

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

EARLENE PETERSON,)
KIMMA GUREL,)
MONICA VEILLETTTE,)
Plaintiffs,)
v.)
WILLIAM P. BARR,)
MICHAEL CARVAJAL,)
T.J. WATSON,)
Defendants.)
No. 2:20-cv-00350-JMS-DLP

Order Granting Plaintiffs' Motion for Preliminary Injunction

Federal death row inmate Daniel Lee Lewis is scheduled to be executed on July 13, 2020, at United States Penitentiary – Terre Haute (USP – Terre Haute) in Terre Haute, Indiana.

Plaintiffs Earlene Peterson, Kimma Gurel, and Monica Veillette are members of Mr. Lee's victims' families and have been selected by the Warden of USP-Terre Haute to attend the execution. The plaintiffs seek to enjoin Mr. Lee's execution on the basis that defendants have violated the Administrative Procedure Act (APA) by scheduling Mr. Lee's execution during the COVID-19 pandemic without adequate measures in place to protect them. The defendants oppose the motion on the bases that the decision of when to set an execution is an unreviewable agency action, the plaintiffs are outside the zone of interests, and the government's decision to promptly schedule the executions was not arbitrary and capricious.

I. Factual and Procedural Background

A. Mr. Lee's Crimes, Sentence, and Procedural History

In 1999, a jury in the United States District Court for the Eastern District of Arkansas convicted Mr. Lee of conspiring to violate and violating the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1962(c) and (d), and of three murders. *United States v. Lee*, 374 F.3d 637, 641 (7th Cir. 2004). Mr. Lee's murder victims were William Mueller, Nancy Mueller, and Nancy Mueller's eight-year-old daughter, Sarah Powell. *Id.* at 641–42. Mr. Lee was sentenced to death. *Id.* at 643.

Mr. Lee's conviction was affirmed on appeal, *id.* at 641, and his petition for certiori was denied, 545 U.S. 1141 (2005). He has unsuccessfully sought post-conviction relief pursuant to 28 U.S.C. § 2555 and has exhausted all appeals as to his § 2255 proceedings. See *United States v. Lee*, No. 4:97-CR-00243-(2), 2008 WL 4079315, at *1 (E.D. Ark. Aug. 28, 2008), *aff'd*, 715 F.3d 215 (8th Cir. 2013), *rehearing denied*, 811 F.3d 272 (8th Cir. 2015), *cert. denied*, 135 S. Ct. 72 (2014); *United States v. Lee*, No. 4:97-cr-00243-02, 2014 WL 1093197, at *1 (E.D. Ark. Mar. 18, 2014), *aff'd*, 792 F.3d 1021 (8th Cir. 2015), *rehearing denied*, 811 F.3d 272 (8th Cir. 2015), *cert denied*, 137 S. Ct. 1577 (2017).

On July 25, 2019, the Attorney General announced that capital executions would resume after nearly two decades without any executions in the federal system. See The United States Department of Justice, "Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse," July 25, 2019, <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>. The Bureau of Prisons (BOP) adopted a revised addendum to its lethal injection protocol that replaced the previous three-drug procedure with the use of a single drug, pentobarbital sodium, as the lethal agent. *Id.* In announcing the change to the injection protocol, DOJ also established execution dates for five condemned federal inmates, including Mr. Lee. *Id.* Mr. Lee's execution was scheduled for December 9, 2019.

Mr. Lee filed suit challenging BOP's single-drug protocol and on November 20, 2019, the district court issued a preliminary injunction staying the executions. *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F. 3d 106, 111 (D.C. Cir. 2020) ("Execution Protocol Cases"). That injunction was vacated by the D.C. Circuit on April 7, 2020. *Id.* at 108. On June 29, 2020, the Supreme Court denied an application for a stay of the mandate. *Bourgeois v. Barr*, 19-1348, --- S. Ct. ---, 2020 WL 3492763.

B. The Novel Coronavirus and Mr. Lee's Scheduled Execution

The novel coronavirus ("COVID-19") has been spreading in the United States since early 2020. As of July 9, 2020, there were 3,047,671 reported cases in the United States, including 368,441 cases in the past week. Centers for Disease Control and Prevention, Covid Data Tracker, <https://www.cdc.gov/covid-data-tracker/#cases> (last visited July 10, 2020). 132,056 people have died from the virus in the United States. *Id.* In Indiana, there have been 49,063 confirmed cases and 2,732 resulting deaths. Indiana COVID-19 Dashboard, <https://www.coronavirus.in.gov/2393.htm> (last visited July 10, 2020). Due to COVID-19, the Bureau of Prisons has limited inmate movement and suspended social and legal visits. *See* "BOP Implementing Modified Operations," https://www.bop.gov/coronavirus/covid19_status.jsp (last accessed July 10, 2020).

Nevertheless, on June 15, 2020, with the COVID-19 pandemic well underway, the Department of Justice announced four execution dates, including Mr. Lee's on July 13, 2020. *See* Press Release, Dep't of Justice, "Executions Scheduled for Four Federal Inmates Convicted of Murdering Children" (June 15, 2020), <https://www.justice.gov/opa/pr/executions-scheduled-four-federal-inmates-convicted-murdering-children>.

C. The Plaintiffs

The plaintiffs in this action are relatives of the victims:

Plaintiff Earlene Branch Peterson is Nancy Mueller's mother and Sarah Powell's grandmother.¹ Dkt. 1 at ¶ 5. She is 81 years old and lives in Hector, Arkansas, more than 500 miles from Terre Haute. *Id.* at ¶ 13. She suffers from congestive heart failure and has other underlying health conditions that put her at increased risk for developing COVID-19-related complications. Dkt. 17-1, ¶ 4. Pursuant to her doctor's directions, she has remained at home since March 10, 2020, receiving deliveries for groceries and medicine. *Id.* at ¶¶ 4, 6.

Plaintiff Kimma Gurel is Nancy Mueller's sister and Sarah Powell's aunt. *Id.* at ¶ 6. She is 61 years old and lives in Spokane Valley, Washington, nearly 2,000 miles from Terre Haute. *Id.* at ¶ 14. She also has underlying health conditions that put her at an increased risk for COVID-19-related complications. *Id.*

Plaintiff Monica Veillete is Nancy Mueller's niece and Sarah Powell's cousin. *Id.* at ¶ 7. She is 43 years old and lives in Deer Park, Washington, nearly 2,000 miles from Terre Haute. *Id.* at ¶ 15.

28 C.F.R. § 26.4 provides that up to eight "citizens" "selected by the Warden" shall be present at the execution. The BOP Execution Protocol states that the Warden will select up to eight citizens and that "in identifying these individuals, the Warden, no later than 30 days after the setting of an execution date, will ask the United States Attorney for the jurisdiction in which the inmate was prosecuted to recommend up to eight individuals who are victims or victim family

¹ The defendants refer to the plaintiffs merely as "extended family members of Mr. Lee's victims." Dkt. 10 at 3. This insensitivity reflects the defendants' pervasive indifference for the plaintiffs' legal and personal interests in Mr. Lee's scheduled execution.

members to be witnesses of the execution." Dkt. 9 at 10. All three plaintiffs were selected by the Warden to witness Mr. Lee's execution.

On July 2, 2020, Dale Hartkemeyer (aka Seigen) filed a complaint in this Court. *Hartkemeyer v. Barr, et al.*, No. 2:20-cv-00036-JMS-DLP. Mr. Hartkemeyer is the spiritual advisor to inmate Wesley Purkey, whose execution is scheduled for July 15, 2020. Mr. Hartkemeyer alleged that the government's plan to execute Mr. Purkey violated his rights under the Religious Freedom Restoration Act (RFRA) and the APA in light of the risks posed by COVID-19. *Id.* at 1. On July 7, 2020, the plaintiffs moved to intervene in Mr. Hartkemeyer's case. Dkt. 35. The Court denied their request, finding that although both cases accuse the defendants of violations of the APA, the facts underlying the claims were different. Dkt. 54 at 4. The Court directed the clerk to open a new action based on the plaintiffs' proposed complaint. *Id.* at 4–5.

The plaintiffs argue that the government violated the APA by scheduling Mr. Lee's execution during the ongoing COVID-19 pandemic, making it dangerous for them to attend.

II. Preliminary Injunction Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The plaintiff must satisfy a four-prong test, establishing "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.*

"A party moving for preliminary injunctive relief need not demonstrate a likelihood of absolute success on the merits. Instead, he must only show that his chances to succeed on his claims are better than negligible." *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018) (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046

(7th Cir. 2017). But if it is clear that the party cannot show a likelihood of success on the merits, the Court should refuse the injunction regardless of the balance of harms. *Id.* at 966.

Finally, "before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the [movant] has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004).

III. Discussion

A. Likelihood of Success on the Merits

The defendants argue that the plaintiffs are unlikely to succeed on the merits for three reasons: 1) judicial review is unavailable under the APA; 2) the plaintiffs do not fall within the "zone of interests" of any relevant law to challenge an execution date; and 3) the Attorney General's decision was not arbitrary or capricious, nor was it "not in accordance with law." The Court addresses each argument in turn.

