IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEZMOND CHARLES MITCHELL	:	
Plaintiff,	:	
v.	:	Civil Action No. _____
WILLIAM P. BARR, et al.	:	**CAPITAL CASE**
Defendants.	:	**EXECUTION SCHEDULED FOR AUGUST 26, 2020**
	:	**Time: 6:00 p.m. EST**

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff Lezmond Charles Mitchell ("Mitchell") hereby moves, pursuant to Fed. R. Civ. P. 65, for a temporary restraining order, to be followed by a preliminary injunction, enjoining Attorney General Defendant William P. Barr; Deputy Attorney General Jeffrey A. Rosen; Acting Pardon Attorney Rosalind Sargent-Burns; Federal Bureau of Prisons Director Michael Carvajal; Federal Bureau of Prisons Regional Director Jeffrey E. Kreuger; and United States Penitentiary Terre Haute, Indiana Complex Warden T.J. Watson, who are all being sued in their official capacities; the United States Department of Justice; the Federal Bureau of Prisons; and the Office of the Pardon Attorney, from deliberately interfering with and obstructing Mitchell's ability to participate in the executive clemency process for individuals under a death sentence, in violation of his Fifth Amendment right to due process; and in violation of his Eighth Amendment prohibition against arbitrary imposition of the death penalty; and in violation of his Fifth Amendment rights to equal protection and due process of law. Mitchell also moves to enjoin Defendants from carrying out his August 26, 2020 execution so that his clemency petition may

be processed to completion and the President may issue a decision free of the Defendant's violations of Mitchell's rights under the Fifth and Eighth Amendments.

But for Defendants' actions and policies, Mitchell would make use of procedures created for individuals under a federal death sentence seeking executive clemency. This motion is supported by facts contained in Mitchell's Complaint for declaratory and injunctive relief, filed on August 24, 2020 and the accompanying memorandum in support of this motion and Exhibits, filed on this date. A proposed order is attached. Oral argument is requested.

The Certification of Counsel Pursuant to LCvR 65.1(a) filed herewith contains a notification regarding notice to the parties.

In accordance with LCvR 7(m), undersigned counsel conferred with counsel for the Defendants, and they are opposed to the requested relief.

WHEREFORE, Plaintiff Mitchell respectfully requests that this Court issue a temporary restraining order, followed by a preliminary injunction to prevent ongoing harm to Mitchell's constitutional rights and enjoin Defendants from interfering with and obstructing his ability to obtain review of his clemency petition, and enjoin Defendants from executing him so that he has the opportunity to complete the clemency process.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: August 24, 2020

By: */s/ Jonathan C. Aminoff*
JONATHAN C. AMINOFF
Deputy Federal Public Defender

Counsel for Lezmond Charles Mitchell

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This memorandum is respectfully submitted in support of Plaintiff Lezmond Charles Mitchell's motion, pursuant to Fed. R. Civ. P. 65, for a temporary restraining order, to be followed by a preliminary injunction, enjoining Attorney General Defendant William P. Barr; Deputy Attorney General Jeffrey A. Rosen; Acting Pardon Attorney Rosalind Sargent-Burns; Federal Bureau of Prisons Director Michael Carvajal; Federal Bureau of Prisons Regional Director Jeffrey E. Kreuger; and United States Penitentiary Terre Haute, Indiana Complex Warden T.J. Watson, who are all being sued in their official capacities; the United States Department of Justice; the Federal Bureau of Prisons; and the Office of the Pardon Attorney, from deliberately interfering with and obstructing Mitchell's ability to participate in the executive clemency process for individuals under a death sentence, in violation of his Fifth Amendment right to due process; and in violation of his Eighth Amendment prohibition against arbitrary imposition of the death penalty; and in violation of his Fifth Amendment rights to equal protection and due process of law. Mitchell also moves to enjoin Defendants from carrying out his August 26, 2020 execution so that his clemency petition may be processed to completion and

the President may issue a decision free of the Defendant's violations of Mitchell's rights under the Fifth and Eighth Amendments.

But for Defendants' actions and policies, Mitchell would make use of procedures created for individuals under a federal death sentence seeking executive clemency. This motion is supported by facts contained in Mitchell's Complaint for declaratory and injunctive relief, filed on August 24, 2020, this memorandum in support of this motion, and the attached Exhibits, filed on this date.

I. INTRODUCTION

Plaintiff Mitchell is scheduled to be executed by lethal injection on August 26, 2020, in two days. He was given 28 days' notice of his execution, and promptly filed his petition for executive clemency two days later, requesting a commutation of his death sentence. Despite Mitchell's diligent efforts, the truncated execution timeframe frustrates the clemency rules and impedes the President's ability to process Mitchell's clemency petition to completion. As a result of Defendants' actions and policies, Mitchell has been arbitrarily denied access to the clemency process, in violation of his Fifth and Eighth Amendment rights. As of the date of this filing, Mitchell has received no decision regarding his clemency petition. Without this Court's immediate intervention, he risks irreparable harm—execution before the completion of the clemency process. The relief sought is necessary and appropriate in order to allow Mitchell to utilize the procedures created for pursuing executive clemency relief.

II. FACTUAL BACKGROUND

On July 29, 2020, Mitchell was served with a letter ("2020 Notice") informing him that his execution had been scheduled for August 26, 2020, 28 days later. (Ex. 4 at 010.) Defendants scheduled Mitchell's execution in this shortened timeframe knowing that doing so would make it impossible for Mitchell to avail himself of the rules and procedures developed specifically for

death-sentenced prisoners seeking executive clemency relief. *See* 28 C.F.R. § 1.1-1.11; Complaint ¶¶ 16, 21.

