contrary to the district court's Order, Mr. Nelson has sufficiently alleged a claim for violation of his Eighth Amendment rights. The only question

before the district court was whether, accepting the allegations of the Amended Complaint as true, Mr. Nelson sufficiently alleged that the 2019 Execution Protocol presents a "substantial risk of serious harm" in violation of the Eighth Amendment, and that "alternative [methods of execution that will] significantly reduce[] the risk of serious pain" are both "feasible [and] readily implemented." *Baze*, 553 U.S. 35. The Amended Complaint contains detailed and specific allegations regarding the extreme pain and needless suffering Mr. Nelson will endure if executed pursuant to the 2019 Protocol, and therefore readily meets that standard.

Specifically, the Amended Complaint contains allegations that prisoners executed with pentobarbital will suffer flash pulmonary edema, which "produces sensations of drowning and asphyxiation," resulting in "extreme pain, terror and panic." Dist. Ct. Dkt. No. 135 (Memorandum Order, July 13, 2020) at 10 (citation omitted). Mr. Nelson further alleged in specific detail, that:

- "[b]arbiturates such as pentobarbital 'do not guarantee lack of consciousness'";
- "Defendants' supplies of pentobarbital . . . show [elevated] pH readings";
- "[a]s a result of pentobarbital's high pH level, injection of a high dose of pentobarbital . . . will cause 'flash' or non-cardiogenic pulmonary edema 'virtually instantaneous[ly],'" before prisoners are rendered unconscious or insensate;

- "[t]he experience of acute pulmonary edema prior to the loss of consciousness 'produces sensations of drowning and asphyxia,' and therefore, 'the experience of this condition in an inmate who was still sensate would result in extreme pain, terror and panic'";

- "[a] review of over two dozen autopsy reports confirms that it is a 'virtual medical certainty' that most, if not all, prisoners executed with a single dose of pentobarbital, as is contemplated by the 2019 Protocol, experienced 'immediate, flash pulmonary edema'"; and

- "[w]itness reports of executions also confirm that prisoners who were executed with a single dose of pentobarbital . . . experienced acute symptoms of pulmonary edema, including burning sensations, labored breathing, gasping, and other signs of severe pain and respiratory distress."

Dist. Ct. Dkt. No. 92, Am. Compl. ¶¶ 74-76, 78, 81-82, 86, 90.

These allegations are supported by the declarations of medical experts. *See, e.g.*, *id.* ¶ 74 (citing Decl. of Gail Van Norman, M.D., at 7 (Nov. []1, 2019), Dist. Ct. Dkt. No. 24); ¶ 75 (citing Decl. of Mark A. Edgar, M.D., at 19 (Oct. 24, 2019), Dist. Ct. Dkt. No. 26-12). Mr. Nelson's allegations are detailed and specific claims, backed by scientific evidence, and thus more than sufficient to satisfy the pleading standards. *See Aref v. Holder*, 774 F. Supp. 2d 147, 165 (D.D.C. 2011) (finding allegations about disparity in prisoners' access to phone calls were "specific and detailed" enough to plausibly state a claim for constitutional violation); *see also Kellum v. Mares*, 657 F. App'x 763, 770 (10th Cir. 2016) (denying motion to dismiss where plaintiff "included in her complaint the specific

underlying factual allegations in support of her [Eighth Amendment] claim"); *Wilson v. Dunn*, No. 2:16-CV-364-WKW, 2017 WL 5619427, at *4 (M.D. Ala. Nov. 21, 2017) (finding inmate "not required to try his claim [challenging Alabama's execution protocol] in the pleadings").

