IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALFREDO R. PRIETO,
Plaintiff,

v. Record No. 15-7553

HAROLD W. CLARKE, DIRECTOR,
Virginia Department of Corrections,

EDDIE L. PEARSON, Warden,
Greensville Correctional Center,

DAVID ZOOK, WARDEN,
Sussex I State Prison, and

OTHER UNKNOWN EXECUTIONERS,
EMPLOYEES, AND AGENTS,
Virginia Department of Corrections,
Defendants.

DIRECTOR'S BRIEF IN OPPOSITION TO PRIETO'S MOTION FOR STAY

This Court has comprehensively reviewed Virginia's lethal injection protocols and found them constitutionally sound.[1] Prieto's speculative attack on one part of that protocol did not entitle him to a stay of his execution.[2] This Court consistently has denied stay applications that fail to satisfy the *Barefoot* standard and should do so

[1] *Emmett v. Johnson*, 532 F.3d 291, 308 (4th Cir. 2008).
[2] *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *Netherland v. Tuggle*, 515 U.S. 951 (1995) (*per curiam*).

here.[3]

Introduction

Alfredo Prieto brutally murdered Rachel A. Raver and Warren H. Fulton, III, 1988 and then evaded detection for almost 17 years. The constitutional validity of Prieto's capital murder convictions and death sentences has been affirmed by the Supreme Court of Virginia,[4] the district court[5] and this Court.[6]

Relevant Prior Proceedings

This Court unanimously affirmed the denial of habeas corpus relief in a published opinion rendered on June 30, 2015,[7] denied rehearing on July 28, 2015,[8] and denied Prieto's motion to stay the mandate on August 10, 2015.[9] The Court's mandate issued on August 18, 2015.[10]

On August 18, 2015, the Circuit Court of Fairfax County entered an order setting Prieto's execution for October 1, 2015. *See* Va. Code Ann. § 53.1-232.1. The

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[3] *See, e.g.*, *Beaver v. Netherland*, 101 F.3d 977 (4th Cir.), *stay denied*, 519 U.S. 1021 (1996); *Bennett v. Angelone*, 102 F.3d 110 (4th Cir.), *stay denied*, 519 U.S. 1002 (1996).
[4] *Prieto v. Commonwealth*, 682 S.E.2d 910, 914 (Va. 2009); *Prieto v. Commonwealth*, 721 S.E.2d 484, 490 (Va. 2012); *Prieto v. Warden*, 748 S.E.2d 94, 105 (20130.
[5] *Prieto v. Davis*, 2014 U.S. Dist. LEXIS 107504 (E.D. Va. 2014).
[6] *Prieto v. Zook*, 791 F.3d 465 (4th Cir. 2015).
[7] *Id.*
[8] Dkt. No. 53.
[9] Dkt. No. 56.
[10] DKt. No. 58.

trial court's order was entered on this Court's docket on August 19, 2015.[11]

As this Court has recognized, the Commonwealth "offers inmates convicted of capital murder and sentenced to death the choice of electrocution or lethal injection."[12] "If the condemned inmate refuses to make a voluntary choice at least fifteen days prior to the scheduled execution, lethal injection is imposed as the default method."[13] In compliance with Virginia law, Prieto was offered this choice and he refused to make an election.[14]

On September 30, 2015, Prieto filed a complaint and emergency motion for a temporary restraining order.[15] At 11:40 a.m. on September 30, 2015, District Judge Anthony J. Trenga issued an *ex parte* temporary restraining that "RESTRAINED and ENJOINED" the Defendants "from conducting or causing the execution of Plaintiff, presently scheduled for October 1, 2015 at 9:00 p.m."[16]

The district court in Richmond, Judge Henry E. Hudson presiding, conducted an evidentiary hearing on October 1, 2015. By written order, the district court vacated the temporary restraining order and denied preliminary injunctive relief.[17]

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[11] Dkt. No. 59.
[12] *Emmett*, 532 F.3d at 293 (citing Va. Code § 53.1-234).
[13] *Id.*
[14] ECF No. 16 at 21.
[15] ECF Nos. 1, 3.
[16] ECF No. 6.
[17] ECF No. 20.