When Mitchell received the 2020 Notice, he had a pending petition for rehearing/rehearing en banc in the Ninth Circuit. *Mitchell v. United States*, No. 18-17031. Dkt. 46 (9th Cir., July 20, 2020). A stay of execution was in place. *Id.* at Dkt. 26.

Given Defendant Office of the Pardon Attorney's ("OPA") rules against adjudicating clemency petitions when the petitioner is involved in active litigation concerning his convictions or sentencing, it was unclear whether OPA would accept Mitchell's clemency petition while litigation was still pending in the Ninth Circuit. *See also* 28 C.F.R. § 1.10 (b) ("No petition for reprieve or commutation of a death sentence should be filed before proceedings on the petitioner's direct appeal of the judgment of conviction and first petition under 28 U.S.C. 2255 have terminated.").

Nevertheless, because he was given less than 30 days' notice of his execution date, on July 31, 2020, Mitchell filed a petition for executive clemency[1], seeking commutation of his sentence, with Defendant OPA, which is part of the cabinet-level agency, Defendant U.S. Department of Justice ("DOJ"). OPA scheduled an oral presentation in support of clemency from undersigned counsel on August 11, 2020. (Ex. 6 at 274-82.)

At the oral presentation, counsel for Mitchell inquired about the review process and whether Mitchell would receive a decision about a grant or a denial of clemency before the execution date. Kira Gillespie, Senior Attorney Advisor at OPA, could not say whether it would be possible to ensure a clemency decision one way or the other before Mitchell's scheduled execution date. (*See* Complaint ¶ 25; Ex. 13 ¶ 5.)

[1] *See* Ex. 5 at 011-273, Clemency Petition and Attachments.

Also on August 11, 2020, the Ninth Circuit denied Mitchell's petition for rehearing/rehearing en banc, and the mandate issued on August 18, 2020. *Id.* at Dkts. 52, 55. With the mandate issued, Mitchell's stay of execution is no longer in effect. *Id.* at Dkt. 26.

Defendants' conduct reflects an awareness that the timeline they have established will result in Mitchell's execution before his petition can be processed to completion. On July 25, 2019, the Government initially notified Mitchell of an execution date of December 11, 2019. (Ex. 1 at 001.) Six days later, the Government sent an amended letter. (Ex. 2 at 002.) Both of these letters include a paragraph explaining to Mitchell that, "If you wish to apply for commutation of sentence your petition must be filed within 30 days of the date you receive this notice." (Ex. 1 at 001 (emphasis added); Ex. 2 at 002.) When the Government set an execution date on July 29, 2020, Mitchell received a similar letter. (Ex. 4 at 010.) However, the July 29, 2020 letter from Defendant Watson, identical in other respects, includes no language about the 30-day period for applying for commutation. That is because, if the execution goes forward as planned, Mitchell will not be alive to request commutation within the period permitted by the regulations.

The primary thrust of Mitchell's pending clemency petition is that his death sentence is an affront to the sovereignty of the Navajo Nation. Mitchell is Navajo, and the victims in his case were also Navajo, and the crime took place on the Navajo reservation. When Congress created the Federal Death Penalty Act, it included a provision called the "tribal option" which left it to Native American tribes to determine whether they wanted the death penalty to apply in cases of intra-Indian crimes occurring on tribal land where federal jurisdiction was predicated on Indian country. 18 U.S.C. § 3598. Despite the Navajo Nation's opposition to the death penalty generally, and to its imposition for Mitchell specifically, DOJ exploited a legal loophole and capitally prosecuted Mitchell for the general applicability crime of carjacking resulting in death.

Three Ninth Circuit Judges have strongly urged that the executive seriously consider granting clemency in this case. *Mitchell v. United States*, 790 F.3d 881, 897 (9th Cir. 2015) ("*Mitchell II*") (Reinhardt, J. dissenting); *Mitchell v. United States*, 958 F.3d 775, 793 (9th Cir. 2020) (Christen, J. concurring) and 794 (Hurwitz, J. concurring) ("I respectfully suggest that the current Executive should take a fresh look at the wisdom of imposing the death penalty. . . . I hope that the Executive will carefully consider whether the death penalty is appropriate in this unusual case.").

Mitchell's request for clemency is joined by Navajo Nation President Jonathan Nez and Vice President Myron Lizer, who have made the Navajo Nation's position clear: a commutation of the death sentence and imposition of a life sentence "honors our religious and traditional beliefs, the Navajo Nation's long-standing position on the death penalty for Native Americans, and our respect for the decision of the victim's family." (Ex.7 at 283.) The Navajo Nation "strongly hold[s]" that "life is sacred" and believes a grant of clemency "is appropriate to begin to restore harmony and balance to the affected families and to the inherent sovereignty of the Navajo Nation." (*Id.* at 284.) President Nez and Vice President Lizer also emphasized what an affront Mitchell's capital prosecution was to tribal sovereignty, and asked President Trump to grant clemency so the two nations could "move forward" and "continue to work on the importance of protecting [the Navajo] people." (*Id.*) President Nez also participated in Mitchell's oral presentation in support of clemency, to reiterate the Navajo Nation's request for a life sentence for Mitchell.

The Navajo Nation Council has also petitioned President Trump for executive clemency. (Ex. 7 at 285-86.) In a letter from Speaker Seth Damon, the Council reiterated its "opposition to the death penalty and its application to Lezmond Mitchell." (Ex. 7 at 286.) Because "[t]ime is of the essence" in light of the impending execution date, the Council urged President Trump to

recognize the sovereign-to-sovereign relationship of Indian tribes and the Federal Government and "exercise mercy for our tribal member, Lezmond Mitchell." (Ex. 7 at 285-86.) Additionally, national Native American rights organizations, including the National Congress of American Indians and the Native American Rights Fund, have also petitioned for executive clemency for Mitchell. (Ex. 7 at 287-88; Ex. 7 at 289-91.) And United States Senator Tom Udall of New Mexico, whose constituency includes portions of the Navajo nation, has personally written to President Trump and requested that clemency be granted. (Ex. 11 at 299-300.)