In addition, to establish an Eighth Amendment violation, "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). Mr. Nelson has specifically alleged three such alternatives: (i) "FDA-approved pentobarbital" accompanied by "a pre-dose of a pain-relieving, anesthetic drug in a sufficiently large clinical dose"; (ii) "compounded pentobarbital that complies with all state and federal compounding requirements, and has been tested for purity and potency" also accompanied by "a pre-dose of a pain-relieving anesthetic drug"; or (iii) firing squad. Dist. Ct. Dkt. No. 92, Am. Compl., ¶ 114. The Amended Complaint contains detailed and specific allegations regarding these alternatives and provides case law and other support for Mr. Nelson's claim that they would significantly reduce the risk of severe pain to him. *Id.* Moreover, the Amended Complaint alleges that the firing squad alternative is "currently authorized by the laws of three states (Utah, Oklahoma, Mississippi)." *Id.*, ¶ 114(c). These allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss. *See* Dist. Ct. Dkt. No. 135 at 15-16 (observing

that "execution by firing squad . . . is feasible, readily implemented, and would significantly reduce the risk of severe pain"); *see also Glossip*, 576 U.S. at 976 (Sotomayor, J., dissenting) (noting that "the firing squad is significantly more reliable than . . . lethal injection" and "is relatively quick and painless").

B. Absent a Stay, Mr. Nelson Will Be Irreparably Harmed and Defendants Will Be Unaffected

Mr. Nelson will suffer irreparable harm of the highest order without a stay of his execution. Denying a stay risks "foreclos[ing] . . . review," which constitutes "irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) . Allowing the Government to execute Mr. Nelson before proceedings have concluded risks "effectively depriv[ing] this Court of jurisdiction." *Id*. A stay is generally warranted when, as here, mootness is likely to arise during the pendency of the litigation—as it will if Mr. Nelson is executed next week. *See Chafin v. Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants "stays as a matter of course").

In contrast, the Government will not be harmed by a stay. Indeed, the eight years that the Government waited to establish a new protocol undermines any argument regarding the purported urgency in proceeding with an execution next week before the courts have had an opportunity to evaluate the constitutionality of the Mr. Nelson's claims. *Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018).

C. A Stay of Execution Will Serve the Public Interest

Finally, "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." J. Chutkan Order (Dist. Ct. Dkt. No. 135 at 21). The public interest lies in ensuring that agencies act in accordance with the Constitution and federal law. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). This interest is only heightened in the context of executions. The public will be ill-served if Mr. Nelson is executed pursuant to an unlawful protocol, or before being given a full opportunity to test the protocol's legality. For this very reason, the Supreme Court and this Court have all confirmed that brief stays or injunctions—to permit potentially meritorious claims to be adjudicated before prisoners are executed—are warranted under these circumstances. *See Barr v. Roane*, 140 S. Ct. 353 (2019) (Alito, J., respecting the denial of stay or vacatur) ("[I]n light of what is at stake, it would be preferable for the District Court's decision to be reviewed on the merits by the Court of Appeals for the District of Columbia Circuit before the executions are carried out."); *see also Lee*, 2020 WL 3964985, at *3 (Sotomayor, J., dissenting) (noting that "because of the Court's rush to dispose of this litigation in an emergency posture, there will be no meaningful judicial review of the grave, fact-heavy challenges respondents bring"); Order, *In the Matter of the Federal Bureau of Prisons'*

Execution Protocol Cases, No. 19-5322 (D.C. Cir. Dec. 2, 2019) (per curiam).

CONCLUSION

For all of the foregoing reasons, Plaintiff-Appellant Keith Nelson respectfully requests that this Court stay Mr. Nelson's execution of August 28, 2020, pending an expedited appeal.

