No. 15-31

IN THE
SUPREME COURT OF THE UNITED STATES

ALFREDO PRIETO,
PETITIONER,
v.
HAROLD W. CLARKE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO INTERVENE OR JOIN OF MARK ERIC LAWLOR

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The respondents (collectively the "Commonwealth") oppose Mark Eric Lawlor's motion to intervene or join in this case. Although Lawlor certainly "shares [Prieto's] interest . . . and seeks the same relief,"[1] Lawlor has known that since at least November 2014. Despite his obvious interest, Lawlor waited to file his intervention papers until the very day the Commonwealth responded to Prieto's petition for writ of certiorari. No special or extraordinary circumstances justify Lawlor's delay. He simply chose not to act until now. This is not the rare case where special circumstances justify intervention as an original matter in this Court.

Lawlor's motion is also untimely and prejudicial under the standards set forth in Federal Rules of Civil Procedure 21 and 24. First, Lawlor could have sought to intervene as soon as November 2014—when he had actual knowledge of his interest in this case—but he failed to do so. Second, because Prieto's challenge was based on the alleged adverse effect his conditions of confinement imposed on his *own* physical and mental condition, it would prejudice the Commonwealth to let Lawlor step into Prieto's shoes, particularly when the evidence adduced by the Commonwealth in Lawlor's pending case, *Porter v. Clarke*, shows that Lawlor's mental-health claims are without merit. Lastly, denying intervention will not prejudice Lawlor because he retains his rights under the stipulated dismissal in

[1] Mot. to Intervene or Join on Behalf of Mark Eric Lawlor at 1, *Prieto v. Clarke*, No. 15-31 (2015) [Lawlor Motion].

Porter to raise his due process claim anew, should he wish to do so. Granting his motion, by contrast, would short-circuit the judicial process and reward Lawlor for his inexcusable delay. Accordingly, his eleventh-hour motion should be denied.

I. Third parties are not liberally permitted to intervene or join cases pending before this Court.

There is nothing routine about intervening for the first time in the Supreme Court. Although this Court has added new parties and permitted late-stage interventions in the past, those cases are exceedingly rare.[2] Unlike lower courts, this Court does not liberally permit intervention and joinder.[3] To justify intervening for the first time in this Court, special circumstances must require the party's addition to the case.[4] Lawlor cannot clear that high bar.

A. Intervention and joinder "rarely come into play at this stage of litigation" and are permitted only in "special circumstances."

Motions to intervene or join are rarely granted in this Court. That is because

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[2] Stephen M. Shapiro et al., *Supreme Court Practice* 427 (10th ed. 2013) ("Ordinarily, there is no need for one who has not participated in any way in the proceeding below to attempt to become a party, by intervention or otherwise, in the Supreme Court proceeding.").

[3] *Compare Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) ("We generally interpret the [Rule 24] requirements broadly in favor of intervention."), *with* Shapiro, *supra* note 2, at 427 ("[N]either intervention nor the addition of new parties can be considered a procedure available in cases containing no extraordinary factors.").

[4] *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952); *see also* Shapiro, *supra* note 2, at 427 (recognizing that "there have been rare occasions where the Court has recognized that the interests of justice demand or justify admitting . . . an intervenor for the first time at the Supreme Court level").

"the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court."[5] Indeed, only a few cases have addressed the requirements for intervening as an original matter in this Court. *Mullaney v. Anderson* provides the best example of this Court's analysis for evaluating such motions.[6]

In *Mullaney*, the Alaska Fishermen's Union and Secretary-Treasurer brought an action to enjoin the territory of Alaska from collecting a $50 license fee imposed on nonresident fishermen.[7] Before this Court, "the standing of respondent union and its Secretary-Treasurer to maintain this suit" was challenged for the first time.[8] To cure the potential standing defect, the union "moved for leave to add as parties plaintiff two of its members, nonresidents of Alaska."[9] In light of the extraordinary circumstances, this Court granted the motion to intervene, but stated that: "Rule 21 will *rarely come into play at this stage of a litigation*. We grant the motion in view of the *special circumstances* before us."[10]

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[5] *Mo.-Kan. Pipe Line Co. v. United States*, 312 U.S. 502, 506 (1941); *see also United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994) ("[The district court] has the advantage of having a better 'sense' of the case than we do on appeal.").