As explained in his Complaint, the rules and procedures governing clemency proceedings give effect to the President's authority to grant pardons and reprieves and to commute sentences under Article II, Section 2, Clause 1 of the U.S. Constitution. Complaint ¶¶ 33-44. The executive clemency procedures have been developed, by necessity, over the course of American history as the administrative system generally, and the federal justice system more specifically, have grown in size and complexity. *See* Complaint ¶¶ 33-44. They have also notably, for more than a half-century, been described in federal regulations formally published for the public, and include substantial requirements for members of the public and death-sentenced prisoners like Mitchell to meet, in order to have their petitions for executive clemency properly considered; they, moreover, as is apparent from the regulations, authorize various administrative officials within the DOJ to undertake certain duties in the clemency process, in order to ensure that the cases worthy of relief are before the President. *See* Complaint ¶¶ 33-44.

Among other requirements, the clemency scheme provides that that a petitioner should file a clemency petition "no later than 30 days after the petitioner has received notification from the Bureau of Prisons of the scheduled date of execution," and allows "15 days after the filing of the petition itself" to submit "all papers in support of the petition." 28 C.F.R. § 1.10.

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The regulations provide that "*[o]nly one request for commutation of a death sentence will be processed to completion*, absent a clear showing of exceptional circumstances." 28 C.F.R. § 1.10 (emphasis added). But Defendants' actions and policies have made it impossible for Mitchell's clemency petition to be processed to completion in accordance with the procedures for evaluation of executive clemency. *See* Complaint ¶¶ 51-80.

In July, 2020, following a similarly rushed timeline, Defendants executed Daniel Lee, another death-sentenced person, while his petition for executive clemency was still pending. (Ex. 10 ¶¶ 10-11.) Like Mitchell, Lee initially had an execution date set for December 2019, which was stayed. (Ex. 10 ¶¶ 1, 5.) On June 15, 2020, the Government rescheduled Lee's execution for July 13, 2020. (Ex. 10 ¶ 6.) On July 10, 2020, Lee's counsel submitted a renewed clemency petition on his behalf. (Ex. 10 ¶ 9.) Lee never received a decision regarding his clemency petition and he was executed on July 14, 2020. (Ex. 10 ¶ 9.)

As of the date of filing, Mitchell's clemency petition remains pending. On August 21, 2020, counsel for Mitchell inquired of OPA as to when a decision might be forthcoming. (Ex. 13 ¶ 7.) Counsel was informed, however, that OPA could provide no information regarding when a decision might be reached or even if Mitchell will receive a decision prior to his execution. (Ex. 13 ¶ 7.)

On August 24, 2020, counsel for Mitchell emailed Assistant United States Attorney Krissa Lanham, of the United States Attorney's Office for the District of Arizona, who represents the Government in the criminal and post-conviction proceedings concerning Mitchell's criminal convictions and sentences. Counsel informed AUSA Lanham of the nature of this lawsuit, inquired as to who would be representing the Government in this matter, and to schedule a meet and confer concerning the motion for a temporary restraining order and injunction. (Ex. 13 ¶ 8.) AUSA Lanham and Mitchell's counsel spoke at approximately 4:15

p.m. E.S.T., and at that time she read a prepared statement as follows: "Having received both written and oral submissions from Mr. Mitchell, the Office of the Pardon Attorney has completed its investigation and the department has made its recommendation to the President. *See* 28 CFR 1.6 and 1.10. (Ex. 13 ¶ 8.) Accordingly, no additional time is needed to complete the executive clemency process." (Ex. 13 ¶ 8.)

Mitchell's execution is currently set to take place in less than 48 hours.

III. ARGUMENT

Courts consider four factors before granting a temporary restraining order or preliminary injunction: 1) the likelihood of the plaintiff's eventual success on the merits; 2) the threat of irreparable injury to the plaintiff if an injunction is not granted; 3) that the balance of the equities tips in his favor, and; 4) the interests of the public. *See Winter v. NRDC, Inc.* 555 U.S. 7, 20 (2008); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977) ("A party seeking a restraining order must make a persuasive showing of irreparable harm and likelihood of prevailing on the merits.")

These factors are evaluated on a "sliding scale," meaning that "if the movant makes an unusually strong showing of irreparable harm and there is no substantial harm to a non-movant, then a correspondingly lower standard can be applied for likelihood of success." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). The application of these factors in Mitchell's case establishes the necessity for the requested relief.

A. Mitchell is substantially likely to succeed on the merits of his constitutional claims.

At this stage, Mitchell need only show that his claims present a substantial likelihood of eventual success on the merits of his claims for relief, and the Court may issue the requested relief if he can meet that standard as to any one of his claims. *Davis*, 571 F.3d at 1291-92. Mitchell meets this standard as to each of his related, but distinct claims.

Mitchell is substantially likely to succeed on his claim that he has been denied due process and the absence of minimal procedural safeguards in the clemency process. Where the government has created specific procedures for seeking clemency, the Due Process Clause of the Fifth Amendment guarantees them basic procedural safeguards in those clemency procedures. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998). In *Woodard*, a five-justice majority agreed that at least some procedural safeguards apply in capital clemency proceedings. *Woodard*, 523 U.S. at 288-89 (O'Connor, J., concurrence); *see also id.* at 292-95 (Stevens, J. concurrence). Justice O'Connor found that judicial intervention might be warranted where an official "flipped a coin to determine whether to grant clemency," or in a case where the State arbitrarily denied a prisoner any access to the clemency process. *Id.* at 274.