Dated: August 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4149 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: August 21, 2020

/s/ Kathryn L. Clune
Katheryn L. Clune

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Kathryn L. Clune
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ADDENDUM

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* THIS DOCUMENT RELATES TO: *ALL CASES*	Case No. 19-mc-145 (TSC)

ORDER

Because Defendants plan to execute him on August 28, 2020, Plaintiff Keith Nelson asks the court to expedite trial on Count II of the Amended Complaint—which alleges that the lethal injection of pentobarbital will cause needless suffering in violation of the Eighth Amendment. (ECF No. 174, Mot. to Expedite Trial; ECF No. 92, Am. Compl. ¶¶ 122–126.) Defendants oppose expedited trial and in fact oppose trial altogether: they move to dismiss Count II for failure to state a claim, arguing that no amount of evidence presented at trial could establish an Eighth Amendment violation. (ECF No. 169, Mot. to Dismiss.)

This court considered the Eighth Amendment claim just a month ago, on Plaintiffs' motion for a preliminary injunction. (*See* ECF No. 135, Mem. Op.) To prove an Eighth Amendment violation, Plaintiffs must first show that there is a "substantial risk of serious harm." *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015). In determining whether these Plaintiffs were likely to make that showing, this court considered expert declarations establishing that the majority of inmates executed with pentobarbital suffered flash pulmonary edema. (*See* ECF No. 26-12, Expert Decl. of Mark Edgar, ¶ 74; ECF No. 24, Expert Decl. of Gail Van Norman, Autopsy Findings, at 85.) The declarations explained that pulmonary edema, which interferes

with breathing, "produces sensations of drowning and asphyxiation" resulting in "extreme pain, terror and panic." (Edgar Decl., ¶¶ 78–80.) The court also considered the eyewitness accounts of executions using pentobarbital, in which observers described inmates repeatedly gasping for breath, as well as one expert's assertion 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 Defendants' current execution protocol. (Van Norman Decl., ¶ 18.) Considering all of this, the court found that Plaintiffs would likely succeed in showing that Defendants' use of pentobarbital posed a "substantial risk of serious harm." *Glossip*, 135 S. Ct. at 2737. After making that and other necessary findings, the court preliminarily enjoined four impending executions. (Mem. Op. at 22.)

A panel of the D.C. Circuit unanimously left the injunction in place pending Defendants' appeal, but the Supreme Court vacated it hours later in a 5-4 decision, allowing the execution of Daniel Lewis Lee that morning, and of Wesley Ira Purkey and Dustin Lee Honken later that week. *See In re Fed. Bureau of Prisons' Execution Protocol Cases,* No. 20-5199 (D.C. Cir. July 13, 2020)*; Barr v. Lee,* No. 20A8, 2020 WL 3964985, *4 (U.S. July 14, 2020) (per curiam). Purkey's autopsy showed that he suffered "severe bilateral acute pulmonary edema"—his right lung weighed 1140 grams, his left lung weighed 1160 grams, and there was "[f]rothy pulmonary edema in trachea and mainstem bronchi." (*See* ECF No. 183, Ex. 1 at 1, Report of Dr. DeJong.) Dr. Gail Van Norman explained that this indicated that Purkey's lungs filled with fluid and that he suffered excruciating air hunger while still alive. (*See id.,* Ex. 2, Second Supplemental Expert Declaration of Gail A. Van Norman, M.D.)

The Supreme Court's order vacating the injunction altered this court's understanding of the scope of the Eighth Amendment protection in ways that implicate the pending motion to

dismiss. For example, while this court would have originally considered the evidence from Purkey's autopsy to be important in pleading and then establishing an Eighth Amendment claim, the Supreme Court's holding in *Lee* suggests that even that is not enough. When the Supreme Court decided *Lee*, it did so having considered this court's conclusion that pulmonary edema and excruciating pain was very likely to occur. It thus would not alter the analysis, nor the conclusion, to now include the evidence that Purkey did in fact experience the edema and pain as predicted. *Lee* also clarified that *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) extends to general pentobarbital challenges, such as this one, not just to the unique medical condition of the inmate in that case—as this court had held in granting the preliminary injunction. *See Lee*, 20A8 at 2 (noting that pentobarbital "[w]as upheld by [the] Court last year, as applied to a prisoner with a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter").