The district court properly identified the controlling standard[18] and analyzed Prieto's claim for relief against that standard. Applying that standard, the district court found that Prieto's challenge to the Virginia Department of Corrections' proposed used of compounded pentobarbital was speculative; thus, Prieto had failed to show any likelihood of success on the merits or irreparable harm.[19]

The district court further held that the balance of equities weighed in favor of the Commonwealth, which has a strong interest in vindicating the jury's moral judgment.[20] The district court found that there is a strong public interest in the orderly administration of justice and heeded this Court's admonition in *Stockton v. Angelone,*[21] that last minute stays of execution "should be avoided in all but the most extraordinary of circumstances."[22] The district court concluded that the circumstances presented here did not satisfy this demanding standard.[23]

Finally, the district court found that equity did not favor Prieto because he waited until the day before his scheduled execution to bring his challenge.[24] The district court expressly rejected Prieto's claim that he could not have brought his challenge earlier, noting that the "difficulty states face in obtaining the appropriate

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[18] ECF No. 19 at 7 (citing *Glossip v. Gross***,** 135 S. Ct. 2726,2736-37 (2015)).
[19] ECF No. 19 at 8-13.
[20] ECF No. 19 at 10-11.
[21] 70 F.3d 12(4th Cir. 1995).
[22] ECF No. 19 at 11 (quoting *Stockton*, 70 F.3d at 13)..
[23] ECF No. 19 at 11.
[24] ECF No. 19 at 12.

drugs for conducting a lethal injection has been a topic of public debate for a number of years."[25] In sum, the district court conducted a sound analysis, applying the standards the Supreme Court articulated in *Glossip v. Gross*.[26] Prieto is not entitled to relief on his underlying claim and there is no reason to delay executing Virginia's lawful sentence.

Prieto is not entitled to a stay of execution

"[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception."[27] So when direct review has concluded, "a presumption of finality and legality attaches to the conviction and sentence."[28] And because this Court has issued its mandate denying Prieto federal habeas corpus relief, Virginia's "interests in finality are compelling."[29]

Given the presumption of finality and Virginia's compelling interests, a petitioner like Prieto—who seeks to unsettle that finality—is obliged to show:

> "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there

[25] ECF No. 19 at 12.
[26] *Glossip v. Gross*, 135 S. Ct. 2726,2736-37 (2015).
[27] *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).
[28] *Id.*
[29] *Claderon v. Thompson*, 523 U.S. 538, 556 (1998).

> must be a likelihood that irreparable harm will result if that decision is not stayed.'"[30]

Prieto has not met, and indeed cannot meet, this standard.

In light of the district court's comprehensive factual findings—made after an evidentiary hearing on the record—Prieto cannot show that "four Members" of the Supreme Court would consider his underlying challenge "sufficiently meritorious" to grant certiorari. Indeed, the Supreme Court has *denied* certiorari on two substantially similar challenges.[31]

Prieto also cannot show "significant possibility of reversal" on the merits. "[A]n inmate who seeks a stay of execution must establish that the lethal injection protocol of his state creates a demonstrated risk of severe pain that is substantial when compared to the known alternatives."[32] Prieto challenged the Virginia Department of Corrections' (VDOC) proposed method of executing him, so he was required to make that two-fold showing to the district court before he was entitled to

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[30] *Id.* at 895 (quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers)).

[31] *See, e.g.*, *Zink v. Lombardi*, 783 F.3d 1089, 1099-1101 (8th Cir.), *cert. denied*, 135 S. Ct. 2941 (2015) (rejecting challenge to compounded pentobarbital because allegations regarding the possibility of: "sub- or super-potent" drugs; or contamination with allergens, toxins, bacteria, fungus, or foreign particles was too speculative to establish a "sure or very likely" risk of harm); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1265 (11th Cir.), *cert. denied*, 134 S. Ct. 2838 (2014) (holding that petitioner's argument that "the compounded pentobarbital may be defective or the personnel administering the execution may be untrained is insufficient to establish a substantial likelihood of success on the merits of his Eighth Amendment claim.")

