IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ALFREDO R. PRIETO,

Plaintiffs,

v. CASE NO. 1:15cv1258

HAROLD W. CLARKE, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT

Plaintiff Alfredo Prieto, a serial rapist-murderer, is scheduled to be executed on October 1, 2015, for the 1988 murders of Rachael A. Raver and Warren H. Fulton III. Prieto has also been sentenced to death in California, and in total, he has been convicted of killing, or suspected of killing, at least nine people.[1] Having exhausted his criminal and habeas appeals, Prieto now turns to 42 U.S.C. § 1983 in this last-minute effort to halt his execution.

In light of well-recognized efforts by anti-death-penalty advocates, it has become increasingly difficult for state departments of corrections to obtain the drugs needed to perform an execution by lethal injection. Virginia has been facing just such a shortage. However, in the spirit of comity, Texas recently agreed to provide, without cost, three vials of pentobarbital to Virginia. Texas also supplied, upon request, a certificate of

[1] After Prieto was sentenced to death for the murders of Rachel Raver and Warren Fulton, the Commonwealth elected not to try him for the remaining Virginia crimes, to which he had been forensically linked through ballistics and DNA evidence. *See Prieto v. Commonwealth*, 278 Va. 366, 380, 682 S.E.2d 910, 916 (2009).

analysis that establishes that the potency of the pentobarbital is within an acceptable range. The Virginia Department of Corrections now stands ready to fulfill its statutory obligation and carry out the court-ordered execution.

Prieto, however, has filed suit under 42 U.S.C. § 1983, claiming that use of the Texas pentobarbital in his execution will constitute cruel and unusual punishment. He has also filed a motion seeking a temporary restraining order and stay of execution so that he can further investigate the source of the Texas pentobarbital. For the reasons that follow, Prieto's eleventh-hour challenge to the manner of his execution must fail. Because preliminary injunctive relief is unwarranted, the *ex parte* temporary restraining order should be vacated, and Prieto's request for preliminary injunctive relief and a stay of execution should be denied.[2]

STATEMENT OF FACTS

Prieto's filing with the Court is rife with supposition. To ensure that this Court is in possession of all of the relevant facts, Defendants state as follows:

1. Under Virginia law, a condemned inmate may decide whether he wishes to be executed by electrocution or lethal injection. Va. Code § 53.1-234. This election is made fifteen days prior to a scheduled execution. If the inmate fails to select either option, he will be executed by lethal injection. *Id.*

[2] Defendants have also filed a motion to transfer venue from the Alexandria division to the Richmond division. Rather than awaiting a ruling on that motion, Defendants, in the interests of judicial efficiency, are also filing this substantive response to the Plaintiff's motion. By filing this response, Defendants do not waive their prior request to have the matter transferred to the Richmond division.

2. In accordance with Virginia Code § 53.1-234, Prieto was given the opportunity to select his method of execution. Because he did not select either option, he will be executed by lethal injection.

3. As has been well-documented in prior cases, VDOC utilizes a three-drug protocol to perform an execution by lethal injection. Specifically:

> There are three stages to the lethal injection procedure. All chemicals used in the process are remotely introduced by pre-established intravenous (IV) lines. Initially, two grams of sodium thiopental, a barbiturate that induces sleep, are administered. A saline solution is then employed to flush the IV line. The saline flush ensures that the full dose of sodium thiopental is delivered and eliminates the possibility of an interaction between sodium thiopental and pancuronium bromide outside of the body. Any interaction between the sodium thiopental and the second stage drug, pancuronium bromide, prior to the chemicals entering the inmate's body, could significantly hinder the effectiveness of the sodium thiopental.
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> Following this flushing procedure, the second chemical, pancuronium bromide, a neuromuscular blocking agent which causes paralysis in all muscles except the heart, is administered by IV. Pancuronium bromide suppresses involuntary seizures or motor manifestations that may occur during the execution process. The 50 mg quantity of pancuronium bromide administered during this stage is sufficient to cause the inmate to suffocate. Next, saline solution is again introduced to flush the line.
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> The final phase involves the administration of 240 milliequivalents of potassium chloride, which causes cardiac arrest. Within moments after the potassium chloride has been injected, the heart of the inmate will stop beating. Shortly thereafter, brain activity will cease. A physician monitors the inmate’s heart beat and pronounces death.

Emmett v. Johnson, 489 F. Supp. 2d 543, 545 (E.D. Va. 2007).