Lee also altered another premise upon which this court had originally relied: that with sufficient evidence, Plaintiffs could establish that even a widely tolerated practice (such as the use of pentobarbital) was nevertheless objectively intolerable. This court understood that pentobarbital is widely used, but noted that Plaintiffs in this case—unlike those in other cases—had amassed an extensive factual record pointing to a "virtual medical certainty" that use of pentobarbital would result in "excruciating suffering." (Mem. Op. at 11 (citing Van Norman Decl. at 7).) The record established that flash pulmonary edema develops "almost instantaneously" following injection (ECF No. 117-1, Supp. Decl. of Gail Van Norman, ¶¶ 19–24) and that pentobarbital renders patients "unresponsive" but still capable of experiencing the severe pain of the flash pulmonary edema (Van Norman Supp. Decl. ¶¶ 10–13, 21). These conclusions were supported by accounts of certain executions—where inmates visibly gasped for

breath—and by autopsies that revealed "foam or froth" in the inmates' airways. (*See, e.g.*, Edgar Decl. ¶¶ 78–79.) But the Supreme Court was aware of all this when it concluded that Plaintiffs were not likely to succeed in establishing the risk of harm necessary for an Eighth Amendment claim; it would thus seem contrary to *Lee* for this court to enter judgment on these facts and find an Eighth Amendment violation. So long as pentobarbital is widely used, *Lee* suggests that no amount of new evidence will suffice to prove that the pain pentobarbital causes reaches unconstitutional levels.

Nelson urges a more limited reading of *Lee.* He suggests that *Lee*'s conclusion had more to do with the last-minute nature of the stay than with the substance of the claim. (*See* ECF No. 184, Pls. Opp. at 15.) Notably, the Supreme Court did mention timing as it vacated the injunction, holding that Plaintiffs failed to make "the showing required to justify *last-minute intervention* by a Federal Court." *Lee,* 20A8 at 2 (emphasis added). At first blush, this appears to leave open the possibility that Plaintiffs' showing might have been sufficient had the injunction come earlier. But this appears not to be the case because the Supreme Court came to the same conclusion for Plaintiffs with execution dates that day and those with execution dates two months later, such as Nelson. Indeed, the injunction was not remotely "last-minute" with respect to Nelson, but the court nonetheless vacated the injunction as to him. This suggests that timing was neither dispositive nor weighty. If it was, the injunction for Nelson would stand, or at the very least the Court would have noted that any heightened standard caused by the last-minute injunction did not apply to him.

Nelson also suggests that the import of *Lee* is limited by its posture: a review of a preliminary injunction. (Pls. Opp. at 15 (citing *Ramirez v. U.S. Immigr. & Customs Enf't*, 338 F. Supp. 3d 1, 20 n.1 (D.D.C. 2018).) It is true that the standards for a motion to dismiss and a

preliminary injunction are distinct, but that does not mean this court can ignore *Lee*'s general language regarding the Eighth Amendment standard. *Lee* indicates that absent particular medical circumstances, the use of pentobarbital will withstand Eighth Amendment scrutiny, no matter the evidence of excruciating pain.

This all leads to the current motion to dismiss: in light of *Lee's* holding, the motion to dismiss must be granted. Dismissal under Rule 12(b)(6) is appropriate "if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Barr v. Clinton*, 370 F.3d 1196, 1202 (D.C. Cir. 2004) (citation omitted). Under *Lee*, even if this court found in favor of Plaintiffs on all alleged facts, there would be no Eighth Amendment violation because the evidence of pain would not satisfy *Lee*'s high bar for an objectively intolerable risk of pain. Plaintiffs have therefore failed to state a claim upon which relief can be granted. The Motion to Dismiss Count II is granted[1] and the Motion to Expedite Trial on that count is necessarily denied. It is of course possible that this court has read *Lee* too broadly. If that is the case, the court will expedite trial on remand.

