
No. 21-5004
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES
COREY JOHNSON AND DUSTIN HIGGS,
Plaintiffs-Appellees,

v.

JEFFREY A. ROSEN, ACTING 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

EMERGENCY MOTION FOR STAY PENDING APPEAL

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January 14, 2021

INTRODUCTION

Plaintiffs Corey Johnson and Dustin Higgs are scheduled for execution on January 14 and 15, 2021, at 6:00 P.M., respectively. Pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, Rule 8(a)(2) of the Federal Rules of Appellate Procedure, and 28 U.S.C. § 1651, Plaintiffs respectfully move this Court to stay their executions pending their appeal of the Court's order vacating the district court's preliminary injunction. ECF No. 1879985. Plaintiff intends to file a petition for a writ of certiorari to the Supreme Court, appealing this Court's ruling that the district court's injunction was precluded by *Barr v. Lee*, 140 S. Ct. 2590, 2591-92 (2020), due to the presence of "competing expert testimony on close questions of scientific fact." *Id.* at 4. Plaintiffs therefore seek a stay of their executions in order to preserve the status quo, so that their appeal may be fully and fairly litigated and will not be mooted by their executions. See *Hawaii Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983) ("It is well-settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal.").

BACKGROUND

Plaintiffs, prisoners currently on death row, filed supplemental complaints on December 23 and 28, 2020, alleging as-applied challenges to the Federal Bureau of Prisons' current lethal injection protocol (the "2019 Protocol") based on their diagnoses with COVID-19. ECF Nos. 370, 374. Both Plaintiffs allege that, given

their diagnoses with COVID-19, injection of pentobarbital under the 2019 Protocol will cause flash pulmonary edema earlier in the execution process, before pentobarbital has reached the brain and before brain levels of pentobarbital have peaked, causing them significant pain and suffering before they are rendered unconscious or insensate. *See* ECF Nos. 371, 375. As the district court described it, flash pulmonary edema is caused by a massive dose of pentobarbital that produces “a sensation of drowning akin to waterboarding.” ECF No. 394 at 3.

In connection with their supplemental complaints, Plaintiffs filed motions for preliminary injunctions. *See* ECF Nos. 371, 375. On January 12, 2021, the district court granted Plaintiffs a limited injunction, postponing their executions until at least March 16, 2021. ECF No. 394 at 31. The next day, Defendants filed an appeal with this Court, and later that evening in a split 2-1 decision, the Court vacated Plaintiffs’ injunction. ECF No. 1879985. Hours later, Plaintiffs filed a petition for rehearing *en banc*, which the Court denied on January 14, 2021. ECF No. 1880129. As Plaintiffs are scheduled for execution on January 14 and 15, 2021, absent a stay of their executions pending their petition for a writ of certiorari, Plaintiffs will not be able to fully and fairly litigate their as-applied challenges to the 2019 Protocol.

ARGUMENT

“[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all the requirements for a stay.” *Hill v. McDonough*, 547

U.S. 575, 584 (2006). The propriety of a stay depends on (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. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *accord Hill*, 547 U.S. at 584 (2006) (likelihood of success on the merits, relative harm to the parties, absence or presence of procedural delay). Before seeking equitable relief in the Supreme Court pending an appeal, a party must ordinarily move the Circuit Court for the same relief first.

Plaintiffs are likely to succeed on the merits of their as-applied challenges to the 2019 Protocol based on their infection with COVID-19. See ECF No. 375-1 at 4-10. In issuing the injunction, the district court made detailed findings of fact that were the result of its review of expert declarations and its assessment of the credibility of the experts at an evidentiary hearing, which was held on January 4 and 5, 2021. ECF No. 394 at 10-18. The district court's analysis of this evidence led it to conclude that both Plaintiffs "had successfully demonstrated a substantial risk of serious harm." *Id.* at 16. Without elaborating how these findings of fact were "clear error," this Court vacated the stay, based on what Plaintiffs submit is a misconstrued reading of *Barr v. Lee*. See ECF No. 1879985 at 10 (Pillard, J., dissenting) ("The government has not shown that any of those findings were clearly erroneous, so we

cannot over turn them.”). Given this error, it is likely that Plaintiffs will succeed on their appeal to the Supreme Court, and accordingly, this Court should grant a stay while Plaintiffs pursue that appeal.

The remaining factors also counsel in favor of a stay. Plaintiffs would suffer irreparable harm by being “executed before their claims can be fully adjudicated.” ECF No. 145 at 15-16; *see also* ECF No. 375-1 at 10-13. The balance of equities also favors a stay. *See* ECF No. 375-1 at 14-15. As this district court has explained, (a) the last-minute nature of these proceedings and the resulting costs to the government are largely the Defendants’ doing by scheduling execution dates during a pandemic as they have, (b) the government’s interest in a prompt execution is diminished by the eight years it spent developing an execution protocol, and (c) Plaintiffs have not delayed their as-applied challenges, bringing them almost immediately after their infections with COVID-19 were confirmed. *See* ECF No. 145 at 16-17. In other words, “the potential harm to the government caused by a delayed execution is not substantial, and is far outweighed by the irreparable harm Plaintiffs would face absent an injunction.” *Id.* at 17. Lastly, as the district court has previously stated, “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.” *Id.*; *see also* ECF No. 375-1 at 13-16.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court stay their executions pending their petition for a writ of certiorari, appealing the Court's order of January 13, 2021, and any other such relief that the Court deems appropriate.

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. 35(b)(2)(A) and D.C. Circuit Rule 35(b), because it contains 1,049 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(f), according to the count of Microsoft Word.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Alexander C. Drylewski
ALEXANDER C. DRYLEWSKI

January 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2021, 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. Counsel for parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Alexander C. Drylewski

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