[6] 342 U.S. 415 (1952).

[7] *Id.* at 416.

[8] *Id.*

[9] *Id.* at 416-17.

[10] *Id.* at 417 (emphasis added).

The motion in *Mullaney* was extraordinary because it "merely put[] the principal, the real party in interest, in the position of his avowed agent," and did not "embarrass the defendant" or "in any way affect[] the course of the litigation."[11] That conclusion was buttressed by the knowledge that, "with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below."[12] *Mullaney* thus exemplifies the kind of unusual circumstances that justify intervention or joinder before this Court: justice required the addition of the real parties in interest to avoid a standing issue raised by the defendant for the first time only after the case reached this Court.

Lawlor is correct that this Court has granted motions to intervene at the certiorari and merits stages—he cites the handful of times when that has happened[13]—but he fails to acknowledge that the most recently granted motions were all *unopposed*.[14] What is more, this Court denies motions to intervene or join far more often than it grants them.[15] It should come as no surprise when

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[11] *Id.*

[12] *Id.*

[13] Lawlor Motion, *supra* note 1, at 5-6.

[14] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 1133 (2012); *Gonzales v. Oregon*, 546 U.S. 807 (2005); *see also Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976) ("[T]he parties stipulated on June 21, 1972, to the intervention of . . . a named party plaintiff in the suit.").

[15] *E.g.*, *JPMorgan Chase & Co. v. Fed. Hous. Fin. Agency*, 134 S. Ct. 372 (2013) (denying motion to intervene); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct.

unopposed intervention motions succeed—the parties themselves have agreed that exceptional circumstances warrant the late intervention or joinder. But that is not the situation here.

B. Lawlor presents no special circumstances justifying his motion in this Court.

This case does not present the special circumstances that justify intervention or joinder at this late date. Lawlor's November 2014 complaint in *Porter* pleaded his Fourteenth Amendment due process claim based on this very case. At the time he filed that complaint, the district court had granted relief to Prieto and the case was on appeal to the Fourth Circuit. Lawlor's complaint sought the same treatment the district court had ordered for Prieto, claiming: "Defendants continue to deny Death Row inmates other than Mr. Prieto, including the plaintiffs, due process of law . . . leading to the same due process offenses as were found unconstitutional in *Prieto*."[16] Lawlor thus knew about his interest in this case no later than November 2014.

1958 (2012) (same); *In re Grand Jury Proceedings*, 562 U.S. 979 (2010) (same); *M.K.B. v. Warden*, 540 U.S. 1213 (2004) (same); *Carson City v. Webb*, 540 U.S. 1141 (2004) (same); *Am. Forest & Paper Ass'n v. League of Wilderness Defenders/Blue Mountains Biodiversity Project*, 540 U.S. 805 (2003) (same); *In re Clancy*, 531 U.S. 806 (2000) (same).

[16] Complaint ¶ 14, *Porter v. Clarke*, No. 14-cv-1588 (E.D. Va. Nov. 20, 2014), ECF No. 1.

Knowing that the due process issue was pending in the Fourth Circuit, Lawlor then elected *not* to intervene there. The Fourth Circuit ultimately issued its decision in this case on March 10, 2015, and denied Prieto's request for rehearing en banc on April 7, 2015. Lawlor stood idly by throughout that entire process.

Because Lawlor should have acted much sooner, granting his motion now would give him an unwarranted procedural windfall. If he had moved unsuccessfully to intervene in the Fourth Circuit, his only recourse would have been a cert petition in this Court to review the denial of his intervention motion.[17] He could not have challenged the merits of the Fourth Circuit's decision,[18] which is what he seeks to do here. Would-be intervenors like Lawlor should not be rewarded for intentionally bypassing the lower courts.

Lawlor cannot show the "special circumstances" required to justify intervention here by complaining about the Commonwealth's statutory requirements for scheduling death-row inmates for execution once their habeas appeals are finished in the Fourth Circuit.[19] That a Virginia circuit court complied

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[17] *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) ("One who has been denied right to intervene in a case in a court of appeals may petition for certiorari to review that ruling . . . ." (citing *Auto. Workers v. Scofield*, 382 U.S. 205, 208-09 (1965))).