By setting an execution date with such a shortened timeline, the Department of Justice has severely impeded the President's ability to conduct his own deliberative process and render a decision to bring Mitchell's clemency petition "to completion" under 28 C.F.R. § 1.10(e), thereby depriving Mitchell of basic procedural safeguards. *Gov't of Canal Zone v. Brooks*, 427 F.2d 346, 347 (5th Cir. 1970) (per curiam) ("[I]t is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it."); *see also Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998) (minimal application of due process ensures that a death row prisoner will receive the clemency procedures explicitly set forth by law, and will not be wholly arbitrary, capricious, or based on a whim, for example, flipping a coin). Mitchell has attempted to use the clemency process that the government has created for review and consideration of clemency petitions. But that process is unavailable to him due to the Defendants' interference. *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000).

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The rushed, 28-day timeframe between notice and execution in this case prevents Mitchell from availing himself of the established rules and procedures for executive clemency in several ways. First, Mitchell was forced to submit his clemency petition before his litigation was resolved, which deviated from OPA's rules. *See* Complaint ¶ 56. Under these rules, OPA then had only 8 days after Mitchell's litigation became final to consider Mitchell's clemency petition. *See id.* Even accepting AUSA Lanham's representation that as of the time of filing, OPA has completed their investigation and the department has made a recommendation to the President (Ex. 13 ¶ 8.), there is simply not enough time for Mitchell's petition to be fairly processed to completion, before he is executed, now in less than 48 hours. As detailed on its website, under normal circumstances, OPA's process is multi-faceted and lengthy, with multiple steps and review by numerous stakeholders, culminating in a final decision from the President.[2]

It is unclear when the President received the department's recommendation, but presumably it was on or after August 11, 2020, fifteen days before Mitchell's scheduled execution. Fifteen days is half of the time given to the President to review an adverse recommendation by the Attorney General in a noncapital clemency request before his or her silence is presumed to be a concurrence in that recommendation. 28 C.F.R. § 1.8. A president should have at least the same amount of time to consider a recommendation in a capital case.

Second, Mitchell's timeframe for submitting documents to OPA was also shortened. Under the rules, a petitioner has 15 days after filing the petition to submit "[a]ll papers in support of a petition." 28 C.F.R. § 1.10 (b). But Mitchell gave his oral presentation on August 11, before that window closed. This prevented OPA from considering his complete clemency package before the oral presentation.

[2] Available at: https://www.justice.gov/pardon/frequently-asked-questions

Third, the August 26 date is set for 28 days into the 30-day window allowed for filing a clemency petition. *See* 28 C.F.R. § 1.10 (b) (providing 30 days in which to submit a clemency petition). This deprives Mitchell of the full 30-day period where he may apply for clemency. No legitimate consideration justifies this haste. Although 28 C.F.R. § 26.4 requires only 20 days' notice of a scheduled execution, it does not prevent a longer notice period, which would allow adequate time for Mitchell's clemency petition to be processed. *See* 28 C.F.R. § 26.4 ("The Warden . . . shall notify the prisoner under sentence of death of the date designated for execution at least 20 days in advance . . . "). As a result of the rushed process, initiated while Mitchell's legal case was still pending, his ability to obtain and submit powerful support materials has been hampered. For example, within the 30-day clemency window, but just one week before his execution date, Mitchell received a letter of support from the Native American Rights Fund. (Ex. 7 at 289-91.) The letter's signatories strongly urge the President to commute Mitchell's death sentence, on the basis that Mitchell's death sentence ignores the sovereign and statutorily designates rights of the Navajo Nation. (Ex. 7 at 289-91.)

Mitchell is substantially likely to prevail on his due process claim based on the extraordinary facts of his case. While courts generally stop short of imposing specific requirements on the clemency process, due process is violated where the state "actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions." *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) ("[i]t is a rare case that presents a successful due process challenge to clemency procedures themselves"). That is what has happened here, where Mitchell's execution date has been set in such a way as to intentionally stymie the clemency process. Defendants are fully aware that the timeline they have established will result in Mitchell's execution before his petition can be processed to completion. (*See* Ex. 4 at 010; *see also* Complaint ¶¶ 45, 60.)

Further, the denial of procedural safeguards in this case results, not only from the Defendants' failure to follow the specific clemency rules, but also because that failure to follow these procedures arbitrarily denies Mitchell of meaningful access to the clemency process. *See Walker v. Hughes*, 558 F.2d 1247, 1259 (6th Cir. 1977) (due process protects against arbitrary decision making); *see also Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 302 (1937) (due process entails the "protection of the individual against arbitrary action.")

In *Woodard*, Justice O'Connor made clear that due process might be offended by a clemency system so arbitrary that it resulted in a decision decided by flipping a coin. *Woodard*, 523 U.S. at 289. Mitchell's clemency process is worse than a coin flip. A coin flip results in a determinate outcome—heads or tails. Mitchell cannot even be assured he will receive any clemency determination at all. In Mitchell's case, the coin could still be in midair at the time he is executed.

The truncated clemency process also violates Mitchell's due process rights by preventing the President from exercising his constitutional authority. "Only the President has the power to grant clemency for offenses under federal law." *Harbison v. Bell*, 556 U.S. 180 & n.5 (2009) ("regardless of what assistance the President seeks, the federal proceeding is one for executive clemency under the Constitution."); U.S. Const. art. II, § 2, cl. 1.5.

Mitchell is likely to prevail on his due process claim because it raises genuine issues of first impression. *See Pearce v. E.F. Hutton Group., Inc.*, 828 F.2d 826, 829 (D. C. Cir. 1987) (staying case to allow consideration of issue of first impression). To his knowledge, no court has interpreted *Woodard's* minimal due process standard to permit the execution of a death-sentenced person with a pending clemency petition. At the very least, until Daniel Lee's execution in July 2020, this situation had not presented itself in the six federal executions since 1963, or since the current clemency regulations were promulgated in 2000. *See* Complaint ¶ 48.

Executing Mitchell before he has availed himself of executive clemency review would be an extraordinarily cruel and brazen act, offending not only basic notions of due process, but also international law. Safeguard 8 of the United Nations Safeguards guaranteeing protection of rights of those facing the death penalty prohibits execution pending a "proceeding relating to the pardon or commutation of the sentence."[3]

Thus, at a bare minimum, whatever "minimal" due process the clemency process requires, it surely entails the right to a clemency petition processed to completion and decided by the President before a rushed execution. For these reasons, Mitchell is substantially likely to succeed on his due process claim.

Mitchell's other constitutional claims are likewise substantially likely to succeed on the merits, under a similar analysis.

Claim Two alleges that deprivation of the most basic procedural safeguards also deprives Mitchell of his constitutional right under the Eighth Amendment's protection against cruel and unusual punishment inflicted in a wholly arbitrary fashion. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. Although clemency proceedings are not the equivalent of sentencing proceedings at a capital trial, executing Mitchell without a complete clemency proceeding also violates the Eighth Amendment, which requires additional procedural protections in capital cases. *Gregg*, 428 U.S. at 188-92. Defendants' actions and

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[3] *See United Nations Safeguards guaranteeing protection of rights of those facing the death penalty*, available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx; *see also Brothers Executed Despite Pending Clemency Appeal*, Malay Mail, March 15, 2017, available at: https://www.malaymail.com/news/malaysia/2017/03/15/brothers-executed-despite-pending-clemency-appeal/1335169

policies, as discussed above and in the Complaint, have resulted in an arbitrary and capricious action, and deprive Mitchell of his rights under the Eighth Amendment.

Likewise, Mitchell is substantially likely to succeed on his Equal Protection claim. The equal protection guarantee of the Fifth Amendment is violated where "discrimination reflects no policy, but simply arbitrary and capricious action." *Baker v. Carr*, 369 U.S. 186, 225 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356, 366, 374 (1886) (decrying "naked and arbitrary power": "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye . . . , the denial of equal justice is still within the prohibition of the constitution"); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (applying the equal protection principles of the Fourteenth Amendment to federal government action); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (equal protection guarantee of the Fourteenth Amendment, which applies to the states, is essentially the same as the equal protection guarantee of the Fifth Amendment, which applies to the federal government). Thus, Mitchell can prevail on his equal protection claim if he can establish that the Government will "treat him disparately from similarly situated persons." *Arthur v. Thomas*, 674 F.3d 1257, 1262 (11th Cir. 2012) (internal quotations omitted).

As noted above and in the Complaint, other death-sentenced individuals facing imminent execution have received a final decision on their clemency petitions under the rules for evaluation of executive clemency before they have been executed. Of the six people executed since 1963, only the most recent execution, of Daniel Lee, was carried out despite a pending clemency petition.[4]

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[4] Timothy McVeigh, who was executed in 2001, did not seek executive clemency review. President George W. Bush denied clemency to Juan Raul Garza before he was executed in 2001, and also to Louis Jones Jr. before his execution in 2003. Neither Dustin Honken nor Wesley Purkey had pending petitions at the time of their executions. *See* Complaint ¶ 48.

Mitchell is entitled to the benefit of the same rules and procedures as these other death-sentenced inmates who have their clemency petitions reviewed by the President before they are executed. Yet by scheduling Mitchell's execution on a shortened timeline that makes it impossible for OPA and the executive to follow their own rules, Defendant's actions deny Mitchell of one commutation request, processed "to completion" under 28 C.F.R. § 1.10(e). This results in arbitrary discrimination, and violates equal protection principles.

Thus, Mitchell has established a substantial likelihood of success on the merits of each of his claims.

B. Mitchell faces the greatest possible irreparable harm unless he is granted injunctive relief.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11 Wright and Miller, *Federal Practice and Procedure* Civil § 2948.1. When the deprivation of a constitutionally protected right is involved, no further showing of irreparable injury should be required. *Deerfield Med. Center v. City of Deerfield*, 661 F.2d 328, 338 (5th Cir. 1981) (determination that the constitutional right to privacy was either threatened or in fact being impaired "mandates a finding of irreparable injury"); *see also Vitek v. Jones*, 445 U.S. 480, 486 (1979) (while prisoner was "under threat" of being transferred to a mental hospital in the future, his challenge to procedures governing transfer was not moot.)

Although no further showing of irreparable injury may be required, absent injunctive relief, Mitchell could be executed before he can pursue this litigation, and before he has had a fair opportunity to have his petition for executive clemency considered. The harm could not be greater or more irreparable. *See, e.g., Wainwright v. Booker*, 473 U.S. 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) ("The third requirement—that irreparable

harm will result if a stay is not granted—is necessarily present in capital cases."); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (granting stay of execution in light of the "obviously irreversible nature of the death penalty"); *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (in acknowledging that "[t]here can be no doubt that a defendant facing the death penalty at the hands of the state faces irreparable injury," court notes importance of "substantial grounds" upon which relief may be granted). Mitchell's harm is thus imminent and would be irreversible if injunctive relief is not granted.

There is also reason to think that this injury will occur, based on the recent execution of Daniel Lee. (Ex. 10 ¶¶ 9-11.) Defendants have demonstrated their willingness to execute a death-sentenced individual who has not had the benefit of executive clemency review.

Thus, absent this Court's intervention, it is highly likely that Mitchell will be executed before he can litigate his claim.

C. The irreparable injury that Mitchell will suffer if the injunction is not granted outweighs any harm to defendants if injunctive relief is granted.

In contrast to the irreparable harm facing Mitchell, Defendants will not suffer any substantial harm by an injunction under these circumstances, where he merely seeks the opportunity for meaningful clemency review before he is executed. The Government cannot suffer harm from an order that merely restrains an unlawful action. *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) ("[T]he INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations.").

Nor do whatever steps the Government has taken towards executing Mitchell compare to the magnitude of harm Mitchell will face if he is executed before he has had clemency review. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily

expended . . . are not enough.")). Moreover, Defendants could mitigate any potential financial harm by promptly stopping any preparations for Mitchell's execution.

Defendant DOJ has stated that "a scheduled federal execution date cannot readily be moved in light of BOP contractor availability and other complex logistical consideration." *Mitchell v. U.S.*, Ninth Cir. Case No. 18-17031, Dkt. 47 (July 29, 2020). In support of this statement, Defendant DOJ cites to an application filed in the Supreme Court, which states that if the execution in question were delayed, it could not be rescheduled for at least *one* month. *Id.*, citing *Barr v. Lee*, No. 20A8, 2020 WL 3964985 (July 14, 2020). Thus, Defendants have sought to hasten Mitchell's execution, despite an unresolved petition for executive clemency, because it would, for reasons unknown, be more convenient for the government to execute Mitchell in August than it would be in September. On this factor, the equities clearly weigh in Mitchell's favor.

D. Injunctive relief would serve the public interest.

The public interest also weighs in favor of a temporary restraining order and preliminary injunction. There is no public interest in an unconstitutional execution, and here important due process rights are at stake. Rather, injunctive relief would vindicate the public's interest in making sure that the Federal Government does not violate the Constitution. Moreover, clemency is an integral part of the criminal justice system in which the public has an interest. As the Supreme Court noted in *Hererra*, "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Hererra v. Collins*, 506 U.S. 390, 411-12 (1993) (footnote omitted).

As discussed above in Section II, Mitchell's clemency petition presents issues of national importance and is joined by stakeholders including the Navajo Nation. It thus critical to protect

the public's interest in the fair administration of justice that Mitchell's clemency claims be considered and decided.

To the extent that the Defendants may assert that the public has an interest in executions being carried out, as noted above, Mitchell seeks injunctive relief only to allow a meaningful opportunity to pursue the clemency process. *See, e.g.*, *Harris v. Johnson*, 323 F. Supp. 2d 797, 810 (S.D. Tex. 2004); *see also Cooey v. Taft*, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006) ("the public interest only is served by enforcing constitutional rights and by the prompt and accurate resolution of disputes concerning those constitutional rights. By comparison, the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights.")

Finally, if this Court stays Mitchell's execution to allow clemency proceedings to continue, such a stay would not have the effect of suspending those proceedings. *See* 28 C.F.R. § 1.10 (d) ("Clemency proceedings may be suspended if a court orders a stay of execution for any reason other than to allow completion of the clemency proceeding.").

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IV. CONCLUSION

Mitchell has demonstrated that all of the relevant factors weigh in favor of a temporary restraining order and preliminary injunction. Based on the foregoing, he respectfully asks this Court to issue a temporary restraining order to be followed by a preliminary injunction to prevent ongoing harm to his constitutional rights. Mitchell further asks this Court to enjoin Defendants from deliberately interfering with his ability to have meaningful clemency review, and enjoin Defendants from executing him so he has an opportunity to effectuate the clemency review process permitted by statute.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: August 24, 2020

By: */s/ Jonathan C. Aminoff*
JONATHAN C. AMINOFF
Deputy Federal Public Defender

Counsel Lezmond Charles Mitchell

CERTIFICATION OF COUNSEL PURSUANT TO LCvR 65.1(a)

Pursuant to LCvR 65.1(a), I hereby certify that on August 24, 2020, in addition to filing via ECF, I caused true and correct copies of Plaintiff's Complaint, Civil Cover Sheet, Motion for Temporary Restraining Order and Preliminary Injunction, Motion for Expedited Hearing, and all supporting papers to be delivered (1) via email to counsel for the defendants Krissa Lanham (email: Krissa.Lanham@usdoj.gov), Sharon Sexton (email: Sharon.Sexton@usdoj.gov), William G. Voit (email: William.Voit@usdoj.gov), and Alan Burch (email: Alan.Burch@usdoj.gov) and (2) by overnight delivery, to the Defendants in the above-captioned action, at the following addresses:

WILLIAM P. BARR, et al.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

JEFFREY A. ROSEN
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

ROSALIND SARGENT-BURNS
Acting Pardon Attorney
Office of the Pardon Attorney
950 Pennsylvania Avenue, NW
Washington, DC 20530

MICHAEL CARVAJAL
Director
Federal Bureau of Prisons
U.S. Department of Justice
320 First Street, NW
Washington, DC 20534

JEFFREY E. KRUEGER
Regional Director
Federal Bureau of Prisons
North Central Region
U.S. Department of Justice
400 State Avenue, Suite 800
Kansas City, KS 66101

T.J. WATSON
Complex Warden
U.S. Penitentiary Terre Haute
4700 Bureau Road South
Terre Haute, IN 47802

U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530

Federal Bureau of Prisons
U.S. Department of Justice
320 First Street, NW
Washington, DC 20534

Office of the Pardon Attorney
950 Pennsylvania Avenue, NW
Washington, DC 20530

DATED: August 24, 2020

/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF
Deputy Federal Public Defender

Counsel for Lezmond Charles Mitchell

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EXHIBIT 1

U.S. Department of Justice
Federal Bureau of Prisons

Federal Correctional Complex
Terre Haute, Indiana

July 25, 2019

Mr. Lezmond Charles Mitchell
Reg. No. 48685-008
Special Confinement Unit
United States Penitentiary
Terre Haute, Indiana 47802

Dear Mr. Mitchell:

The purpose of this letter is to inform you that a date has been set for the implementation of your death sentence, pursuant to the Judgment and Order issued on January 8, 2004, by Senior Judge David G. Campbell of the United States District Court for the District of Arizona. This letter will serve as official notification that pursuant to Title 28, Code of Federal Regulations, Section 26.3 (a)(1), the Director of the Federal Bureau of Prisons has set December 11, 2019, as the date for your execution by lethal injection.

Under Title 28, Code of Federal Regulations, Sections 1.1 and 1.10, if you wish to seek commutation of sentence or reprieve from the President, petitions may be emailed directly to the DOJ Pardon Attorney at USPARDON.Attorney@usdoj.gov. If email is not available, petitions may be mailed to with the Office of the Pardon Attorney, U.S. Department of Justice, 950 Pennsylvania Avenue, RFK Main Justice Building, Washington, D.C 20530. The Office of the Pardon Attorney is responsible for receiving and processing on behalf of the President all requests for clemency. If you wish to apply for commutation of sentence your petition must be filed within 30 days of the date you receive this notice.

Soon, I will come to your housing unit to personally discuss with you many of the details surrounding the execution. At that time, I will be available to answer any questions you may have regarding the execution process.

Sincerely,

T.J. Watson
Complex Warden

cc: The Honorable David G. Campbell, U.S. District Court (D. Arizona)
Mr. Brian D. Karth, Clerk of the Court (D. Arizona)
Mr. Michael G. Bailey, United States Attorney (D. Arizona)
Mr. William Volt, Assistant United States Attorney (D. Arizona)
Ms. Statia Peakheart, Esq.
Mr. Josh Minkler, Acting US Attorney (S.D. of Indiana)
Mr. Joseph "Dan" McClain, US Marshal (S.D. of Indiana)
Mr. Joseph H. (Jody) Hunt, Assistant Attorney General, Civil Division

EXHIBIT 2

U.S. Department of Justice
Federal Bureau of Prisons

Federal Correctional Complex
Terre Haute, Indiana

July 31, 2019

Mr. Lezmond Charles Mitchell
Reg. No. 48685-008
Special Confinement Unit
United States Penitentiary
Terre Haute, Indiana 47802

Dear Mr. Mitchell:

The purpose of this amended letter is to inform you that a date has been set for the implementation of your death sentence, pursuant to the Judgment and Order issued on January 8, 2004, by Judge Mary H. Murguia of the United States District Court for the District of Arizona. This letter will serve as official notification that pursuant to Title 28, Code of Federal Regulations, Section 26.3 (a)(1), the Director of the Federal Bureau of Prisons has set December 11, 2019, as the date for your execution by lethal injection. This does not change your execution date, but was amended to accurately reflect the name of your sentencing judge.

Under Title 28, Code of Federal Regulations, Sections 1.1 and 1.10, if you wish to seek commutation of sentence or reprieve from the President, petitions may be emailed directly to the DOJ Pardon Attorney at USPARDON.Attorney@usdoj.gov. If email is not available, petitions may be mailed to with the Office of the Pardon Attorney, U.S. Department of Justice, 950 Pennsylvania Avenue, RFK Main Justice Building, Washington, D.C 20530. The Office of the Pardon Attorney is responsible for receiving and processing on behalf of the President all requests for clemency. If you wish to apply for commutation of sentence your petition must be filed within 30 days of the date you receive this notice.

Soon, I will come to your housing unit to personally discuss with you many of the details surrounding the execution. At that time, I will be available to answer any questions you may have regarding the execution process.

Sincerely,

T.J. Watson
Complex Warden

cc: The Honorable David G. Campbell, U.S. District Court (D. Arizona)
Mr. Brian D. Karth, Clerk of the Court (D. Arizona)
Mr. Michael G. Bailey, United States Attorney (D. Arizona)
Mr. William Voit, Assistant United States Attorney (D. Arizona)
Ms. Statia Peakheart, Esq.
Mr. Josh Minkler, Acting US Attorney (S.D. of Indiana)
Mr. Joseph "Dan" McClain, US Marshal (S.D. of Indiana)
Mr. Joseph H. (Jody) Hunt, Assistant Attorney General, Civil Division

EXHIBIT 3

From:	US Pardon Attorney (imailagent)
To:	Celeste Bacchi
Cc:	Jonathan Aminoff
Subject:	Lezmond Charles Mitchell, Reg. No. 48685-008, Death Penalty Case No. C288750 (Intranet Quorum IMA00813062)
Date:	Wednesday, September 4, 2019 11:36:50 AM
Attachments:	IOFormatFile.txt

September 4, 2019

Ms. Celeste Bacchi
Office of the Federal Public Defender
Central District of California
321 East Second Street
Los Angeles, CA 90012-4202

Death Penalty Case No. C288750

Dear Ms. Celeste Bacchi:

This is to advise you that we have received the petition for commutation of sentence you submitted on Lezmond Charles Mitchell's behalf. I must advise you of a few things, however, before we may consider the application.