4. Because of the current unavailability of sodium thiopental, VDOC has authorized the use of other sedatives as the first drug in its execution protocol.[3]

5. In 2011 VDOC authorized the use of pentobarbital as the first drug in its execution protocol.

6. In recent years, VDOC has been unable to obtain pentobarbital through any of its prior suppliers or manufacturers.

7. For this reason, VDOC recently approved midazolam for use as the first drug in its execution protocol. The only midazolam remaining in VDOC's custody bears an expiration date of September 30, 2015.

8. VDOC has been unable to obtain any additional supplies of midazolam.

9. When Prieto's execution was scheduled for October 1, 2015, VDOC therefore lacked a drug needed for the first step in Virginia's protocol for execution by lethal injection.

10. In August 2015, the VDOC verbally contacted the Texas Department of Criminal Justice to inquire into the possibility of acquiring pentobarbital from that jurisdiction.[4] Texas verbally agreed to donate three vials of pentobarbital to VDOC.

11. On or about August 26, 2015, two VDOC employees arrived in Texas and accepted custody of the pentobarbital. The appropriate DEA paperwork was completed, and the VDOC employees personally transported the vials back to Virginia, maintaining chain of custody and appropriate temperature controls at all times.

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[3] Every time the Department modifies a lethal injection protocol, they immediately post a notification to that effect on the VDOC website, https://vadoc.virginia.gov.

[4] VDOC previously donated pentobarbital to Texas when Texas faced a shortage of this substance.

12. Upon receipt of the vials, VDOC verbally contacted the Texas Department of Corrections to request a copy of any certificate of testing that would show the potency and/or efficacy of the donated pentobarbital.

13. The Texas Department of Criminal Justice mailed the corresponding certificate of testing directly to the Virginia Office of the Attorney General. A copy of that certificate is attached to this Memorandum as Exhibit One, and a copy of the corresponding pharmacopeia—which establishes the acceptable range of potency for pentobarbital—is attached as Exhibit Two.

14. The pentobarbital has been compounded by a licensed pharmacy in Texas. Texas does not publicly disclose the suppliers or manufacturers of substances used in lethal injections.

15. Texas has used compounded pentobarbital successfully in twenty-four executions over the past two years.

16. On September 25, 2015, VDOC received a letter from Prieto's counsel, seeking admissions and answers to various questions regarding the Texas pentobarbital.[5] The letter requested a response by September 29, 2015.

17. On September 29, counsel for VDOC sent, by electronic mail, a response to the letter from Prieto's counsel.

[5] This letter marked the first time, in recent months, that the Virginia Capital Representation Resource Center identified themselves as counsel for Prieto. Although the VCRRC represented Prieto in his state habeas proceedings, they refused an order of appointment for his federal habeas proceedings. The district court and the Fourth Circuit both appointed separate counsel for his ongoing federal litigation. Thus, to the extent Plaintiff's counsel complain that they were not "kept in the loop" regarding Prieto's execution, they would not have been because they were no longer his counsel of record.

18. On September 30, Prieto filed the instant action, accompanied by a motion for a temporary restraining order and stay of execution.

ARGUMENT AND AUTHORITIES

"'A plaintiff seeking a preliminary injunction must establish 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.'" *Glossip v. Gross*, 135 S. Ct. 2726, 2736-37 (2015) (quoting *Winter v. Nat'l Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). Within the context of a method-of-execution suit, the determinative inquiry is generally whether the plaintiff can demonstrate likelihood of success on the merits. *Id.* For the following reasons, these factors do not weigh in favor of granting preliminary injunctive relief.

I. Prieto Is Not Likely to Succeed on the Merits of His Eighth Amendment Claim.

To succeed on the merits of a method-of-execution suit, a plaintiff must first "establish that the method presents a risk that is 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Id.* at 2737 (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008) (internal quotations omitted)). That is, "'there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.'" *Id.* (quoting *Baze*, 553 U.S. at 50) (internal quotations omitted).

Separate and apart from this first requirement, a method-of-execution plaintiff must also "identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze*, 553 U.S. at

52) (alteration in original). This identification is not satisfied "'merely by showing a slightly or marginally safer alternative.'" *Id.* (quoting *Baze*, 553 U.S. at 51).

In sum, "[a] stay of execution may not be granted . . . unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives.'" *Id.* (quoting *Baze*, 553 U.S. at 61) (alterations in original). "The preliminary injunction posture of the present case thus requires petitioners to establish a likelihood that they can establish both that [the] lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives." *Id.*

Here, Prieto's allegations are insufficient to establish a serious risk that he will needlessly suffer during his execution. Moreover, he has not established that any risk is significant when compared against a known and *available* method of execution. For these reasons, Prieto cannot succeed on the merits of his action. Without this crucial showing, preliminary injunctive relief cannot issue.

A. Prieto cannot establish that Virginia's lethal injection protocol creates a demonstrated risk of severe pain.

Prieto does not generally challenge Virginia's basic three-drug execution protocol, which has been upheld against prior constitutional challenges. *See Emmett v. Johnson*, 532 F.3d 291 (4th Cir. 2008); *see also Walker v. Johnson*, 328 F. App'x 237 (4th Cir. 2009). Prieto argues, rather, that the specific batch of compounded pentobarbital that Virginia intends to use might be contaminated, might be impure, and therefore might cause him to suffer some pain.

In support of this allegation, Prieto contends that "VDOC did not request, investigate, obtain, or confirm any of the information listed above about the purported pentobarbital, or the results of any alleged testing." Compl. at 6; *see also* Compl. at 18. As discussed above, this assertion is not based on any evidence, but rather, a false conclusion drawn from a FOIA response. Based on the absence of documents, Prieto concludes that VDOC must not have made any diligent inquiries regarding the Texas pentobarbital. A FOIA response, however, is intended to provide documents—not information. The lack of written documentation does not mean that no inquiry was made—rather, it means only that nothing was commemorated in writing.

Regardless, Prieto's speculative allegations do not withstand scrutiny. The pentobarbital was compounded by a licensed pharmacy, and it has been independently tested, verified as sufficiently potent and contaminant-free, and maintained in appropriate conditions since its transfer into VDOC custody.[6] Also of note, Texas has used

[6] To the extent that Prieto argues that Virginia obtained the pentobarbital in violation of "state and federal law," Compl. at 13, this is both untrue and irrelevant. The legality of Virginia's possession of pentobarbital does not bear on whether its administration would cause undue pain and thereby violate the Eighth Amendment. *See, e.g.*, *Zink v. Lombardi*, 783 F.3d 1089, 1113 (8th Cir. 2015) ("The prisoners complain that the use of compounded pentobarbital as a lethal drug in executions violates the federal Food, Drug, and Cosmetic Act, and the Controlled Substances Act. They acknowledge, however, that there is no private right of action under federal law to enforce these alleged violations." (citations omitted)). Nevertheless, Defendants note that the Virginia Board of Pharmacy only has "the authority to license and regulate the dispensing of controlled substances by practitioners of the healing arts." Code 54.1-3304.1. Because the execution team is not practicing "the healing arts," the state Board of Pharmacy regulations are inapplicable. This is a matter of state law, which has already been litigated in Virginia courts. *See Shapiro v. Va. Dep't of Corrections*, No. CL12-1894-02 (Richmond Circuit Court) (final order attached as Exhibit Three). Also, the state and federal drug control acts are inapplicable because the Department of Corrections possesses a Controlled Substances Registration Certification from the Virginia Board of Pharmacy, as well as a Controlled Substance Registration Certificate from the DEA. These certifications authorize VDOC to possess Schedule II controlled substances.

compounded pentobarbital successfully in twenty-four executions over the past two years.

Prieto, then, cannot establish that the Texas pentobarbital is likely to cause an objectively intolerable risk of severe pain, such that he would be suffering in needless agony during his execution.[7] He has alleged that he might suffer some pain if there is an unknown contaminant in the compounded pentobarbital. But the Eighth Amendment does not require a guaranteed pain-free execution: "Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether." *Glossip*, 135 S. Ct. at 2733.

Moreover, Prieto's arguments regarding the possibility that the Texas pentobarbital is contaminated are purely speculative. The Fifth Circuit has recently rejected Prieto's very argument, in a § 1983 action brought by a Texas death row inmate challenging the use of compounded pentobarbital. Specifically, the Fifth Circuit held that an inmate's argument "that compounded drugs are unregulated and subject to quality and efficacy problems . . . is essentially speculative," and, therefore, "cannot substitute for evidence that the use of the drug is sure or very likely to cause serious illness and needless suffering." *Ladd v. Livingston*, 777 F.3d 286, 289 (5th Cir.) (internal quotations omitted), *cert. denied*, 125 S. Ct. 1197 (2015). Because "[h]ypthetical possibilities that the [compounding] process was defective are not enough for a stay," the court affirmed the district court's denial of preliminary injunctive relief. *Id.*; *accord Sells v. Livingston*, 561 F. App'x 342 (5th Cir. 2014) (reversing grant of injunctive relief and vacating stay of

[7] To the extent that Prieto is concerned about a possible contaminant, it is worth noting that the pentobarbital is not going to be administered for a medicinal purpose, but rather, a lethal one. Pharmaceutical concerns about sterility and contaminants lack substantive weight in an execution context.

execution, rejecting the plaintiff's argument that "newly acquired pentobarbital being supplied by a new compounder may be different and may cause a risk of severe pain," because "[s]peculation is not enough" to establish a likelihood of success on the merits).

As the Fifth Circuit explained in another case denying injunctive relief for an inmate challenging the use of compounded pentobarbital,

> If the state were using a drug never before used or unheard of, whose efficacy or science was completely unknown, the case might be different. The state, however, will use a standard amount of pentobarbital for [the] execution. Plaintiffs argue that because the state has transitioned to using compounding pharmacies, there are known unknowns because of the possibility of contamination. That may be true, but plaintiffs must point to *some* hypothetical situation, based on science and fact, showing a likelihood of severe pain.
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> None of the examples in their brief shows any such possibility based on the known unknowns stemming from obtaining drugs from a compounding pharmacy. Plaintiffs claim that compounding pharmacies are not subject to stringent FDA regulations, that the active ingredients are obtained from a global "grey market," and that there is a chance of contamination. Plaintiffs claim . . . that this increases the risk of a more painful injection . . . [and] of a potency problem that may make the drug ineffective in killing (although the laboratory results for the drug showed a 98.8% potency).
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> All of these things may be true. But what plaintiffs are demanding is that, in effect, they be permitted to supervise every step of the execution process. They have no such entitlement.

Whitaker v. Livingston, 732 F.3d 465, 468 (5th Cir. 2013). Because the inmate had "pointed to only hypothetical possibilities that the [compounding] process was defective," the Fifth Circuit affirmed the order denying injunctive relief. *Id.*; *accord Zink v. Lombardi*, 783 F.3d 1089, 1101 (8th Cir.) ("None of the alleged potentialities the prisoners identify in the second amended complaint relating to compounded pentobarbital

rises to the level of 'sure or very likely' to cause serious harm or severe pain. The prisoner's allegations are limited to descriptions of hypothetical situations in which a potential flaw in the production of the pentobarbital or in the lethal-injection protocol could cause pain. This speculation is unsufficient to state an Eighth Amendment claim."), *cert. denied*, 135 S. Ct. 2941 (2015); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1265 (11th Cir. 2014) ("[The inmate's] argument that the compounded pentobarbital may be defective . . . is unsufficient to establish a substantial likelihood of success on the merits of his Eighth Amendment claim.").

Similarly, here, Prieto's allegations regarding the compounding process, and any remote possibility that he might suffer some pain, are speculative in nature and, therefore, insufficient to withstand scrutiny under the Eighth Amendment. *See Zink*, 783 F.3d at 1101; *Wellons*, 754 F.3d at 1265; *Whitaker*, 732 F.3d at 468; *see also Emmett*, 532 F.3d at 302 (affirming dismissal of method-of-execution suit, reasoning that "[t]he possibilities and other speculative scenarios" in the complaint could not establish that the Virginia protocol was "'sure or very likely to cause serious illness and needless suffering'" (quoting *Baze*, 553 U.S. at 50)).

Of note, any risk of serious and significant suffering is further minimized by the procedures VDOC follows during an execution. Specifically,

> The execution takes place in a one room chamber. The inmate is strapped to a gurney in the front of the chamber, and the executioner, the IV team, and the physician who pronounces death are a few feet away, behind a curtain in the rear of the chamber. The curtain has a window so that the executioner can observe the administration of the lethal drugs.
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> Prior to the execution, electrodes, which serve the heart monitor, will be attached to Plaintiff. The heart monitor is

> watched by a physician who also is present during the administration of the lethal chemicals. Before an execution, inmates are sometimes offered Valium, but are not required to take it.
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> Virginia has taken considerable effort to ensure that human error or defective equipment do not increase the risk that Plaintiff will suffer more than de minimus pain. Virginia's execution protocol provides very specific step-by-step directions for carrying out an execution. Additionally, almost every stage of the execution process, from the preparation of the syringes to site selection of IV lines, is supervised by a team leader with decades of experience in carrying out lethal injections. Furthermore, Virginia always sites two IV lines on the condemned inmate so that members of the execution team can quickly switch to the secondary line in the event there is difficulty with the primary line. Prior to administering the lethal chemicals, team members test the IV lines using saline solution. During the execution process, the individual administering the drugs can observe the inmate and the IV lines to ensure that the drugs are reaching the inmate in the proper manner.

Emmett, 489 F. Supp. 2d at 549. These safeguards further minimize the risk that an improperly-administered sedative would fail, thereby causing Prieto to suffer serious, significant pain.

Prieto's allegations, at best, are not that the "State has any intent (or anything approaching intent) to inflict unnecessary pain; the complaint is that the State's pain-avoidance procedure may fail." *Workman v. Governor Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007). And "[t]he risk of negligence in implementing a death-penalty procedure, particularly when the risk has not come to pass in the State, does not establish a cognizable Eighth Amendment claim." *Id.* That is, "'[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional

review.'" *Emmett*, 489 F. Supp. at 553 (quoting *Reid v. Johnson*, 333 F. Supp. 2d 543, 553 (E.D. Va. 2004)) (alteration in original) (internal quotations omitted).

Because Prieto's speculative allegations do not establish a substantial and serious risk that he will suffer severe and needless suffering during his execution, he cannot succeed on the merits of his Eighth Amendment claim. *See Glossip*, 135 S. Ct. at 2738 (affirming denial of stay of execution where the inmates did not show "a risk of pain so great that other acceptable, available methods must be used"); *see also Workman*, 486 F.3d at 906 ("One cannot credibly establish a likelihood of success in attacking a death-penalty procedure when the theory of success has yet to succeed in a considerable number of cases over a considerable number of years."). Injunctive relief is therefore inappropriate. *See Glossip*, 135 S. Ct. at 2738.

B. Prieto has not alleged that VDOC has a known and available execution alternative, utilization of which would pose a lesser risk of pain.

Second, Prieto has not alleged the existence of a known and available alternative to VDOC's current execution plan. As noted in *Glossip*, a method-of-execution plaintiff must "identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze*, 553 U.S. at 52) (alteration in original). This identification is not satisfied "'merely by showing a slightly or marginally safer alternative.'" *Id.* (quoting *Baze*, 553 U.S. at 51).

As his proposed alternative, Prieto has stated that VDOC should use "a fast-acting barbiturate that (1) carries FDA approval for use in humans; or (2) for which the VDOC has taken reasonable and appropriate measures to ensure appropriate safeguards, including transparency as to the execution process, the source of the drugs used, the due diligence supporting the selection of the execution process and the drugs used, and all

pertinent information about the selection, purchase, storage and testing of the drug (all of which are relevant to a determination of the drugs' efficacy and purity, i.e. the risk that it will cause substantial pain at the time of the execution)." Compl. p. 19.

VDOC's current execution plan calls for the administration of pentobarbital, a "fast-acting barbiturate" that "carries FDA approval for use in humans." The "alternative" proposed by Prieto is, therefore, indistinguishable from the execution plan that is already in place. This, alone, is fatal to his likelihood of establishing an Eighth Amendment violation.

With respect to Prieto's second suggestion, which is posed in the disjunctive, Prieto has not alleged that VDOC is actually in possession of, or able to obtain, any lethal-injection drugs that would satisfy his transparency standard. To the contrary, the Texas pentobarbital is the only substance VDOC has been able to obtain for use in the first step of its three-drug protocol. Although VDOC had a supply of midazolam, it is expired and no longer suitable for use in an execution.

For these reasons, Prieto has not identified an *available* and *alternative* method of execution that he believes would pose a lesser risk of subjecting him to his speculated potential suffering. *See Glossip*, 135 S. Ct. at 2738 (affirming denial of stay of execution where the inmates "have not identified any available drug or drugs that could be used in place of those that [the state] is now unable to obtain"). Because Prieto has not made this threshold allegation—and because there are no available alternatives to the Texas pentobarbital—Prieto cannot prevail on the merits of his Eighth Amendment claim.

