

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5206

September Term, 2019

1:19-mc-00145-TSC

Filed On: July 17, 2020

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

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

Appellees

v.

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

Appellants

Consolidated with 20-5210

BEFORE: Rogers, Griffith, and Pillard, Circuit Judges

O R D E R

Upon consideration of the motion for stay of execution pending appeal, the opposition thereto, and the reply, it is

ORDERED that the motion for stay of execution pending appeal be denied.

Plaintiff Dustin Honken is a federal death-row inmate scheduled to be executed at 4 p.m. today, July 17, 2020. On July 16, he moved for a stay of execution pending his appeal of the district court's partial denial of his motion for a preliminary injunction. Honken argues that he is likely to succeed on three claims under the Administrative Procedure Act (APA). Specifically, Honken claims that the Federal Bureau of Prisons' (BOP) 2019 Execution Protocol is arbitrary and capricious because (1) BOP failed to consider the risk that pentobarbital could cause flash pulmonary edema; (2) BOP failed to address the risk of faulty IV placement; and (3) BOP failed to justify its use of compounded drugs.

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In determining whether to grant “the exceptional remedy of a [stay] pending appeal,” John Doe v. CFPB, 849 F.3d 1129, 1131 (D.C. Cir. 2017), we consider four factors: “(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, 434 (2009). Under this difficult-to-satisfy standard, Honken has not made “a strong showing” that he is “likely to succeed on the merits.” Id.

First, Honken has not demonstrated a likelihood of success on his claim that the 2019 Protocol is arbitrary and capricious based on its failure to consider the risk of flash pulmonary edema. The APA’s standard of review is highly deferential. BOP selected this method of execution after consulting medical professionals, studying state execution protocols that rely on pentobarbital and the experience of those states in its administration, and reviewing the literature and case law concerning the drug. Although the Protocol does not discuss the risk of flash pulmonary edema specifically, BOP need not consider every possible risk associated with its chosen method of execution.

Second, Honken has not demonstrated a likelihood of success on his claim that the 2019 Protocol is arbitrary and capricious because BOP “failed to address the risk of faulty IV-line placement.” Mot. at 14. Honken says that the 2019 Protocol “is all but silent on how to insert the IV or address any complications” and “does not assure that medical personnel will be qualified.” Id. at 15. However, the Protocol mandates that the IV line must be placed “by qualified personnel,” “(1) based on the training and experience of personnel establishing the intravenous access; (2) to comply with specific orders of federal courts; or (3) based upon a recommendation from qualified personnel.” A.R. 874-75. The Protocol also defines “qualified personnel” to include “licensed physicians, nurses, EMTs,” and other medical professionals. Id. The agency studied the difficulties of IV-line placement, see, e.g., A.R. 931-932, and Honken has not made a strong showing that its decision to allow medically trained personnel to determine how best to place the IV line was unreasonable.

Last, Honken has not demonstrated a likelihood of success on his claim that BOP has acted arbitrarily and capriciously by obtaining the pentobarbital it plans to use in his execution from a compounding pharmacy. Because compounded pentobarbital is subject to less stringent FDA regulation than pentobarbital manufactured by a traditional drug supplier, Honken alleges that its use in his execution poses an unjustified risk of subpotency, which could cause him significant pain. But the government has stated that it cannot acquire pentobarbital from traditional suppliers, who have stopped selling the drug for use in executions. See Defs.’ Opp’n to Pl.’s Mot. for Prelim. Inj. 36, ECF No. 36. BOP reported that the Drug Enforcement Agency ensured that the compounding

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pharmacy is properly registered, and the pharmacy itself and two independent laboratories have performed quality testing. A.R. 872. Honken has not met his burden of showing that the government's decision to use compounded drugs to fulfill its statutory mandate to carry out executions is unreasonable when it cannot obtain drugs through a traditional supplier.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk