

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

PATRICK R. SMITH and BRANDON S. HOLM,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

JEFFREY A. ROSEN, in his official capacity as the
Acting 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 the Terre
Haute Federal Correctional Complex,

Defendants.

No. 2:20-cv-630-JMS-DLP

**PLAINTIFFS’ EMERGENCY MOTION REQUIRING DEFENDANTS TO SHOW
CAUSE WHY THEY SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING THE
COURT’S PRELIMINARY INJUNCTION ORDER**

Plaintiffs respectfully move for emergency relief in light of new evidence that the Government is not complying with this Court’s injunction order.

On January 7, 2021, and as a condition of holding any further executions, this Court directed that Defendants to take four steps to reduce the threat of spread of COVID-19 at Terre Haute FCI stemming from the executions Defendants have elected to hold during the pandemic. ECF 56. The first of these directives is that the “defendants will enforce mask requirements for all staff participants in the executions.” Id. at *1. The mask requirement was part of a narrowly drawn Preliminary Injunction that imposed various safety protocols on the Defendants as a condition of conducting any further executions in the midst of the COVID-19 pandemic.

On January 10, Plaintiffs moved for an order requiring Defendants to file pre- and post-execution compliance reports in light of this Court’s prior findings on misrepresentations by

Defendants. ECF 58; ECF 55. Defendants opposed the compliance-report motion, assuring the Court that “they intend to comply with the Court’s preliminary injunction while conducting the scheduled executions.” ECF 59.

The Court partially granted Plaintiffs’ compliance-report motion, directing Defendants to file compliance reports within fifteen days after the executions. *See* Order Granting in Part and Denying in Part Plaintiffs’ Emergency Motion for Pre- and Post-Execution Compliance Reports (Dkt. 60) (“Compliance Report Order”). The Court did not order Defendants to provide a pre-execution compliance report, but it stated that “[n]othing in this [order] prevents the court from taking additional enforcement action, should it learn its injunction is not being followed.” *Id.* The present motion seeks such additional enforcement action based upon violations of the Court’s injunction.

Witnesses to last night’s execution of Corey Thompson report that Defendants failed to ensure that execution team members complied with the Court’s mask mandate. A media witness to the execution reported that at least one of the executioners never wore a mask, and the other removed his mask. *See* Declaration of Jennifer Davis, attached hereto as Exhibit 1. And the spiritual advisor to Mr. Thompson attests that he saw both of the executioners in the execution chamber during the proceedings without masks. *See* Declaration of William Breeden, attached hereto as Exhibit 2.

Dustin Higgs is scheduled to be executed this evening at 6:00 p.m. EST. Mr. Higgs, who continues to maintain his innocence,¹ would be the latest person executed by the current administration,² with many of the executions occurring at the worst (up to now) point in the pandemic, and with COVID-19 still widespread at FCC Terre Haute.

¹ “Dustin Higgs, Awaiting Federal Execution, Says He's Innocent,” *The Intercept* (Jan. 14, 2021), <https://theintercept.com/2021/01/14/dustin-higgs-federal-executions-death-penalty/>; *see also* *Newsweek* (Jan. 12, 2021), <https://www.newsweek.com/petition-halt-dustin-higgs-execution-amasses-over-15-million-signatures-1560842> .

² “Trump Is Putting the Machinery of Death Into Overdrive,” *The Atlantic* (Jan. 15, 2021) (“After 17 years without a federal execution in the United States, the Trump administration has gone on what can

In light of this evidence of non-compliance, Plaintiffs request additional relief, including but not limited to:

1. Ordering Defendants to show cause immediately why they should not be held in contempt for the violating the Court's preliminary injunction order;
2. Barring any future executions at FCC Terre Haute in light of Defendants' non-compliance with the Court's preliminary injunction, pending a ruling by the Court on this show-cause motion; and/or
3. Entering an order precluding the executioners who violated the Court's mask requirement from participating in the execution scheduled for January 15, 2021 and any other executions in the next 60 days.

Dated: January 15, 2021

Respectfully submitted,

/s/ Robert A. Burgoyne

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only be called a killing spree.”), <https://www.theatlantic.com/ideas/archive/2021/01/trump-putting-machinery-death-overdrive/617682/>.

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, a copy of the foregoing document was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the court's electronic filing system.

/s/ Robert A. Burgoyne _____

Robert A. Burgoyne