[32] *Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir. 2013).

a preliminary injunction or a restraining order. Prieto did not satisfy these threshold requirements; thus, he was not entitled to relief.

First, Prieto was obligated to demonstrate that Virginia's proposed method presents a "substantial risk" that is "*sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers."[33] This required Prieto to present *evidence* of "an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment."[34] Mere speculation does not satisfy Prieto's burden—and that was all he offered the district court.

Indeed, the fulcrum of Prieto's complaint was that the compounded pentobarbital Virginia intends to use as part of the three-drug execution protocol *might* not be good enough. In particular, Prieto posited to the district court that the VDOC's compounded pentobarbital might be "sub-potent, expired, contaminated, contain unintended additives, or will contain a substantial level of particulates."[35] The district court found that these allegations amounted to speculation "that the first drug in Virginia's protocol will not function properly and he will suffer intolerable pain from the administration of the second and third drugs.[36]

In addressing Prieto's complaints regarding the manner in which Virginia

[33] *Baze v. Rees*, 553 U.S. 35, 50 (2008) (internal quotations omitted)).
[34] *Id.* (internal quotations omitted).
[35] ECF No. 16 at 14.
[36] ECF No. 19 at 2-3.

procured the compounded pentobarbital and potential hazards, the district court found as fact that:

- VDOC employees personally transported the vials back to Virginia and maintained the vials at appropriate temperature controls at all times.[37]
- The pentobarbital supplied by the TDCJ was compounded by a licensed pharmacy in Texas.[38]
- The labels on the donated pentobarbital reflect that they each should be used by April 14, 2016.[39]
- The VDOC expert explained the safeguards that the VDOC has instituted to be sure that proper sedation occurs before an execution goes forth.[40]
- VDOC officials transported and stored the donated pentobarbital in accord with all appropriate directions.[41]
- Prieto failed to adduce any persuasive evidence that the storage or transport of the donated pentobarbital has comprised its integrity.[42]
- The TDCJ utilizes a licensed pharmacy to compound its pentobarbital.[43]
- The TDCJ's supplier of compounded pentobarbital has a long and proven record of producing pentobarbital that adequately anesthetizes inmates sentenced to death.[44]
- The compounded pentobarbital was tested and proved to be suitable to use for more than six months past Prieto's scheduled execution date. Prieto does

[37] ECF No. 19 at 3.
[38] ECF No. 19 at 3.
[39] ECF No. 19 at 4.
[40] ECF No. 19 at 5.
[41] ECF No. 19 at 6.
[42] ECF No. 19 at 6.
[43] ECF No. 19 at 6.
[44] ECF No. 19 at 6.

not point to any instance where the TDCJ has used compounded pentobarbital that, although within the labeled BUD, actually failed to function appropriately.[45]

- Prieto failed to adduce any persuasive evidence that the donated pentobarbital will be significantly compromised by its age.[46]
- No persuasive evidence exists that the donated pentobarbital was compounded under conditions inadequate to insure its potency for the one year represented on the bottle, much less the shorter time period at issue here.[47]

The district court was also satisfied that "any potential risk of pain to Prieto by some unforeseen problem with the donated pentobarbital is diminished, if not *wholly eliminated*, by Virginia's specific execution protocols.[48] Under all these circumstances, Prieto failed to show a "substantial risk" that is "*sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers."[49] In fact, other courts have rejected similar arguments challenging the use of compounded pentobarbital as too speculative.[50] In sum,