1. The Plaintiffs Have a Strong Likelihood of Showing Their Claim Is Reviewable under the APA.

"The APA 'sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992)). "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

"The APA establishes a 'basic presumption of judicial review [for] one suffering legal wrong because of agency action.'" *Regents of the Univ. of California*, 140 S. Ct. at 1905 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). The agency may rebut that presumption by

establishing that its action falls into one of two exceptions set out in 5 U.S.C. § 701. *See id.* First, the APA does not permit judicial review where "statutes preclude judicial review" of the agency action. 5 U.S.C. § 701(a)(1). Second, the APA does not permit judicial review where the action "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

The defendants argue that their decision to schedule an execution is committed to agency discretion by law. But courts are directed to read § 701(a)(2)'s exception "quite narrowly, restricting it to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019) (internal quotation omitted). And contrary to the defendants' suggestion, agency decisions regarding implementation of the death penalty are not categorically off limits. *See generally Execution Protocol Cases*, 955 F. 3d 106 (reviewing claims regarding agency's execution protocol under the APA). Indeed, in the *Execution Protocol Cases*, neither the Supreme Court nor any of the opinions in the D.C. Circuit Court of Appeals embraced the defendants' argument here that such claims are unreviewable. *Id.*; *see Bourgeois v. Barr*, --- S. Ct. ----, 2020 WL 3492763 (Mem.) (denying certiorari).

Here, the Federal Death Penalty Act of 1994 (FDPA) provides the relevant standards. The FDPA provides that a person sentenced to death "shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence." 18 U.S.C. § 3596(a). "When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." *Id.*

The "law of the State in which the sentence is imposed" includes state statutes and binding regulations that govern the execution process. *Execution Protocol Cases*, 955 F.3d at 134 (Rao, J., concurring) ("federal government [must] follow all procedures prescribed by state statutes and formal regulations, but no more.").² As relevant here, Arkansas law provides a fairly robust statutory scheme governing the conduct of executions. *See Ark. Code §§ 4-5-617, 16-90-502.*

Thus, the FDPA does not commit the choice of scheduling an execution to agency discretion. The agency's discretion is bound by the language of the FDPA and by "the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a).

2. The plaintiffs Have a Strong Likelihood of Showing They State a Claim Within the FDPA's Zone of Interests.

The Court may review the plaintiffs' APA claim only if they are "aggrieved by agency action . . . within the meaning of a relevant statute." 5 U.S.C. § 702. To satisfy this requirement, the plaintiffs' claim must at least be "arguably within the zone of interests" that Congress sought to protect or regulate under the statute in question. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

The defendants assert that the FDPA "makes no provision for witnesses such as Plaintiffs to attend an execution, much less provides them a private cause of action to protect *their* rights." Dkt. 10 at 13–14 (emphasis in original). True, the FDPA itself does not explicitly mention victims, but it does provide that an execution must proceed "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a); *See Execution Protocol Cases*, 955 F.3d at 134 (Rao, J., concurring). And Arkansas law provides significant rights to victims' family members in the context of an execution.

² The D.C. Circuit's decision in *Execution Protocol Cases* does not bind this Court, but the Court recognizes Judge Rao's concurrence, which provides the narrower basis for the result, as the controlling opinion. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1976).

Under Arkansas law, a spouse, parent, adult sibling, or adult child of the victim "shall be present" for the execution "if he or she chooses to be present." Ark. Code § 16-90-502(e)(1)(C). Two of the three plaintiffs here qualify, as Ms. Peterson is Nancy Mueller's mother, and Ms. Gurel is Nancy Mueller's adult sibling. The same statute provides that "[t]he director may prohibit a person who otherwise would be eligible to witness or view an execution under this subsection if he or she determines the person to be a security risk." Ark. Code § 16-90-502(e)(2). This suggests that eligible persons cannot be prohibited for any reason whatsoever. Unless they are a security risk, Arkansas law provides them a right to be present for the execution.

Even if not a spouse, child, sibling, or parent, "[a]ny other adult relative with a close relationship to the victim" also has rights under the statute. Ark. Code § 16-90-502(e)(2)(D) (defining "Close relative of the victim"). Specifically, "[a] closed-circuit audiovisual monitor dedicated to viewing a live broadcast of the execution shall be placed in a location chosen by the director for the benefit of any close relative of the victim . . . who desires to view the execution and who is not witnessing the execution as allowed under subdivision (e)(1)(C)." Ark. Code § 16-90-502(e)(5)(A). Ms. Veillette satisfies the definition of a "[c]lose relative of the victim."

The FDPA directs federal authorities to follow state law in implementing an execution, and state law provides rights to victims' family members. The plaintiffs therefore have a strong likelihood of showing that their claim is "arguably within the zone of interests" Congress intended to protect with the FDPA.

3. The plaintiffs Have a Strong Likelihood of Showing that the Defendants' Setting Execution Dates During a Pandemic Without Adequately Considering Whether the Victims' Family Could Safely Attend Was Arbitrary and Capricious or Not in Accordance With Law.

The APA "instructs reviewing courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Dep't of Commerce*, 139 S. Ct.

at 2567 (quoting 5 U.S.C. § 706(2)(A)). The reviewing court must limit its inquiry to whether the agency "examined 'the relevant data' and articulated 'a satisfactory explanation' for its decision, 'including a rational connection between the facts found and the choice made.'" *Id.* at 2569 (quoting *Motor Vehicle Mfrs. Assn. of United States v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). "Under this highly deferential standard, an administrative decision should be upheld if the agency's path may be reasonably discerned." *Sierra Club v. U.S. EPA*, 774 F.3d 383, 393 (7th Cir. 2014) (internal quotation omitted).

"But even deferential review should 'be searching and careful' when considering 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Boucher v. United States Dep't of Agric.*, 934 F.3d 530, 547 (7th Cir. 2019) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)). "An agency decision will be found 'arbitrary and capricious' if it 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *State Farm*, 463 U.S. at 43). "If a reviewing court is faced with 'such deficiencies,' it 'should not attempt itself to make up' for those gaps by 'supply[ing] a reasoned basis for the agency's action that the agency itself has not given.'" *Id.* (quoting *State Farm*, 463 U.S. at 43).

Even applying the deferential standard, the plaintiffs have a strong likelihood of showing that the defendants' actions were arbitrary and capricious or not in accordance with law. The defendants assert that the plaintiffs have no right to be present for the execution. Dkt. 10 at 4 ("The fact that Plaintiffs are victims of Lee's crime means that the government has made efforts to accommodate their attendance, but in terms of legally enforceable rights vis-à-vis Lee's capital

sentence, they stand in the shoes of any member of the public."). This assertion alone underscores that the defendants "entirely failed to consider an important aspect of the problem," *see Boucher*, 934 F.3d at 547 (internal quotation omitted)—namely, victims' family members' rights to be present for the execution under Arkansas law.

The agency record, such as it is, offers no help to the defendants. They have produced no evidence to show that their decision to conduct an execution during a pandemic accounted for the victims' family's right to be present. To be sure, they have produced evidence that the family members—like any other member of the public who attends the execution—will have access to personal protective equipment, soap, and hand sanitizer while on prison grounds. *See Hartkemeyer v. Barr, et al.*, No. 2:20-cv-336-JMS-DLP, dkt. 51-1, ¶ 11 (Declaration of Rick Winter (July 8, 2020)). But there is no evidence that the defendants considered whether these measures give adequate protection to the plaintiffs, who have a right to be present under Arkansas law (and thus the FDPA). The defendants also gave no consideration to whether Ms. Peterson, who must travel more than 500 miles from Arkansas, and Ms. Gurel, who will travel by plane from Washington, can safely get to Terre Haute for the execution. *See* dkt. 10 at 8 (conceding that the government has no control over the safety of the plaintiffs' travel). And they apparently gave no consideration to the requirement that closed-circuit viewing be made available for close relatives of the victim. Ark. Code § 16-90-502(e)(5)(A). Indeed, given the defendants' argument that the plaintiffs are "outside the zone of interests" it appears they gave no consideration to their rights whatsoever.

Accordingly, the plaintiffs have shown a strong likelihood of prevailing on their claim that the defendants' setting of Mr. Lee's execution date without considering their right to be present was arbitrary and capricious and not in accord with law.

B. Irreparable Harm

The defendants argue that the only potential harm to the plaintiffs is "the mere 'possibility' that the plaintiffs will be exposed to COVID-19 if they attend the execution." Dkt. 10 at 19. Not so. The harm to Ms. Peterson, for example, is being forced to choose whether being present for the execution of a man responsible for the death of her daughter and granddaughter is worth defying her doctor's orders and risking her own life.

If there were any doubt about the seriousness of this harm, Ms. Peterson's declaration puts it to rest:

I am now faced with an impossible choice of either not exercising my right to attend the execution, or traveling in dangerous conditions which could cause me to become very sick, or even die.

I want to attend this execution at a time when it is safe for people to travel. Although I have some medical issues, I can travel if the conditions are not especially dangerous.

I pray every day for my lost daughter and granddaughter. As a mother I feel very sorry for Daniel Lewis Lee's mother. I hope somehow by attending I can find some peace. Right now I am not at peace.

Dkt. 17-1 at 4.

The plaintiffs have shown irreparable harm absent the grant of a preliminary injunction.

C. Balance of Harms

The government has an interest in the prompt and orderly execution of Mr. Lee's death sentence. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (the government has "an important interest in the timely enforcement of a sentence" (internal quotation omitted)); *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (after years of litigation, the government "is entitled to the assurance of finality"). But the government's interest is intertwined with—and based in part upon—the victim's interest in timely justice. *See Bucklew*, 139 S. Ct. at 1133 (ascribing "important interest" in finality to "[b]oth the [government] and the victims of crime"); *Calderon*, 523 U.S. at 556 ("Only

with real finality can the victims of crime move forward knowing the moral judgment will be carried out.").

At least three family members of Lee's victims—Ms. Peterson, Ms. Gurel, and Ms. Veillette—have expressed a greater interest in safely attending the execution than in having the execution proceed on the government's timetable. The defendants suggest that other family members may have different priorities. Dkt. 10 at 19 ("[Ms. Peterson] is not the lone family member of a victim of Mr. Lee's crimes."). But the defendants present no evidence to support that suggestion. The balance of harms weighs in the plaintiffs' favor.