First, per our regulations, in order to process a requested commutation of a death sentence, we require either a submission from (a) the person under the sentence of death, or (b) a written and signed authorization permitting the petitioner's attorney to submit the request on his or behalf. *Please see* 28 C.F.R. § 1.10(a). Such an authorization is not included in the current materials you submitted to us on August 30, 2019. Please provide such an authorization within 30 days of September 4, 2019, or this case will be closed administratively without further processing. You may submit the authorization to USPardon.Attorney@usdoj.gov, and reference Death Penalty Case No. C288750 in the subject of your email transmission.

Second, per our regulations, any substantive materials, which you wish to be included in the clemency application, must be received within 15 days of September 4, 2019. We **cannot** guarantee that any submission, save for the written authorization identified above, will be considered in the clemency application if it is received more than 15 days from September 4, 2019. *See* 28 C.F.R. § 1.10(b).

Third, per our regulations, only one clemency request for commutation of a death sentence will be processed to completion absent "a clear showing of exceptional circumstances." 28 C.F.R. § 1.10(e). Moreover, because clemency is generally considered an option of "last resort," a petitioner should exhaust his or her readily available remedies prior to applying for clemency. Should the date of execution be suspended or stayed by the court for any reason—other than to allow additional time for processing a clemency application—the petition may also be withdrawn without penalty, or may be suspended by this office to allow for the resolution of judicial proceedings. *See* 28 C.F.R. § 1.10(d).

Fourth, the submission of your client's petition includes a request to make an oral presentation, as permitted by our regulations. 28 C.F.R. § 1.10(c). The regulations permit an oral presentation of "reasonable duration" to the Office. (We cannot address your request to make a presentation to the President). Though the exact parameters of the presentation will be determined by the Office of the Pardon Attorney (PARDON) after review of the application, you may reasonably anticipate being permitted to make a presentation of approximately one hour to a panel of representatives involved in the clemency analysis. We would anticipate that no more than 2 to 3 individuals will be permitted to speak on Lezmond Charles Mitchell's behalf during that presentation. The date of the presentation will be set after our office has reviewed the application and notification has been made to other government officials involved in the process. Though we will attempt to provide you with at least two weeks' notice prior to setting the hearing date, given the time-sensitive nature of the death sentence process, particularly once a date of execution has been set, a two-week notice may not be feasible.

Please be aware that this office may request comments and recommendations from the United States Attorney in the district of conviction, other Department of Justice officials, as well as the sentencing judge. Moreover, we will obtain relevant documentation of the crime, to include the presentence report and judgment, as well as documentation of Mr. Mitchell's prison conduct from the Bureau of Prisons.

Please advise your client that we have received the application you have submitted. Please also ensure that your client is aware of information that is publicly available about the identities of executive clemency applicants. If the President grants clemency, a public notice is released stating the recipient's name, city and state of residence, offense, sentence, and date and district of conviction for the offense for which clemency was granted. The Office of the Pardon Attorney (PARDON) will also proactively disclose an electronic copy of the clemency warrant on our website. Moreover, pursuant to long-standing policy, this office would, if asked, confirm that a specific individual has applied for or was granted or denied clemency. Finally, PARDON is obligated pursuant to the Freedom of Information Act to release existing lists of the names of persons who have been denied executive clemency by the President to anyone who requests such records.

To ensure your correspondence receives immediate attention, please always be sure to reference Death Penalty Case No. C288750 in any future correspondence with this office. We have attached a copy of our sentence of death regulations to this email. These regulations are also available for review on our website at https://www.justice.gov/pardon/rules-governing-petitions-executive-clemency#procedures. You may address any questions about your case to Acting Pardon Attorney Rosalind Sargent-Burns at USPardon.Attorney@usdoj.gov or leave us a voicemail at (202) 616-6070 and we will be sure to respond to you in a timely manner based on time restraints in your client's case. Please note that the nature of the clemency review process limits the information we will be able to provide to you and your client, but we will attempt to be as responsive as possible.

Sincerely,
Office of the Pardon Attorney

From: Jonathan Aminoff
To: US Pardon Attorney (imailagent)
Cc: Celeste Bacchi
Subject: RE: Case No. C288750
Date: Friday, October 4, 2019 2:14:51 PM
Attachments: ClemencyAuthorization.pdf

Good afternoon-

Attached please find Mr. Mitchell's signed authorization allowing the Office of the Federal Public Defender for the Central District of California to file clemency materials on his behalf and to represent him in these proceedings. Please contact us if you have any questions.

Thanks very much.

Jonathan C. Aminoff
Deputy Federal Public Defender
Office of the Federal Public Defender
Central District of California
321 East Second Street
Los Angeles, CA 90012
Direct: 213 894 5374
Fax: 213 894 0310

CONFIDENTIALITY NOTICE

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From: Celeste Bacchi <Celeste_Bacchi@fd.org>
Sent: Thursday, October 3, 2019 9:54 AM
To: US Pardon Attorney (imailagent) <uspardon.attorney@usdoj.gov>
Cc: Jonathan Aminoff <Jonathan_Aminoff@fd.org>
Subject: RE: Case No. C288750

Good morning,

Thank you for the opportunity to make an oral presentation on behalf of Mr. Mitchell's request for clemency. We will attend in person, and would like to give the presentation on the morning of October 22, if that date/time is still available. While Mr. Aminoff and myself will be in attendance, we are still in the process of determining the third person who will attend on Mr. Mitchell's behalf. Is it alright if we get you that name in a week or so?

Additionally, we intend to submit Mr. Mitchell's signed authorization on October 4, 2019.