Date: August 15, 2020

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

[1] This ruling applies to all cases except that of Plaintiff Norris Holder, who has separately alleged that he has epilepsy and is taking the medication carbamazepine to prevent seizures, which he alleges "is likely to affect the way he metabolizes pentobarbital." (ECF No. 186, Holder Suppl. Br., at 3.) Given this, Defendants have not moved to dismiss Holder's Eighth Amendment claim on the basis that he fails to allege that there is a serious risk of substantial harm (Defendants do move to dismiss it on the grounds that he has failed to plead a viable alternative). Because this order relies exclusively on the fact that Plaintiffs have failed to allege a risk of substantial harm sufficient for relief, its holding does not apply to Holder, whose allegations related to risk of harm are substantially different.

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:	
ALL CASES	

ORDER

Consistent with the courts' Memorandum Opinions and Orders (ECF Nos. 135, 136, 193, 204), the court hereby GRANTS Keith Nelson's Emergency Motion for Entry of Partial Final Judgment (ECF No. 196). Pursuant to Fed. R. Civ. P. 54(b), the court hereby enters PARTIAL FINAL JUDGMENT for the Defendants, dismissing Count II (Eighth Amendment) of the Amended Complaint (ECF No. 92). This Judgement applies to all Plaintiffs in this consolidated action, except Norris Holder.

Date: August 20, 2020

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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

This is an appeal from a final order of the U.S. District Court for the District of Columbia.

Appellant is Keith Nelson.

Appellees are the United States Department of Justice, William P. Barr, Timothy J. Shea, Michael Carvajal, Nicole C. English, Jeffrey E. Krueger, T.J. Watson, William E. Wilson, M.D., Donald W. Washington, and Stephen M. Hahn, M.D.

Plaintiffs appearing before the district court were Brandon Bernard, Alfred Bourgeois, Chadrick Evan Fulks, Norris G. Holder, Jr., Cory Johnson, Daniel Lewis Lee, Keith Nelson, Wesley Ira Purkey, James H. Roane, Jr., Julius Robinson, and Richard Tipton. Intervenor-plaintiffs appearing before the district court were Anthony Battle, Orlando Hall, Dustin Lee Honken, Jeffey Paul, and Bruce Webster.

Defendants appearing before the district court were the United States Department of Justice, William P. Barr, Mark Bezy, Radm Chris A. Bina, John F. Caraway, Alan R. Doerhoff, Kerry J. Forestal, Eric H. Holder, Jr., Newton E.

Kendig II, Jeffrey E. Krueger, Paul Laird, Harley G. Lappin, Michele Leonhart, Charles L. Lockett, Joseph McClain, Michael B. Mukasey, Charles E. Samuels, Jr., Karen Tandy, T.J. Watson, Thomas Webster, Uttam Dhillon, Nicole C. English, Christopher Andre Vialva and William E. Wilson, M.D. Richard Veach appeared as intervenor-defendant.

There are no *amici curiae* in this Court or the district court.

B. Rulings Under Review

Appellant seeks review of the August 15, 2020 (ECF No. 193) and August 20, 2020 (ECF No. 205) orders of the district court (Chutkan, J.).

C. Related Cases

Appellant appeals from the district court's order in the consolidated case *In The Matter of The Federal Bureau of Prisons' Execution Protocol Cases*, 1:19-mc-145 (D.D.C.). This consolidated case has been before this Court before. *See In re FBOP Execution Protocol Cases* (*Execution Protocol Cases*), No. 20-5206 (D.C. Cir. 2020); *Execution Protocol Cases*, No. 19-5322 (D.C. Cir. 2020); and *Execution Protocol Cases*, No. 20-5199 (D.C. Cir. 2020).

There are no currently pending related cases in this Court or other courts that raise the same issue presented on appeal here.

Respectfully submitted,

/s/ Kathryn L. Clune
Kathryn L. Clune

Dated: August 21, 2020