D. Public Interest

The public, like the government, has an interest in prompt and orderly execution of Mr. Lee's death sentence. But the public also has an interest—codified by Congress—in ensuring that crime victims are "treated with fairness and with respect for the victim's dignity." 18 U.S.C. § 3771(a)(8). In this case, the public's interest in a prompt, orderly execution should give way to their interest in treating Ms. Peterson, Ms. Gurel, and Ms. Veillette with fairness, respect, and dignity.

E. Unnecessary Delay

The defendants do not argue that a stay should be denied based on the plaintiffs' unnecessary delay in bringing the claim. Any such argument is therefore waived.

In any event, the plaintiffs did not unnecessarily delay in bringing their claim. While they did not file a complaint immediately after Mr. Lee's execution date was announced, they did try to obtain assurances about safety measures from Bureau of Prisons staff member Steve Markle. Dkt. 17-2 at ¶¶ 6, 8 (Monica Veillette Affidavit). Ms. Veillette spoke with Mr. Markle several times, and he informed her that "it would be impossible to maintain social distancing at the witness

room, in the hallways, in the transport vans, at checkpoints and at other areas in the prison." *Id.* at ¶ 8. When Ms. Veillette asked for a written description of the safety measures the Bureau of Prisons had in place, he responded that he could not provide anything in writing "because it would be 'discoverable.'" *Id.* at ¶ 10.

The plaintiffs will not be penalized for seeking an informal remedy before filing this lawsuit.

IV. Conclusion

The plaintiffs' motion for preliminary injunction, dkt. [6], is **granted** to the extent that the Court enjoins the defendants from carrying out the execution of Daniel Lewis Lee on July 13, 2020, or on any future date, pending final resolution of the merits of this case or until further order of this Court. The Court will vacate the injunction upon a showing by the defendants of an agency action setting a date for Mr. Lee's execution in accord with the FDPA and demonstrating reasonable consideration of the plaintiffs' right to be present for the execution.

The **clerk is directed** to correct the name of plaintiff Monica Veillette on the docket.

IT IS SO ORDERED.

Date: 7/10/2020



Hon. Jane Magnus-Stinson, Chief Judge
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Southern District of Indiana

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION**

EARLENE BRANCH PETERSON, KIMMA GUREL,
and MONICA VEILLETTE,

Plaintiffs,

v.

WILLIAM P. BARR, in his official capacity as
Attorney General of the United States; MICHAEL
CARVAJAL, in his official capacity as Director of the
Federal Bureau of Prisons; and T.J. WATSON, in his
official capacity as Complex Warden for Terre Haute
Federal Correction Complex,

Defendants.

Case No. _____

[PROPOSED] COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Earlene Branch Peterson, Kimma Gurel, and Monica Veillette (collectively
“Plaintiffs”), by and through their undersigned counsel, bring this Complaint and in support thereof
they allege as follows:

Nature of Action

1. This action is for declaratory relief, pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, and related injunctive relief, pursuant to 28 U.S.C. § 2202 and Fed. R. Civ. P. 65, and it arises out of Defendants’ ongoing and future violation of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the “APA”).

2. As alleged below, Defendants are egregiously violating the APA because they have announced their intention to execute Daniel Lewis Lee on July 13, 2020 at the United States

Penitentiary in Terre Haute (USP Terre Haute), even though the COVID-19 pandemic is worsening and currently ravaging the federal prison system, including USP Terre Haute. Plaintiffs, who are all members of Mr. Lee's victims' families, have been selected to attend the execution and they have a well-established right to do so. Defendants, however, have placed Plaintiffs in an untenable position because Plaintiffs cannot exercise those rights unless they put their own lives at grave risk by traveling to USP Terre Haute and being exposed to COVID-19 while there,

3. There is no legitimate reason for Defendants to go forward with Mr. Lee's execution on July 13, 2020 as opposed to a later date. Defendants have arbitrarily and capriciously set that execution date, despite the COVID-19 pandemic, without adequately taking into account Plaintiffs' health and safety. Thus, Plaintiffs' rights to attend Mr. Lee's execution have been subverted, and the agency action in setting the execution violates the APA because it is "arbitrary and capricious" and "not in accordance with law." 28 U.S.C. § 706(2)(A).

4. Accordingly, through this Complaint, Plaintiffs seek (1) a declaration that Defendants' action is unlawful and should be set aside; and (2) an injunction barring Defendants from setting an execution date for Mr. Lee until such time as Plaintiffs are able to exercise their right to attend Mr. Lee's execution without endangering their own lives.¹

Parties

5. Plaintiff Earlene Branch Peterson is the mother of victim Nancy Mueller and the grandmother of victim Sarah Powell.

¹ The spiritual advisor for another prisoner, Wesley Purkey, has also filed an action in this Court regarding the risks posed to him by attending Mr. Purkey's execution, which is scheduled for July 15, 2020. *See Hartkemeyer v. Barr et al.*, 20-cv-00336 (S.D. Ind.) (the "Hartkemeyer Action").

6. Plaintiff Kimma Gurel is Nancy Mueller's sister and Sarah Powell's aunt.

7. Plaintiff Monica Veillette is Nancy Mueller's niece and Sarah Powell's cousin.

8. Defendant William P. Barr is the Attorney General of the United States. He scheduled Mr. Lee's execution for July 13, 2020 and has responsibility over carrying out death sentences against federal prisoners. Defendant Barr maintains an office in Washington, D.C. and is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

9. Defendant Michael Carvajal is the Acting Director the Federal Bureau of Prisons ("BOP"). He is responsible for the supervision and operation of all federal prisons, including USP Terre Haute, where Mr. Lee is scheduled to be executed on July 13, 2020. Defendant Carvajal maintains an office in Washington, D.C. and is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

10. Defendant T.J. Watson is the Complex Warden for the Federal Correctional Complex, Terre Haute (FCC Terre Haute). Defendant Watson maintains an office in Terre Haute, Indiana and is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

Jurisdiction and Venue

11. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 because Plaintiffs seek relief pursuant to 28 U.S.C. §§ 2201 and 2202.

12. Venue lies in the Southern District of Indiana, where FCC Terre Haute, which includes USP Terre Haute, is located. Venue is also appropriate under 28 U.S.C. § 1391, as venue is proper in any district in which a defendant resides.

Statement of Facts

I. Plaintiffs Suffer from A Variety of Ailments.

13. Plaintiff Earlene Branch Peterson is 81 years old. She lives in Hector, Arkansas, a distance of more than 500 miles from Terre Haute, Indiana. She suffers from congestive heart failure and, in addition to her age being a risk factor, also has other underlying conditions, that put her at increased risk for developing COVID-19-related complications. She attended Mr. Lee's capital trial on a daily basis. She has been contacted over the years by members of the prosecution, who have updated her on the status of proceedings in the case.

14. Plaintiff Kimma Gurel is 61 years old. She lives in Spokane Valley, Washington, a distance of nearly 2,000 miles from Terre Haute, Indiana. In addition to her age being a risk factor, she suffers from underlying health conditions that put her at increased risk for developing COVID-19-related complications. She attended Mr. Lee's capital trial on a daily basis.

15. Plaintiff Monica Veillette is 43 years old. She lives in Deer Park, Washington, a distance of nearly 2,000 miles from Terre Haute, Indiana. She suffers from asthma and other underlying conditions that put her at increased risk for developing COVID-19-related complications. She attended Mr. Lee's capital trial on a daily basis, and she testified as a witness for the prosecution.

II. Plaintiffs Will Be Exposed to Unnecessary and Life-Threatening Risks by Attending Mr. Lee's Execution.

16. Defendants have relied on 28 C.F.R. Part 26 in announcing their intent to execute Mr. Lee on July 13, 2020. 28 C.F.R. § 26.4 lists the persons who "shall be present" during an execution and it includes "[e]ight citizens" selected by the Warden. 28 C.F.R. § 26.4(c)(4)(i).

17. The BOP Execution Protocol (2019) (the "Protocol"), attached hereto as Exhibit A, repeats the requirement from 28 C.F.R. § 26.4 that the Warden must select eight citizens to attend

an execution. *See* Ex. A, Ch. 1, III.G.1.c.(1), 10-11. The Protocol further provides that, in identifying those individuals, the Warden “will ask the United States Attorney for the jurisdiction in which the inmate was prosecuted to recommend up to eight individuals who are victims or victim family members to be witnesses of the execution.” *Id.*

18. The process set forth in the Code of Federal Regulations and Protocol has taken place and Plaintiffs are among the witnesses selected to attend Mr. Lee’s execution. Therefore, pursuant to 28 C.F.R. § 26.4, Plaintiffs have the right to attend Mr. Lee’s execution.

III. COVID-19 is a serious, debilitating and potentially lethal disease, which hits vulnerable populations with particular severity.

19. The SARS-CoV-2 virus, and the human infection it causes – COVID-19 – is a global pandemic, was designated a global health emergency by the World Health Organization, and was declared a national emergency on March 13, 2020, by President Donald Trump.

20. In his Proclamation, declaring this national state of emergency, President Trump noted that “[t]he spread of COVID-19 within our Nation’s communities threatens to strain our Nation’s healthcare systems. As of March 12, 2020, 1,645 people from 47 States have been infected with the virus that causes COVID-19.” *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (issued on March 13, 2020).²

21. Those numbers have increased dramatically over the past four months. According to the Centers for Disease Control and Prevention (“CDC”), as of July 4, 2020, there have been

² Available at: <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited July 5, 2020).

2,789,678 total confirmed cases of COVID-19 in the United States, and 129,305 deaths. *Cases, Date & Surveillance: Cases in the U.S.* (July 4, 2020).³

22. As of July 4, 2020, the number of new confirmed cases reported compared to July 3, 2020, was 57,718, including 661 new deaths. *Id.*

23. The number of new deaths tends to lag by two weeks or more behind the number of new COVID cases.

24. COVID-19 is a serious, debilitating, and sometimes deadly disease. Although it is often compared to influenza, the overall case fatality rate is 5-35 times the fatality rate associated with influenza infection. And unlike influenza, overall, some 20% of cases will have more severe disease requiring medical intervention and support.

25. There is currently no vaccine or known cure for COVID-19.

26. The virus enters the body when someone inhales respiratory droplets containing SARS-CoV-2, or when these droplets enter via the eyes. The coronavirus then enters cells in the nose and throat where it invades them by latching onto a receptor at the cell surface. It then proliferates by using the invaded cell's own machinery. From there, the virus can spread from the nose and throat to the lungs, where the virus—and the body's immune response—can disrupt the flow of oxygen into the blood, causing coughing and shortness of breath. SARS-CoV-2 can invade many other organs in the body with a wide range of effects: seizures and strokes in the brain; blood clots and cardiac inflammation in the vessels and heart; and liver and kidney damage.⁴

³ Available at: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited July 5, 2020).

⁴ Wadman, Couzin-Frankel, Kaiser, Matacic, *How does coronavirus kill? Clinicians trace a ferocious rampage through the body, from brain to toes*, Science, April 17, 2020.

27. The course of illness in any particular person is unpredictable. Some individuals with COVID-19 may have no symptoms or only mild symptoms, while others may develop severe illness.

28. The “mild” symptoms for COVID-19 are fever, chills, cough, shortness of breath, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, and diarrhea. Many COVID-19 infections resolve within a few weeks. However, a subset of individuals has enduring symptoms that last months. Many of these individuals are young and previously healthy.⁵

29. Once contracted, COVID-19 can cause severe damage to lung tissue, including a permanent loss of respiratory capacity.

30. It can also permanently damage tissues in other vital organs, as well, such as the heart, central nervous system, and liver.

31. There are multiple ways in which COVID-19 can be deadly. Among patients who have more serious disease, some 30% will progress to Acute Respiratory Distress Syndrome (ARDS), a condition in which oxygen levels in the blood and blood pressure falls dramatically.

Available at: <https://www.sciencemag.org/news/2020/04/how-does-coronavirus-kill-clinicians-trace-ferocious-rampage-through-body-brain-toes>. (last visited July 6, 2020).

⁵ *Symptoms of Coronavirus*, Centers for Disease Control and Prevention, (noting “This list does not include all possible symptoms.”) <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited July 6, 2020); Ed Young, *COVID-19 can last for several months*, The Atlantic, June 4, 2020 Available at: <https://www.theatlantic.com/health/archive/2020/06/covid-19-coronavirus-longterm-symptoms-months/612679/> (last visited July 6, 2020).

ARDS has a 30% mortality rate overall, higher in those with other health conditions. Some 13% of these patients will require mechanical ventilation.⁶

32. COVID-19 can also cause heart damage, blood clots, and constriction of blood vessels, all of which can play a role in causing death. Kidney failure can also be involved in COVID-19 mortality.

33. Even when it does not kill, COVID-19 can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, cause permanent loss of breathing capacity. COVID-19 may also target the heart, causing a medical condition called myocarditis, or inflammation of the heart muscle. Myocarditis can reduce the heart's ability to pump.

34. An exaggerated response of the immune system called a “cytokine storm” can come from a COVID-19 infection. When that occurs, a flood of inflammatory signaling molecules are unleashed onto the body. These molecules cause blood vessels to become leaky, resulting in a drop in blood pressure. Blood clots become more likely to form and obstruct vessels. Organs may not get the oxygen they need to function. This is a complication of grave concern.⁷

35. Age is a critical risk factor for the severe illness and potential fatality associated with COVID-19. There are multiple estimates of the ratio between all known cases and known

⁶ Sinha, Matthay & Calfee, *Is a “cytokine storm” relevant to COVID-19?*, JAMA Internal Medicine, June 30, 2020. Available at: <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2767939> (last visited July 6, 2020).

⁷ *Id.*

deaths (the “case-fatality ratio”) for COVID-19 but risk for severe illness and mortality rises steeply above 60-70 years of age.⁸

36. A number of underlying conditions, other than age, create higher risk and influence the course of symptoms and mortality rate. For example, people with type 2 diabetes are nearly 4 times more likely to develop serious disease or die from COVID-19.⁹ Heart disease, COPD, hypertension, and cancer are all risk factors for ICU admission, ventilation, or death.¹⁰

37. The COVID-19 mortality rate is twelve times higher among those with underlying conditions. Specifically, 19.5% of people with COVID-19 who had underlying health conditions died as compared to 1.6% of those without underlying conditions.¹¹

38. Epidemiologists have collected additional demographic data on populations of COVID sufferers. Individuals with obesity are about twice as likely to be hospitalized with

⁸ *Older Adults*, Centers for Disease Control and Prevention, updated June 25, 2020. Available at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited July 6, 2020).

⁹ Zheng Z, Peng F, Xu B, et al. Risk factors of critical & mortal COVID-19 cases: A systematic literature review and meta-analysis [published online ahead of print, 2020 Apr 23]. *J Infect*. 2020;S0163-4453(20)30234-6. doi:10.1016/j.jinf.2020.04.021

¹⁰ Guan WJ, Liang WH, Zhao Y, et al. Comorbidity and its impact on 1590 patients with COVID-19 in China: a nationwide analysis. *Eur Respir J*. 2020;55(5):2000547. Published 2020 May 14. doi:10.1183/13993003.00547-2020.

¹¹ Stokes EK, Zambrano LD, Anderson KN, et al. *Coronavirus Disease 2019 Case Surveillance – United States, January 22–May 30, 2020*, MMWR Morb Mortal Wkly Rep 2020;69:759-765. DOI: <http://dx.doi.org/10.15585/mmwr.mm6924e2>. Available at: https://www.cdc.gov/mmwr/volumes/69/wr/mm6924e2.htm?s_cid=mm6924e2_w#T1_down (last visited July 6, 2020).

COVID-19. Younger patients with obesity are more likely to require hospital admission and ICU care when infected than their non-obese counterparts.¹²

39. To be classified as a confirmed case of COVID-19, an individual must meet confirmatory laboratory evidence.¹³ A viral test identifies people with current SARS-CoV-2 infection. Additionally, antibody tests can be used to identify people with a previous viral infection.

40. To be determined a confirmed case, an individual must have undergone diagnostic testing, which is often limited in availability.

41. If diagnostic testing is limited, either by availability or by choice, the number of actual infected individuals may greatly exceed the number of reported confirmed cases.

42. The Indiana State Department of Health confirmed its first case of COVID-19 on March 6, 2020 and recorded its first death due to the virus on March 16.

¹² Petrilli Christopher M, Jones Simon, A. Yang Jie, Rajagopalan Harish, O'Donnell Luke, Chernyak Yelena et al. Factors associated with hospital admission and critical illness among 5279 people with coronavirus disease 2019 in New York City: prospective cohort study *BMJ* 2020; 369 :m1966; Jennifer Lighter, Michael Phillips, Sarah Hochman, Stephanie Sterling, Diane Johnson, Fritz Francois, Anna Stachel, Obesity in Patients Younger Than 60 Years Is a Risk Factor for COVID-19 Hospital Admission, *Clinical Infectious Diseases*, , ciaa415, <https://doi.org/10.1093/cid/ciaa415>; Kass DA, Duggal P, Cingolani O. Obesity could shift severe COVID-19 disease to younger ages. *Lancet*. 2020;395(10236):1544-1545. doi:10.1016/S0140-6736(20)31024-2

¹³ *Coronavirus Disease 2019 (COVID-19) 2020 Interim Case Definition, approved April 5, 2020*, Centers for Disease Control and Prevention.
<https://www.cdc.gov/nndss/conditions/coronavirus-disease-2019-covid-19/case-definition/2020/> (Last visited July 6, 2020)

43. Children, while initially thought to be safe from effects of the virus, are now recognized as being susceptible to multisystem inflammatory syndrome (MIS-C) associated with COVID-19.

44. On May 18, 2020, Indiana confirmed its first case of MIS-C in a child.

45. As of July 5, 2020, the Indiana State Department of Health (ISDU) announced that 522 additional Indiana residents had been diagnosed with COVID-19 from the previous day, bringing to 47,432 the total number of Indiana residents known to have the novel coronavirus. On July 6, 2020, the ISDU reported 596 additional state residents diagnosed with COVID-19 over the previous day's count, bringing the state total to 48,008.¹⁴ This represents a 14% increase over the number of cases added the previous day.

46. This number represents a jump in the State of Indiana of almost 11,000 new cases reported since June 5, 2020. *Compare Health Department Updates Statewide COVID-19 Case Counts, June 5, 2020*,¹⁵ with *Health Department Updates Statewide COVID-19 Case Counts, July 4, 2020*.¹⁶

47. As of July 4, 2020, the ISDU reported that a total of 2,494 Indiana residents were confirmed to have died from COVID-19, and that an additional 193 probable deaths had been reported based on clinical diagnoses in patients for whom no positive test was on record.