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[45] ECF No. 19 at 9.
[46] ECF No. 19 at 6.
[47] ECF No. 19 at 6.
[48] ECF No. 19 at 6 (emphasis added).
[49] *Baze v. Rees*, 553 U.S. 35, 50 (2008) (internal quotations omitted)).
[50] *See, e.g., Zink v. Lombardi*, 783 F.3d 1089, 1099-1101 (8th Cir.), *cert. denied*, 135 S. Ct. 2941 (2015) (rejecting challenge to compounded pentobarbital because allegations regarding the possibility of: "sub- or super-potent" drugs; or contamination with allergens, toxins, bacteria, fungus, or foreign particles was too speculative to establish a "sure or very likely" risk of harm); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1265 (11th Cir.), *cert. denied*, 134 S. Ct. 2838 (2014) (holding that petitioner's argument that "the compounded pentobarbital may be defective or the personnel administering the execution may be untrained is insufficient to establish a substantial likelihood of success on the merits of his

"allegations of generalized harms resulting from the use of a compounding pharmacy to produce the pentobarbital" are insufficient "to provide anything more than speculation that the current protocol carries a substantial risk of severe pain."[51] Prieto failed to meet this burden to make the first required showing.

Supreme Court precedent also demanded that Prieto allege the existence of a known *and available* alternative to VDOC's current execution plan.[52] Thus, Prieto was also required to identify an alternative procedure that is "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[53] And that burden is not met "merely by showing a *slightly or marginally* safer alternative."[54]

"The existence of such an alternative method of execution . . . is a necessary element of an Eighth Amendment claim, and this element—like any element of a claim—must be pleaded adequately."[55] Prieto fell well short of the mark in this regard. In fact, the district court found that he "completely failed to shoulder his responsibility to suggest an alternative method of execution that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe

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Eighth Amendment claim."); *Sells v. Livingston*, 750 F.3d 478, 481 (5th Cir. 2014) (rejecting as speculative challenge to Texas's compounded pentobarbital).

[51] *Lombardi*, 783 F.3d at 1101.

[52] *Baze*, 553 U.S. at 52.

[53] *Baze*, 553 U.S. at 52.

[54] *Baze*, 553 U.S. at 51 (emphasis added).

[55] *Lombardi*, 783 F.3d at 1103.

pain.'"[56]

The district court noted that "[i]t appears to be uncontested that the VDOC has faced difficulty obtaining either of these drugs from its traditional suppliers. In fact, Prieto's counsel was unable to identify any source in the immediate region."[57] Prieto failed "to identify a 'known and available' source for pentobarbital (or other appropriate sedative) that he would find acceptable,"[58] and failed "to direct the Court to any known and available source for such an FDA-approved barbiturate or other drug that meets his safety and transparency concerns."[59] Given all these shortcomings, Prieto failed to meet the second *Baze* requirement.

The district court also found that Prieto had failed to show his potential, speculative harm outweighed the "profound and [significant] harm to the state if an injunction is issued."[60] "These harms are magnified," the district court found "by the appalling number of people that Prieto has killed, raped, or otherwise injured."[61]

Prieto may not place additional limitations on VDOC because has no right "to know where, how, and by whom the lethal injection drugs will be manufactured, as well as the qualifications of the person or persons who will

[56] ECF No. 19 at 9.
[57] ECF No. 19 at 3.
[58] ECF No. 19 at 9-10.
[59] ECF No. 10 at 10 n.3.
[60] ECF No. 19 at 10.
[61] ECF No. 19 at 11.

manufacture the drugs, and who will place the catheters."[62] "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[63] To the extent Prieto wants some other, still-unidentified "fast-acting barbiturate" he was obligated to identify it and show that it is in fact available and substantially superior to the compounded pentobartibal. Prieto made no such showing.

In sum, Prieto has failed to demonstrate that he is entitled to the extraordinary equitable relief he seeks.

Conclusion

This Court should deny the stay application.

Respectfully submitted,

Harold W. Clarke, Director,
Virginia Department of Corrections, et al.,
Defendants herein.

By: _____/s/_____
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[62] *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014).
[63] *Almy v. Sebelius*, 679 F.3d 297, 309 (4th Cir. 2012) (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14-15, 47 S. Ct. 1, 71 L. Ed. 131 (1926) (internal quotation marks omitted))).

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CERTIFICATE OF SERVICE

On October 1, 2015, the above Opposition to the Motion to Stay was filed with the Clerk of this Court and a copy was served on counsel of record via ECF notification:

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