As the Supreme Court has cautioned, "challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts. Although we must

invalidate a lethal injection protocol if it violates the Eighth Amendment, federal courts should not 'embroil [themselves] in ongoing scientific controversies beyond their expertise.'" *Glossip*, 135 S. Ct. at 2740 (quoting *Baze*, 553 U.S. at 51) (alteration in original). For this reason, "an inmate challenging a protocol bears the burden to show, based on evidence presented to the court, that there is a substantial risk of severe pain." *Id.*

Because Prieto cannot show that the Texas pentobarbital is likely to subject him to severe and needless suffering, and because he has not identified an available and alternative method of execution that would lessen his speculative risk of pain, he cannot carry this burden and, therefore, cannot succeed on the merits of his Eighth Amendment claim. For this reason, Defendants request that this Court deny Prieto's request for a temporary restraining order and stay of execution. *See generally Green v. Johnson*, Case No. 3:08cv326 (E.D. Va. 2008); *Emmett v. Johnson*, 511 F. Supp. 2d 634 (E.D. Va. 2007); *Emmett v. Johnson*, 489 F. Supp. 2d 543 (E.D. Va. 2007); *Lenz v. Johnson*, 443 F. Supp.2d 785 (E.D. Va. 2006); *Vinson v. Johnson*, Case No. 3:06cv230-HEH (E.D. Va. 2006); *Reid v. Johnson*, 333 F. Supp. 2d 543 (E.D. Va. 2004).

C. Prieto Has Not Exhausted His Administrative Remedies, and Therefore Cannot Succeed on the Merits of His Suit.

Separate and apart from the substantive merits of his pleading, Prieto's claim will fail under 42 U.S.C. § 1983 because, upon information and belief, he has not exhausted his administrative remedies. The Prisoner Litigation Reform Act ("PLRA") requires all inmates to fully exhaust their administrative remedies as a mandatory prerequisite to the initiation of any suit under 42 U.S.C. § 1983. Specifically, the PLRA provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any

other federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available have been exhausted." 42 U.S.C. § 1997e(a).

As noted by the United States Supreme Court, exhaustion of administrative remedies in the context of prisoner litigation "serves two main purposes": (1) to "protect[] administrative agency authority," so that an agency has "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into [] court," and (2) to "promote[] efficiency," because "[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation." *Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (internal quotations omitted).

The exhaustion requirement of 42 U.S.C. § 1997e(a) applies to method-of-execution challenges. *See Nelson v. Campbell*, 541 U.S. 637, 650 (2004); *see also Reid*, 333 F. Supp. 2d at 552 (holding that the method-of-execution challenge was "subject to dismissal because [the inmate] has failed to exhaust his available administrative remedies for this action"). And there is no futility exception to the exhaustion requirement: In *Booth v. Churner*, the United States Supreme Court analyzed the legislative history of 42 U.S.C. § 1997e(a) and concluded that Congress did not intend to excuse exhaustion even in the absence of an "'effective' administrative remedy." 532 U.S. 731, 740 (2001). Moreover, the Court "stress[ed]" that it would not excuse the exhaustion requirement even if exhaustion was "futile," because this would read language into the statute that is not there. *Id.* at 741 n.6 ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."); *see also Newton v. Washington*, 311 Fed. App'x 652, 652 n* (4th Cir. 2009) ("We specifically note that [the

inmate's] claim that he is excused from administratively grieving his claims based on futility is without merit.").

Because Prieto has not attempted to utilize the institutional grievance procedure prior to filing suit, and because Defendants do not waive this statutory defense, his action should be dismissed for failure to exhaust administrative remedies. Accordingly, Prieto cannot establish likelihood of prevailing on the merits of his action.

II. Prieto Will Not Be Irreparably Harmed If He Is Executed Under the Current Protocol, and the Balance of the Equities Weighs in Favor of VDOC.

Prieto argues that he will be irreparably harmed if the Texas pentobarbital is used in his execution. His supposition on this point, however, is based on the faulty premise that the Texas pentobarbital has been improperly stored and/or not tested for potency or efficacy. As reflected in the certificate of analysis obtained from an independent laboratory, the Texas pentobarbital tested as uncontaminated and at 94.6% potency, which is well within acceptable parameters. Considering this, along with the fact that Texas has had no difficulties using compounded pentobarbital during its last twenty-four executions, Prieto will not be irreparably harmed—in the form of a constitutional violation—when he is executed. *See Reid*, 333 F. Supp. 2d at 551 ("There is simply no reason to believe the speculative list of horribles described by [the inmate] are likely to come to pass. . . . In sum, the likelihood of [the inmate] suffering irreparable harm from the manner in which the defendants intend to carry out his sentence is so remote as to be nonexistent. [The inmate's] failure to show any likelihood of irreparable harm precludes him from obtaining preliminary injunctive relief.").

By contrast, the Commonwealth of Virginia will suffer harm if it is unable to enforce the jury-imposed sentence of death. As Prieto argues at length, all drugs—

compounded or not—have a shelf life. And granting Prieto a preliminary injunction and stay of execution so that he can fully indulge his speculations may very well prolong this case past the expiration date of the Texas pentobarbital—the only substance VDOC has been able to obtain for use in the first stage of the three-drug protocol. Granting injunctive relief in these proceedings, then, may very well negate the Commonwealth's ultimate ability to execute this serial murderer-rapist. Considering the very minimal likelihood that Prieto would incur irreparable harm if the Texas pentobarbital is administered to him, the balance of the equities weighs against a grant of preliminary injunctive relief.

III. The Public Interest Weighs in Favor of Proceeding with the Execution.

The citizens of the Commonwealth of Virginia have a strong interest in seeing Prieto's death sentences carried out. A jury heard the evidence, convicted him of two counts of capital murder, considered evidence in mitigation, found the requisite aggravating statutory factors beyond a reasonable doubt, and then sentenced him to die. Prieto's criminal convictions have been upheld by the Virginia Supreme Court and by the federal courts. There is a strong public interest in favor of seeing these proceedings through to their ultimate conclusion, particularly while Virginia still has viable execution drugs. As the Fifth Circuit has noted, "[f]iling an action that can proceed under [section] 1983 does not entitle the complainant to an order staying the execution as a matter of course," for "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue influence from the federal courts." *Ladd*, 777 F.3d at 288 (internal quotations omitted and alterations in original); *see also Reid*, 333 F. Supp.

2d at 551-52 ("It is well settled that the state has 'a significant interest in meting out a sentence of death in a timely fashion.'" (*quoting Nelson*, 541 U.S. at 644)).

Moreover, there is a strong public interest in bringing closure to the families of Prieto's many victims, some of whom have waited nearly twenty-seven years to see this killer brought to justice.[8] In light of the speculative nature of Prieto's allegations, this Court should not compound their agony by granting him leave to pursue his ultimately baseless Eighth Amendment claim. *See Reid*, 333 F. Supp. 2d at 552 ("At this point, the state and the victims of crime can expect the moral judgment of the state to be carried out without delay. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." (internal quotations and citation omitted)).

CONCLUSION

The grant of interim injunctive relief is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in limited circumstances which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811(4th Cir. 1991). In keeping with this basic principle, a stay of execution is "not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 547, 584 (2006). Thus, "inmates seeking time to challenge the manner in which the State plains to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on

[8] *See generally* THE WASHINGTON POST, 3 Murder Victims' Families Prepare for Alfredo Prieto's Execution (9/29/15), *available at* https://www.washingtonpost.com/local/public-safety/3-murder-victims-families-prepare-for-alfredo-prietos-execution/2015/09/29/34ff9812-661f-11e5-8325-a42b5a459b1e_story.html.

the merits." *Id.* at 584; *see also Stockton v. Angelone*, 70 F.3d 12, 13 (4th Cir. 1995) ("Last minute stays [of execution] . . . represent an interference with the orderly processes of justice which should be avoided in all but the most extraordinary circumstances.").

Those "extraordinary circumstances" are not present here. Prieto cannot prevail on the merits of his Eighth Amendment claim. And, because the Texas pentobarbital has been independently tested and its potency verified, Prieto will not be irreparably harmed when it is used during his October 1 execution. By contrast, there is a strong public interest in ensuring that the Commonwealth is able to implement the court-imposed sentence of death—an interest that would be undermined if the execution were stayed so that Prieto could indulge his speculations regarding the composition of the drugs that will be used to execute him. In light of all these circumstances, the "extraordinary remedy" of preliminary injunctive relief should not issue.

Accordingly, Defendants request that this Court VACATE the *ex parte* temporary restraining order, DENY Prieto's request for preliminary injunctive relief, and DENY Prieto's request for a stay of execution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 2015, I electronically filed the foregoing Memorandum in Support with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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And I hereby certify that I have mailed the document by United States Postal Service to the following non-filing user: N/A

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