¹⁴ *Health Department updates statewide COVID-19 case counts*, Indiana State Department of Health, IN.gov. Available at: <https://calendar.in.gov/site/isdh/event/health-department-updates-statewide-covid-19-case-counts-65/> (last visited July 6, 2020).

¹⁵ Available at: <https://calendar.in.gov/site/isdh/event/health-department-updates-statewide-covid-19-case-counts-36/> (last visited July 5, 2020).

¹⁶ Available at: <https://calendar.in.gov/site/isdh/event/health-department-updates-statewide-covid-19-case-counts-64/> (last visited July 5, 2020).

48. On July 1, 2020, Indiana Governor Eric Holcomb renewed the COVID-19 public health emergency to extend from July 4 (the then-current expiration date) to August 3, 2020, “unless further renewed.” *Executive Order 20-34, for: Fourth Renewal of Public Health Emergency Declaration for the COVID-19 Outbreak*, ¶ 2, State of Indiana Executive Department.¹⁷

49. COVID-19 cases continue to rise in the United States. Just in the past week, rates in some states and counties that had previously seen little disease have risen dramatically.

50. For example, COVID-19 has continued to spread in Arkansas. In the last month, the number of cases has almost tripled (5,644 cases reported on May 21st; 15,142 cases reported June 21st). In response to the climbing cases, on June 18, 2020, the Governor extended the Public Health Emergency Order for another forty-five days. Pulaski County, which includes Little Rock, has one of the highest number of cases in Arkansas and reported 1,499 positive cases and 52 deaths from COVID-19 as of June 21, 2020.

IV. COVID-19 is highly transmissible.

51. COVID-19 passes from person to person primarily through respiratory droplets. This can happen whenever a person expels droplets into the air, and increases when an infected individual speaks, shouts, sings, coughs, or sneezes.

52. COVID-19 can survive on hard surfaces for hours to days. It can live for 72 hours on plastic and metal, 48 hours on stainless steel, and 24 hours on cardboard.¹⁸

¹⁷ Available at: <https://www.in.gov/gov/files/Executive%20Order%2020-34%20Extention%20of%20the%20Public%20Health%20Emergency.pdf> (last visited, July 5, 2020.)

¹⁸ Neeltje van Doremalen et al., “Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1,” letter, *New England Journal of Medicine* (Massachusetts

53. New information indicates that COVID-19 may also be transmissible through aerosolized fecal contact.

54. The longer the time a person spends in an environment that harbors the virus increases his or her chance of contracting it. While a very short period of time may be enough for someone to contract it if the viral load is heavy, a longer period of time in the presence of even a small amount of virus increases the chance of infection.

55. For contact tracing purposes to determine a high likelihood of exposure, “close contact” is defined by the CDC as “any individual who was within 6 feet for more than 15 minutes of an infected person starting from 2 days *before* illness onset (or, for asymptomatic patients, 2 days prior to a positive specimen collection) until the time the patient is isolated.¹⁹

56. The most dangerous transmission scenarios are indoor environments with poor ventilation in which people are close together. Research suggests that speech droplets which carry the virus that causes COVID-19 can linger in the air in closed environments for 8 to 14 minutes.²⁰ A study currently under review found that among 1,245 cases during the COVID-19 outbreak in China, there

Medical Society, March 17, 2020), Available at: <https://www.nejm.org/doi/10.1056/NEJMc2004973> (last visited July 6, 2020). *See also, COVID-19 basics: symptoms, spread and other essential information about the new coronavirus and COVID-19*, Harvard Health Publishing, Harvard Medical School, updated July 2, 2020. (last visited July 6, 2020).

¹⁹ *Contact tracing for COVID-19*, Centers for Disease Control and Prevention, Updated June 17, 2020. Available at: <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/contact-tracing.html> (last visited July 6, 2020).

²⁰ Valentyn Stadnytskyi, Christina E. Bax, Adriaan Bax, Philip Anfinrud. The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2 transmission. *PNAS*. May 2020, 202006874; DOI: 10.1073/pnas.2006874117

was only one case of COVID-19 transmission that was in an outdoor environment, highlighting the overwhelming predominance of COVID-19 transmission in indoor environments.²¹

57. Wearing face masks helps to mitigate transmission of SARS-CoV-2, but does not guarantee full protection. Even surgical masks, for example, block 75% of airborne particles, but not all.²² This is why medical personnel wear full coverage Personal Protective Equipment (PPE).

58. When wearing non-N95 face masks, social distancing must be maintained to avoid acquiring the virus. The two measures must be taken in combination – wearing a mask *and* social distancing.

59. Poorly ventilated spaces increase the likelihood of COVID-19 transmission. Some airflow studies have found that respiratory droplets can travel between people even from 10 feet away, suggesting that even the social distancing recommendation of 6 feet may be insufficient depending on ventilation.²³ The Indiana State Department of Health warns that droplets expelled when a person

²¹ Hua Qian, Te Miao, Li Liu et al. *Indoor transmission of SARS-CoV-2*, medRxiv. April 2, 2020. Available at: <https://doi.org/10.1101/2020.04.04.20053058> (last visited July 6, 2020).

²² Amy Mueller and Loretta Fernandez, *Assessment of fabric masks as alternatives to standard Masks in terms of particle filtration efficiency*, medRxiv. April 17, 2020. Available at: <https://www.medrxiv.org/content/10.1101/2020.04.17.20069567v2.full.pdf> (last visited July 6, 2020).

²³ Feng Y, Marchal T, Sperry T, Yi H. Influence of wind and relative humidity on the social distancing effectiveness to prevent COVID-19 airborne transmission: A numerical study [published online ahead of print, 2020 May 18]. *J Aerosol Sci.* 2020;147:105585. Available at: www.sciencedirect.com/science/article/pii/S0021850220300744?via%3Dihub (last visited July 6, 2020).

infected with COVID-19 speaks, coughs, sneezes or speaks can travel up to 25 feet.²⁴ Airflow direction may also influence transmission.²⁵

60. Wearing a mask helps keep the person wearing it from spreading disease to another (“source control”) but it does not confer much protection on the person wearing it unless it is an N95 mask.²⁶

61. N95 masks with vents, however, expel air so the wearer is protected but can still transmit the virus.

62. Because the virus can also enter one’s body through his or her eye membranes, no mask confers complete protection.

63. The onset and duration of viral shedding, which propagates spread, and the period of infectiousness for COVID-19, are not well understood, and therefore, cannot be easily prevented. Epidemiologists report that individuals who are contagious do not necessarily show symptoms, either because they are asymptomatic (i.e. has a mild enough case of the virus that they are unaware they have it) or because they are pre-symptomatic. A pre-symptomatic person will go on to develop symptoms but can be infectious for up to 3 days before symptoms first develop.

²⁴ *State encourages Hoosiers to wear masks to help curb COVID-19*, Indiana State Department of Health, IN.gov. July 1, 2020. Available at: <https://calendar.in.gov/site/isdh/event/state-encourages-hoosiers-to-wear-masks-to-help-curb-covid-19/> (last visited July 6, 2020).

²⁵ Lu J, Gu J, Li K, et al. COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020. *Emerging Infectious Diseases*. 2020;26(7):1628-1631. Available at: https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article (last visited July 6, 2020).

²⁶ *Considerations for wearing cloth face coverings*, Centers for Disease Control and Prevention, updated June 28, 2020. Available at: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> (last visited July 6, 2020).

64. The combined effect of asymptomatic and pre-symptomatic carriers is thought to account for a substantial portion of SARS-CoV-2 transmission, with some estimates putting it at between 50 to 80% of all transmission.²⁷

65. Because asymptomatic and pre-symptomatic carriers are infectious at early stages of infection, screening measures that do not include testing, such as restricting access to buildings if someone has a fever or symptoms, do little to prevent the introduction of the virus into any environment.

66. The State of Missouri is the only jurisdiction in the United States that has carried out an execution since the President declared COVID-19 a national emergency on March 13, 2020. The Missouri prison where that execution occurred on May 19, 2020, experienced an outbreak of 21 COVID-19 infections in the weeks after the execution.²⁸

67. Upon information and belief, the COVID-19 screening measures employed by BOP at FCC Terre Haute, including USP Terre Haute, have been and continue to be inadequate. Widespread testing of staff and inmates has not taken place at the correctional complex, and asymptomatic individuals are not tested. In March 2020, the BOP employed a screening tool for visitors, volunteers and contractors seeking entrance to a prison that asked the individual to self-report if she had fever or chills, cough, or shortness of breath, and required a temperature check.

²⁷ Gandhi, Yokoe, & Havlir, *Asymptomatic transmission, the Achilles' heel of current strategies to control COVID-19*, N Engl J Med 2020; 382:2158-2160. May 28, 2020. Available at: https://www.nejm.org/doi/full/10.1056/NEJM2009758?query=recirc_curatedRelated_article (last visited July 6, 2020).

