

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<p>In the Matter of the Federal Bureau of Prisons’ Execution Protocol Cases,</p> <p>LEAD CASE: <i>Roane et al. v. Barr</i></p> <p>THIS DOCUMENT RELATES TO:</p> <p><i>Lee &amp; Honken v. Barr et al.</i>, 19-cv-2559</p> <p><i>Purkey v. Barr et al.</i>, 19-cv-3214</p> <p><i>Nelson v. Barr et al.</i>, 20-cv-557</p>	<p>Case No. 19-mc-0145 (TSC)</p>
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**PLAINTIFF DUSTIN HONKEN’S EMERGENCY MOTION FOR STAY OF  
EXECUTION PENDING CROSS-APPEAL**

Plaintiff Dustin Honken is scheduled for execution on July 17. Pursuant to Fed. R. Civ. P. 62(d), Fed. R. App. P. 8(a)(1), and 28 U.S.C. § 1651, Mr. Honken respectfully moves the Court to stay his execution pending his cross-appeal of the Court’s order partially granting and partially denying his motion for preliminary injunction. *See* Dkt. # 145, 146. Mr. Honken intends to appeal the Court’s ruling insofar as it denied a preliminary injunction on the ground that the 2019 Protocol is arbitrary and capricious under the Administrative Procedure Act. *See* Dkt. #145 at 7-10. He therefore seeks a stay of his execution in order to preserve the status quo, so that his appeal may be fully and fairly litigated rather than becoming moot by his execution. “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[.]” *Hawaii Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983).

**Background**

Counsel assume the Court’s familiarity with recent proceedings in this matter, as well as previous litigation on preliminary injunctions. Of relevance here, the Court’s order of July 15

granted a preliminary injunction on Plaintiffs Purkey, Honken, and Nelson’s claim that the 2019 Protocol violates the Food, Drug, and Cosmetic Act. Dkt. #145 at 12-13. The Court also concluded that the balance of relevant factors justified preliminary injunctive relief. *Id.* at 15-18. The Court later declined the Government’s request to stay the injunction – *see* Minute Order of July 15, 2020 – and the court of appeals also denied the Government’s motion to stay or vacate it. *See In re Federal Bureau of Prisons’ Execution Protocol Cases*, No. 20-5206 (D.C. Cir. July 15, 2020). Several hours later, however, the Supreme Court vacated the preliminary injunction on the Government’s application. *See Barr v. Purkey*, --- S. Ct. ---, No. 20A10 (U.S. July 16, 2020).

Although Plaintiffs argued the arbitrary-and-capricious claim as an alternative basis for affirming the Court’s injunctive relief on the FDCA claim, the arbitrary-and-capricious claim has not been resolved other than by this Court. Specifically, neither the D.C. Circuit nor the Supreme Court addressed the arbitrary-and-capricious claim in yesterday’s rulings. That result is unsurprising, and the claim remains viable on Mr. Honken’s cross-appeal. *See Sherley v. Sebelius*, 644 F.3d 388, 397-98 (D.C. Cir. 2011) (declining to “uphold[] a preliminary injunction based on a legal theory not embraced by the district court”).

### **Argument**

Stays of execution, preliminary injunctions, and stays pending appeal are governed by similar standards. The propriety of a stay depends on (1) whether the stay applicant has made a strong showing that (s)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); *accord Hill v. McDonough*, 547 U.S. 573, 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 appellate court pending an appeal, a party must ordinarily move the district court for the same relief first. *See* Fed. R. App. P. 8(a)(1)(C).

Plaintiff Honken is likely to succeed on the merits of his claim that the 2019 Protocol is arbitrary and capricious. *See* Dkt. #102 at 5-20; Dkt. #118 at 2-8. With respect, Mr. Honken disagrees with the Court's ruling that the APA claim is precluded "by the Supreme Court's holding that, given Defendants' contention that pulmonary edema occurs post-mortem or after the inmate has been rendered insensate, this risk does not justify last-minute judicial intervention." Dkt. #145 at 8 (citing *Barr v. Lee*, --- S. Ct. ---, No. 20A8, 2020 WL 3964985, at \*2 (U.S. July 14, 2020)). *Lee* held only that, given the conflicting evidence about pulmonary edema, Plaintiffs had not made the showing required for a preliminary injunction on Eighth Amendment grounds. That holding has no bearing on whether Defendants were obligated to consider the risk of flash pulmonary edema when they made the decision to select pentobarbital as the execution drug. Neither, as a general matter, does the Eighth Amendment have anything to do with whether an agency has "entirely failed to consider [an] important aspect of the problem." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). If the absence of a viable Eighth Amendment claim precluded such an APA inquiry, then APA review itself would be a dead letter.

The remaining factors counsel in favor of a stay, as the Court has already held. Mr. Honken would suffer irreparable harm by being "executed before [his] claims can be fully adjudicated," Dkt. 145 at 15-16, including a claim that his execution would be illegal under the APA. *See* 5 U.S.C. § 706(2) (court must "hold unlawful and set aside" agency action that is "arbitrary, capricious, [or] an abuse of discretion"). The balance of equities also favors a stay. As

the Court has explained, (a) the last-minute nature of these proceedings and the resulting costs to the Government are largely of the Defendants' creation by scheduling execution dates 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) Mr. Honken has not delayed his APA claim, and indeed, he first asserted it in his intervention-complaint on Nov. 1, 2019, as well as in his initial motion for preliminary injunction four days later. Dkt. #29 at 26-34; Dkt. #145 at 16-17.

Otherwise stated, "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." Dkt. #145 at 17. Finally, Mr. Honken agrees with the Court that "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.* at 17.

### **Conclusion**

For the foregoing reasons, Plaintiff Dustin Honken respectfully moves that the Court stay his scheduled execution pending his cross-appeal of the Court's orders of July 15, 2016 (Dkt. #145, 146).

DATED: July 16, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 16, 2020, I caused a true and correct copy of foregoing to be served on all counsel of record via the Court's CM/ECF system. Pursuant to this Court's August 20, 2019 Order, below is a list of all counsel of record. The names marked with an asterisk (\*) have no email provided on the docket or are no longer with the identified firms.

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