²⁸ Bobby Radford, *COVID-19 Outbreak Confirmed at Prison in Bonne Terre*, Daily Journal Online (June 19, 2020), https://dailyjournalonline.com/news/local/govt-and-politics/covid-19-outbreak-confirmed-at-prison-in-bonne-terre/article_c7222072-e242-513d-871a-c63a9c30cfbc.html (last visited July 7, 2020)

The form also asked if the person had traveled within the previous 14 days to China, Iran, South Korea, Italy, or Japan, or had had close contact with anyone “diagnosed” with the COVID-19 illness with the last 14 days. According to the BOP website, this remains the screening tool being used for visitors to BOP prisons. *See BOP Visitor/Volunteer/Contractor COVID-19 Screening Tool*²⁹ and *BOP Implementing Modified Operations*.³⁰

68. The BOP also employs an inadequate staff screening tool that requires a temperature check, and an employee self-report as to whether he or she has a “new on-set cough,” “new onset trouble speaking because of needing to take a breath,” or “stuffy/runny nose.” With a temperature above a certain designated point, the staff member is to be denied access. But with a yes answer to the other screening questions, the staff member is only instructed to “contact the medical officer on call for the Institution to provide Disposition.” *See Coronavirus Disease 2019 (COVID-19) Staff Screening Tool*, March 27, 2020.³¹

69. Based on data collected in a study conducted by the Indiana University Richard M. Fairbanks School of Public Health, researchers estimated that 43% of all Indiana residents who were currently infected showed no symptoms. *IUPUI, ISDH release findings from 2nd phase of COVID-19 testing in Indiana*, June 17, 2020.³²

²⁹ Available at: https://www.bop.gov/coronavirus/docs/covid19_screening_tool.pdf (last visited July 5, 2020).

³⁰ Available at: https://www.bop.gov/coronavirus/covid19_status.jsp (last visited July 5, 2020).

³¹ Available at: https://www.bop.gov/coronavirus/docs/covid19_staff_screening_tool_v2.8_20200327.pdf (last visited July 5, 2020.)

³² Available at: <https://calendar.in.gov/site/isdh/event/iupui-isdh-release-findings-from-2nd-phase-of-covid-19-testing-in-indiana/> (last visited July 5, 2020).

70. This number strongly suggests that a large percentage of those people who would successively pass the BOP's screening test and be admitted in its prisons would nevertheless have an active case of COVID-19.

71. Because individuals without symptoms transmit COVID-19, until a vaccine is developed, the only effective screening measure is regular, rapid-result COVID testing for everyone entering the facility.³³

V. In Order to Travel to Attend Mr. Lee's Execution, Plaintiffs Will Be Exposed to Considerable Risk of contracting COVID-19.

72. In order to participate as witnesses to Mr. Lee's execution, Plaintiffs will have to undertake long distance interstate travel to and from Terre Haute, Indiana, where the execution will take place. Because the execution is scheduled for the afternoon of Monday, July 13, 2020, Plaintiffs will have to spend two nights in hotels. Plaintiffs Veillette and Gurel will have to travel by air and will be riding in a small van provided by the Government, in which their ability to maintain social distancing—from the driver, from each other, and from anyone else in the van—will not be feasible. Plaintiffs Veillette and Gurel have been practicing social distancing during the pandemic, both generally and from each other as well. Neither has been with Plaintiff Peterson during the pandemic. Plaintiff Peterson will be driven to Terre Haute by her son who has multiple sclerosis.

³³ Gandhi, Yokoe, & Havlir, *supra* at n.27.

73. Travel has the potential to cause new outbreaks across the country. The outbreak of COVID-19 in New York is estimated to be responsible for 60-65% of cases nationwide, and travel from Seattle spread the virus to at least 12 different states.³⁴

74. The CDC has published “Considerations for Travelers – Coronavirus in the US,” which cautions “*staying home is the best way to protect yourself and others from getting sick.*” (emphasis in original). The list of considerations includes the following: “(a) You can get infected while traveling. (b) Even if you don’t have symptoms, you can spread COVID-19 to others while traveling. (c) Being within 6 feet of others increases your chances of getting infected and infecting others. (d) Individuals who have an increased risk of severe illness from COVID-19 should limit their travel. (e) If you get infected while traveling you can spread COVID-19 to loved ones when you return, even if you don’t have symptoms.”³⁵

75. Every stage and mode of travel involves significant risks of exposure for the traveler. According to the CDC, “airports, bus stations, train stations, and rest stops are all places travelers can be exposed to the virus in the air and on surfaces. These are also places where it can be hard to social distance (keep 6 feet apart from other people).”³⁶

³⁴ Benedict Carey and James Glanz, *Travel from New York City Seeded Wave of U.S. Outbreaks*, The New York Times, May 7, 2020. Available at: <https://www.nytimes.com/2020/05/07/us/new-york-city-coronavirus-outbreak.html> (last visited July 6, 2020).

³⁵ *Considerations for Travelers – Coronavirus in the US*, Centers for Disease Control and Prevention, Updated June 28, 2020. Available at: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (last visited July 6, 2020).

³⁶ *Id.*

76. Travel by car involves “[m]aking stops along the way for gas, food, or bathroom breaks [which] can put you and your traveling companions in close contact with other people and surfaces.”³⁷

77. All airports pose a risk of COVID-19 due to the need to stand in security lines, as well as exposure to high contact surfaces, close proximity to others, and spending extended periods of time in an indoor environment.³⁸

78. The amount of time spent in airports in cities with higher cases counts increases one’s risk of exposure to an infected person or surface.

79. This means traveling from, laying over, and arriving into cities with higher case counts increases one’s risk of exposure, as well.

80. Air travel itself, separate from the hazards of being in airports, can lead to numerous risks of transmission.

81. The risk of transmission inside an airplane depends in small part on the number of individuals on a plane, and the amount of space left between them, but, according to at least one airline executives, social distancing is largely impossible on planes.³⁹

³⁷ *Id.*

³⁸ *Id.*

³⁹ Where some airlines have promised to block middle seats as a safety precaution, Josh Earnest, United’s chief communications officer, said on July 1 that blocking middle seats is just a public relations strategy. “When you’re onboard the aircraft, if you’re sitting in the aisle, and the middle seat is empty, the person across the aisle is within six feet from you, the person at the window is within six feet of you, the people in the row in front of you are within six feet of you, the people in the row behind you are within 6 feet of you.” Chris Fuhrmeister, *Delta reiterates middle-seat policy after criticism from United*, Atlanta Business Chronicle, July 1, 2020. Available at: <https://www.bizjournals.com/atlanta/news/2020/07/01/delta-blocking-middle-seat-united-criticism.html> (last visited July 5, 2020). In other words, there is no way to social distance on commercial airlines.

82. Universal mask wearing, especially on long flights during which passengers must remove their masks to eat or drink, is largely unenforceable. Air circulation on planes may not be uniform or subject to the control of an individual passenger. A fellow traveler, for example, may choose to increase the air flow from his personal vent or point it away from himself, towards another passenger.

83. Taking cabs and other car services leads to close contact with the driver, who may spread the virus. A study from Zhuhai, China found that sharing a car with someone infected significantly increased the risk of that person then becoming infected.⁴⁰ In addition, if cab owners do not wipe down the interior after each passenger, there may be residual risk of infection from the prior trip.

84. The risk of infection from using public restrooms varies, depending on how often and how thoroughly they are cleaned. However, the distance between bathroom stalls and sinks may not provide adequate distancing, especially in an environment that may seem private enough for one to remove his or her mask. And, as noted earlier, new information indicates that COVID-19 may also be transmissible through aerosolized fecal contact.

85. The risks from staying in a hotel includes the virus remaining on surfaces if rooms were not properly cleaned. This may occur if staff who clean the rooms are infected but are not taking proper precautions (wearing a mask, washing their hands, etc.) or are engaging in any improper cleaning practices (using cleaners that are too weak, for instance).⁴¹

⁴⁰ Jian Wu et al., “Household Transmission of SARS-CoV-2, Zhuhai, China, 2020,” *Clinical Infectious Diseases: An Official Publication of the Infectious Diseases Society of America*, May 11, 2020, Available at: <https://doi.org/10.1093/cid/ciaa557> (last visited July 6, 2020).

⁴¹ Maggie O’Neill, *Is it safe to stay in a hotel during COVID-19? What you need to know before you plan a vacation*, Health, May 22, 2020. Available at: <https://www.health.com/condition/infectious-diseases/coronavirus/is-it-safe-to-stay-in-a-hotel->

86. During check-in, as well, it may be difficult to remain 6 feet or more from others, including guests and staff. It may also be difficult to avoid elevators which present a risk of infection, as they are a close, confined space. Individuals who are infected may touch the buttons or join others in the elevator, thus exposing others to the virus.

87. It is presumably for these reasons that federal government agencies, including the DOJ and the BOP suspended most official travel. *See Federal Bureau of Prisons COVID-19 Action Plan: Agency-wide Modified Operations*, March 13, 2020;⁴² *Memorandum from Lee Lofthus, Assistant Attorney General for Administration to Heads of Department Components and United States Attorneys*, U.S. Department of Justice, Justice Management Division, May 18, 2020.⁴³ *See also, Federal Judiciary COVID-19 Recovery Guidelines*, at p. 9, April 24, 2020

[during-covid-19](#) (last visited July 6, 2020). *See also Coronavirus Disease 2019 (COVID-19) Personal and Social Activities*, Centers for Disease Control and Prevention, updated June 15, 2020. Available at: <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html#hotel> (last visited July 6, 2020).

⁴² Available at: https://www.bop.gov/resources/news/20200313_covid-19.jsp (last visited July 5, 2020).

⁴³ Available at: <https://www.justice.gov/doj/page/file/1284406/download> (last visited July 5, 2020). In this memorandum, it was announced that “[o]nly essential travel is permissible in Phase 1. Staff traveling to areas that still have significant levels of COVID-19 cases must follow the CDC quarantine guidelines before returning to the office. ... [T]ravel to significant outbreak areas should be considered only in light of the state/locality operating announcements and, as noted above, travelers are subject to the CDC post-travel isolation guidelines. As a general matter, routine travel for discretionary training, events, conferences, speeches and the like should continue to be postponed in Phase 1 and Phase 2 (considering both departure points and destinations). ... In July we will assess whether we can more broadly return to in-person even scheduling and travel.” (emphasis added.)

In this same memorandum, DOJ “recognizes that some employees are in vulnerable populations or may be at higher risk for severe illness, or are caring for family members or others in these groups. . . . Those at higher risk for severe illness include individuals who are over 65 years of age and people of all ages with underlying medical conditions, particularly if not well controlled, including those who suffer from chronic lung disease, moderate to severe asthma,

(requiring employees to maximize physical distance from others; instructing all vulnerable individuals so continue teleworking, including employees who live with or provide care for vulnerable individuals to “reduce chances that they could carry the virus to these vulnerable individuals,” and notably, “MINIMIZE PERSONAL TRAVEL (i.e., leisure travel, non-business related) and adhere to CDC guidelines and local state orders regarding travel destination and potential for self-isolation upon return.”⁴⁴

VI. Attending Mr. Lee’s Execution Will Place Plaintiffs at Great Risk of Contracting COVID-19.

88. Plaintiff Earlene Branch Peterson is 81 years old and has congestive heart failure. She lives in Hector, Arkansas, at a distance of roughly 500 miles from FCC Terre Haute.

89. Plaintiff Kimma Gurel is over 60 years old and has underlying health conditions that put her at increased risk. She lives in Spokane Valley, Washington, a distance of more than 2,000 miles from FCC Terre Haute.

90. Plaintiff Monica Veillette has asthma. She lives in Deer Park, Washington, a distance of roughly 2,000 miles from FCC Terre Haute.

91. As noted above, the greatest risks for transmission of COVID-19 result from spending time in an enclosed indoor space without the ability to maintain social distancing and where one is in contact with someone who has the virus. Wearing masks does not protect the

serious heart conditions, immune disorders, obesity, diabetes, or chronic kidney or liver disease should work with supervisors to continue telework.” These employees are to be afforded workplace flexibilities to “help reduce the chances that they could carry the virus to these vulnerable individuals.”

⁴⁴ Available at: <https://www.fedbar.org/wp-content/uploads/2020/04/Federal-Judiciary-COVID-19-Recovery-Guidelines.pdf> (last visited July 5, 2020).

wearer, and one's eye membranes are an entry point for the virus. Sharing toilet facilities creates additional risk, as fecal matter may be aerosolized when one flushes a toilet, and surfaces within a bathroom may become contaminated.

92. For the Plaintiffs to witness Mr. Lee's execution, they would of necessity be in contact with many other people in close proximity to them.

93. Upon information and belief, Plaintiffs will not be permitted to come to the prison grounds on their own but will be escorted there by BOP personnel.

94. Upon information and belief, Plaintiffs will be brought into the main prison and kept there for some period of time before being escorted to the execution facility.

95. Prisons are known to have poor infection control mechanisms available, and are often hotspots for infectious diseases, including SARS-CoV-2, as well as HIV, tuberculosis, hepatitis viruses, influenza, and others.⁴⁵

96. As with other contaminated environments, like nursing homes, to receive basic necessities, prisoners are required to interact with numerous correctional officers daily: to receive food, receive medication, be let outside into recreational facilities. One infected correctional officer can spread infections between different areas of the prison.

⁴⁵ Joseph A. Bick, "Infection Control in Jails and Prisons," *Clinical Infectious Diseases: An Official Publication of the Infectious Diseases Society of America* 45, no. 8 (October 15, 2007): 1047–55, <https://doi.org/10.1086/521910>; C. Raina MacIntyre et al., "Impact of Tuberculosis Control Measures and Crowding on the Incidence of Tuberculous Infection in Maryland Prisons," *Clinical Infectious Diseases* 24, no. 6 (June 1, 1997): 1060–67, <https://doi.org/10.1086/513632>; Masoud Dara et al., "Tuberculosis Control in Prisons: Current Situation and Research Gaps," *International Journal of Infectious Diseases*, Special Issue: Commemorating World Tuberculosis Day 2015, 32 (March 1, 2015): 111–17, <https://doi.org/10.1016/j.ijid.2014.12.029>.

97. As noted above, the screening of staff conducted at FCC Terre Haute, including USP Terre Haute, does not provide adequate measures to detect infected staff members or other personnel with whom Plaintiffs might have to interact.

98. It is evident the screening measures at FCC Terre Haute, including USP Terre Haute, have permitted the virus to gain entry there because prisoners have contracted the virus, and at least one inmate has died of COVID-19.⁴⁶

99. The Government's plan for the execution involves "activation of the execution team, which consists of 40 BOP staff members," who normally conduct a "wide range of correctional and administrative positions" and who will spend several days before the execution practicing and preparing for the execution.⁴⁷

100. In addition to the 40 members of the execution team, the BOP protocol involves approximately 200 FCC Terre Haute staff who will perform security and support for the execution.⁴⁸ These staff are "pulled away from their normal duties," including, for example, preparation of prisoners' meals.⁴⁹ The plans for the execution also involve specialized BOP teams with 50 individuals traveling to FCC Terre Haute from other prisons.⁵⁰ Approximately 300 BOP

⁴⁶ COVID-19 Cases, BOP.gov, July 5, 2020. Available at: <https://www.bop.gov/coronavirus/> (July 6, 2020).

⁴⁷ See *In re Matter of Federal Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-145-TSC, Declaration of Rick Winter ("Winter Decl."), ECF No. 54 (D.D.C. No. 21, 2019), ¶5.

⁴⁸ *Id.* at ¶8.

⁴⁹ *Id.*

⁵⁰ *Id.* at ¶10.

and FCC Terre Haute staff will be supplemented by additional staff from various federal, state, and local law enforcement agencies to provide additional security.⁵¹ Many of these individuals will be traveling by air and staying in local hotels.⁵²

101. The execution protocol requires the Director of the BOP to select eight witnesses to the execution, including members of the victim’s family.⁵³ Plaintiffs will thus presumably be in the company of any other individuals selected, who will likely also have been involved in interstate transit to attend the execution, and who will not have been in quarantine prior to being in close quarters with Plaintiffs.

102. The execution “house,” which consists of several small, cramped rooms, is located on the FCC Terre Haute grounds.⁵⁴ It is a small, single story building, like a small home.⁵⁵ For the execution, witnesses, including the Plaintiffs, are shuttled in a small van to the facility from the main correctional complex, to clear a security checkpoint.⁵⁶ They are then escorted by BOP personnel through separate entrances to four small, cramped viewing rooms for each of the various groups of witnesses, including a room for media, a room for Government witnesses, and a room for the victims’ family members—to witness the execution.⁵⁷

⁵¹ *Id.* at ¶7.

⁵² *Id.* at ¶5.

⁵³ See Exh. A, Ch. 1, III.G.1.c.(1), 10-11.

⁵⁴ See Motion for Preliminary Injunction, *Hartkemeyer v. Barr, et al.*, No. 2:20-cv-0036-JMS-MJD (S.D. Ind. July 2, 2020), Exh. D, Declaration of Timothy Floyd, ¶¶ 4-5.

⁵⁵ *Id.*

⁵⁶ *Id.* at ¶¶ 4, 9.

⁵⁷ *Id.* at ¶9.

103. At each stage of these proceedings, which are likely to last several hours, Plaintiffs will be in the company of Defendants' staff and other witnesses in circumstances during which social distancing is not possible.

104. At each stage of these proceedings, which are likely to last several hours, Plaintiffs will be captive participants, unable to walk away if their escorts, other personnel, or other witnesses remove their masks, and/or potentially exposed to COVID-19 due to its being on hard surfaces.

105. At each stage of these proceedings and their travel to participate in them, Plaintiffs face grim risks of exposure to COVID-19, a disease which for these vulnerable Plaintiffs, could prove lethal.

Cause of Action

Agency Action in Violation of 5 U.S.C. § 706(2)(A)

106. Plaintiffs reallege and incorporate by references all of the preceding paragraphs of the Complaint as if they were set forth fully below.

107. The APA states that a reviewing court "shall ... hold unlawful and set aside agency action" that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

108. The agency action here — the setting of Mr. Lee's execution date for July 13, 2020 — is both (1) arbitrary and capricious; and (2) "not in accordance with law."

109. Defendants acted arbitrarily and capriciously because, in setting Mr. Lee's execution date, they failed to consider important issues, including the effect of COVID-19 on

Plaintiffs' rights to attend the execution. As alleged above, Defendants have directly impaired such rights because Plaintiffs can attend the execution only if they put their own lives at risk.

110. Defendants' action is also "not in accordance with law" because it effectively nullifies 28 U.S.C. § 26.4, which, in combination with the Protocol, states that Plaintiffs are entitled to attend Mr. Lee's execution. As a result of Defendants' action, Plaintiffs' rights to the attend the execution have been rendered illusory.

111. Defendants easily could have avoided the foregoing violations of the APA by delaying the setting of Mr. Lee's execution date until such time as the COVID 19 abates sufficiently so as to allow for safe travel and indoor gathering or there is an effective vaccine. However, without good cause, Defendants have refused to change Mr. Lee's execution date.

112. An actual controversy exists between the parties regarding Defendants' action and, pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, Plaintiffs request that the Court declare their rights in connection with the setting of Mr. Lee's execution date.

113. Accordingly, the Court should hold that Defendants have acted unlawfully, in violation of 5 U.S.C. § 706(2)(A), and it should issue a declaratory judgment setting aside Defendants' selection of July 13, 2020 as Mr. Lee's execution date.

114. In addition, the Court should enter injunctive relief, pursuant to 28 U.S.C. § 2202 and Fed. R. Civ. P. 65, barring Defendants and their agents from establishing a new execution date until they demonstrate to the Court that Plaintiffs will not be exposed to an undue health risk by attending Mr. Lee's execution.

Request for Relief

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and that the Court:

- a. Grant a declaratory judgment finding that carrying out Mr. Lee's execution during a pandemic caused by SARS-CoV-2 and national health emergency without a vaccine or treatment available for COVID-19 infringes on and constructively prevents Plaintiffs' exercise of their legal right to attend the execution;
- b. Grant a declaratory judgment finding that the scheduling of Mr. Lee's execution during a national health emergency that creates substantial health risks to Plaintiffs is arbitrary and capricious action, and set aside the warrant of execution;
- c. Grant injunctive relief prohibiting the BOP from carrying out the execution until treatment or a vaccine is available;
- d. Award attorney's fees and costs as the Court deems equitable and just; and
- e. Award such other and further relief as the Court deems equitable and just.

Respectfully submitted

/s/ H. Baker Kurrus

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Attorney for Plaintiffs

Dated: July 7, 2020

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

EARLENE PETERSON)	
KIMMA GUREL)	
MONICA VIELLETTE)	
)	
Plaintiffs,)	Case No. 2:20-cv-00350-JMS-MJD
)	
v.)	
)	
WILLIAM P. BARR, in his official)	
capacity as the Attorney General of the)	
United States; MICHAEL CARVAJAL, in)	
his official capacity as the Director of the)	
Federal Bureau of Prisons; and T.J.)	
WATSON, in his official capacity as)	
Complex Warden for Terre Haute Federal)	
Correctional Complex,)	
)	
Defendants.)	

DECLARATION OF RICK WINTER

I, Rick Winter, do hereby declare and state as follows:

1. I am employed by the United States Department of Justice, Federal Bureau of Prisons (“BOP”), as Regional Counsel for the BOP’s North Central Region. I have held this position since October 2016. I have been employed by the BOP since 1994.
2. The statements I make hereinafter are made on the basis of my review of the official files and records of the BOP, my own personal knowledge, or on the basis of information acquired by me through the performance of my official duties.
3. The BOP, under the supervision of the United States Marshals Service, is responsible for implementing federal death sentences. See 18 U.S.C. § 3596(a); 28 C.F.R. Part 26. Currently, execution dates are in place for four inmates. Specifically, Daniel Lee’s execution is scheduled to occur on July 13, 2020; Wesley Purkey’s execution is scheduled

to occur on July 15, 2020; Dustin Honken's execution is scheduled to occur on July 17, 2020; and Keith Nelson's execution is scheduled to occur on August 28, 2020.

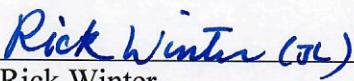
4. In advance of these dates, the BOP has been, and intends to continue, making necessary arrangements.
5. Such arrangements include the activation of the execution team, which consists of approximately 40 BOP staff members. These staff members, by necessity, have been removed from their normal duties, which include a wide range of correctional and administrative positions within the BOP. Pursuant to the current operational plan, cessation of normal duties occurs several days in advance of a scheduled execution, in order to give the team time to practice and prepare for their role in an execution. In addition to the team members, a number of BOP administrators will be present as well. They also ceased their normal duties in the days in advance of an execution. Logistical items such as travel, lodging and personal arrangements have already been completed for the three execution dates in July.
6. Also, the BOP plans to use contractors who have made themselves available and have made necessary arrangements for personal and work related matters based on the executions scheduled in July and August. If the current execution dates are stayed, it is likely that both contractors will need at least one month's notice in order to be able to reschedule.
7. Executions will take place at the Federal Correctional Complex at Terre Haute, Indiana (FCC Terre Haute). Accordingly, FCC Terre Haute is also mobilizing personnel in preparation of the currently scheduled executions, and has also been coordinating with federal, state, and local law enforcement agencies, some of who plan to send personnel to FCC Terre Haute to help maintain security for the currently scheduled executions.
8. Approximately 100 BOP staff will serve as institution security and support during an

execution. With its staff pulled away from their normal duties, FCC Terre Haute will not be able to operate under normal conditions. For example, due to expected staffing issues and changes in security procedures, FCC Terre Haute will not be able to prepare inmate meals in the ordinary fashion. Instead, the institution plans to prepare food in advance for its approximately 2,500 inmates. This alteration in meal preparation comes at a greatly increased cost to BOP.

9. Additionally, FCC Terre Haute has made arrangements for specific needs related solely to an execution, for example contracting for buses which will be used to transport public demonstrators who wish to assemble.
10. Schedules for FCC Terre Haute staff members have been created, allocating staff based on current execution dates. For additional security and support, specialized BOP teams such as Special Operations Response Teams (SORT) and Disturbance Control Teams (DCT) will travel to FCC Terre Haute from other BOP institutions. These teams consists of approximately 50 individuals. Again, logistical arrangements such as travel and lodging have already begun for the current execution dates.
11. Additionally, BOP has made travel and lodging arrangements for the victims' family members to attend the July executions.
12. Any adjustment to the execution dates would require significant planning and coordination such as that has been undertaken by BOP to date.

I declare, under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed this 9th day of July, 2020.


Rick Winter
Federal Bureau of Prisons

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

DECLARATION OF RICK WINTER

I, Rick Winter, do hereby declare and state as follows:

1. I am employed by the United States Department of Justice, Federal Bureau of Prisons (“BOP”), as Regional Counsel for the BOP’s North Central Region. I have held this position since October 2016. I have been employed by the BOP since 1994.
2. The statements I make hereinafter are made on the basis of my review of the official files and records of the BOP, my own personal knowledge, or on the basis of information acquired by me through the performance of my official duties.
3. The BOP, under the supervision of the United States Marshals Service, is responsible for implementing federal death sentences. *See* 18 U.S.C. § 3596(a); 28 C.F.R. Part 26. The BOP undertakes its role in accordance with the BOP Execution Protocol, *see* ECF No. 33-1, Declaration of Rick Winter (July 7, 2020), Ex. A-1, unless the Director or his designee determines that deviation is required. Daniel Lewis Lee is a condemned inmate whose execution is scheduled to occur on July 13, 2020, at the United States Penitentiary at Terre Haute, Indiana (USP Terre Haute).
4. I am aware that Earlene Branch Peterson, Kimma Gurel, and Monica Veillette have been

designated as witnesses for purposes of the execution on July 13, 2020. 28 C.F.R. § 26.4(c)(4)(i).

5. The Government announced the re-scheduling of Mr. Lee's execution on June 15, 2020. Ms. Branch Peterson, Ms. Gurel, and Ms. Veillette were informed of that date shortly after it was publicly announced in order to begin their travel arrangements.
6. I am aware that in the above referenced lawsuit Ms. Branch Peterson, Ms. Gurel, and Ms. Veillette (Proposed Intervenors) seek to intervene as plaintiffs and allege that because of their age and health conditions, and because of the number of BOP staff members and other individuals expected to be present at the execution, they would be subject to an unacceptably high risk of exposure to COVID-19 if they choose to attend the execution.
7. However, despite the large number of individuals expected to be present at Mr. Lee's execution, Proposed Intervenors will have very limited interactions with the vast majority of them. There are also numerous mitigation measures in place to avoid the spread of COVID-19.
8. The Terre Haute Federal Correction Complex (FCC Terre Haute) consists of USP Terre Haute, as well as a Federal Correctional Institution (FCI Terre Haute) and a prison camp. Staff are required to pass a temperature check and symptom screening daily before being allowed on the grounds of FCC Terre Haute. All BOP staff are required to wear face masks. FCC Terre Haute will continue its screening procedures for all individuals arriving at the FCC.
9. If Proposed Intervenors choose to attend Mr. Lee's execution, they will have no interaction with any inmates or members of the public other than possible limited interaction with the rest of the witness group comprised of only the family members of Mr. Lee's victims.
10. As to their interaction with BOP employees, while the execution team consists of

approximately 40 BOP staff members, the vast majority of them have assignments in areas other than where Proposed Intervenors will be located. Similarly, while approximately 100 BOP staff members and approximately 50 members of specialized teams will have various roles in the overall security of FCC Terre Haute, the vast majority will have duties which will not cause them to have any interaction with Proposed Intervenors.

11. On the day of the execution, Proposed Intervenors will be picked up by BOP staff from a designated location off FCC Terre Haute grounds. Passengers in the vehicle will include Proposed Intervenors and members of their immediate family. Upon being picked up, they will be given the opportunity to utilize Personal Protective Equipment (“PPE”) in the form of a surgical face mask, gloves, a gown, and a plastic face shield. BOP staff will be wearing face masks. Proposed Intervenors will be escorted to FCC Terre Haute and through security to a staging area on FCC Terre Haute property. At the staging area, they will have access to hand sanitizer and a restroom with a sink and hand soap. The individuals at the staging area will include Proposed Intervenors, their immediate family members, three other witnesses from the family of Lee’s victims and approximately four BOP staff members. The staging area allows for ample social distancing.
12. At the appropriate time, those witnesses who have chosen to witness the execution will be escorted to the execution facility witness room. Of the three proposed intervenors, only Ms. Veillette has elected to do so. She will be accompanied in the witness room by two additional witnesses, who will have access to PPE, and a small number of BOP staff, who will be wearing face masks. Hand sanitizer will be available and the witnesses will have access to a sink with hand soap. Ms. Branch Peterson and Ms. Gurel have elected to remain in the staging area during the execution.
13. At the conclusion of the execution, Ms. Veillette and the other witnesses in the execution

facility witness room will be escorted back to the staging area. Then the rest of their group will be picked up and the group will be escorted back to the designated area where they were initially picked up.

I declare, under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed this 8th day of July, 2020.

Rick Winter (sc)
Rick Winter
Federal Bureau of Prisons