[18] *See* 28 U.S.C. § 1254(1); *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 524 (1947) ("[A third party] cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene . . . .").

[19] Va. Code Ann. § 53.1-232.1 (2013).

with its statutory duty to set Prieto's execution date, once the Fourth Circuit rejected his habeas claim, does not excuse Lawlor's failure to move to intervene in the district court or in the Fourth Circuit.

Lawlor is also wrong in claiming that "Virginia could prevent review of its own practice unless another inmate similarly situated to [Prieto] but whose execution is not imminent—like [Lawlor]—is permitted to participate."[20] Nothing stops Lawlor or any other death-row inmate from bringing a conditions-of-confinement challenge during the seven-to-ten-year period that capital offenders typically reside on Virginia's death row before their appeals are exhausted and their sentence is carried out.[21] The Commonwealth's post-conviction processes in death-penalty cases—well known to Lawlor's counsel—do not present the "special circumstances" needed to justify Lawlor's late-filed motion to intervene.

In short, this is not the "rare" case that *Mullaney* described.[22] Rather, Lawlor seeks "a conventional form of intervention."[23] And because his run-of-the-mill intervention request should have been presented to the lower courts, special circumstances do not excuse Lawlor's failure to seek intervention below.

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[20] Lawlor Motion, *supra* note 1, at 2.

[21] CAJA-679.

[22] *Mullaney*, 342 U.S. at 417; *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833-34 (1989) (explaining that *Mullaney* "expressed confidence that amendments at such a late stage 'will rarely come into play'" (citation omitted)).

[23] *Mo.-Kan. Pipe Line*, 312 U.S. at 506.

II. Lawlor has not satisfied the timeliness requirements under Federal Rules of Civil Procedure 21 and 24.

Even if this Court were able to find special circumstances present here, Lawlor has nonetheless failed to satisfy the timeliness requirement for joinder and intervention under Federal Rules of Civil Procedure 21 and 24.[24] Because "[t]imeliness defies precise definition," courts do not confine their analysis "strictly to chronology."[25] "Timeliness is to be determined from all the circumstances."[26]

Whether a motion to intervene is timely depends on several factors: "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness."[27] Because Lawlor has known of his interest in this case since at least November 2014; because the Commonwealth will be prejudiced by his late addition; because Lawlor will not be prejudiced; and

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[24] Fed. R. Civ. P. 24(a); Fed. R. Civ. P. 24(b)(1); *see also Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (explaining timeliness requirement of Rule 24); *Health Res. Grp. v. Kennedy*, 82 F.R.D. 21, 29 (D.D.C. 1979) (joinder under Rule 21 is "guided by the related considerations of timeliness and prejudice to the opposing party").

[25] *Pitney Bowes*, 25 F.3d at 70.

[26] *NAACP v. New York*, 413 U.S. 345, 366 (1973).

[27] *Pitney Bowes*, 25 F.3d at 70.

because no unusual circumstances are present,[28] his motion is untimely under Rules 21 and 24.

A. Lawlor has known about his interest in this case since at least November 2014 but he failed to act until September 2015.

Lawlor's motion to intervene or join comes approximately 10 months after he filed his § 1983 complaint, which expressly referenced Prieto's case; six months after the Fourth Circuit rejected Prieto's due process claim; five months after the Fourth Circuit denied rehearing of its decision; 31 days after the deadline for filing amicus briefs in support of Prieto; and 22 days after Prieto's execution was scheduled. Nothing about Lawlor's course of conduct in this case is timely.

Lawlor attempts to justify his delay in two ways, one legal and one factual: (1) he asserts that timeliness means prejudice, not timeliness; and (2) he claims that the 22-day delay between the scheduling of Prieto's execution and the filing of his motion to intervene or join was necessary to seek "reassurance from respondents that participating in this case would not violate a current stay in his separate litigation against respondents."[29] Neither claim has merit.

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[28] *See supra* Part I.

[29] Lawlor Motion, *supra* note 1, at 5.

First, Lawlor is incorrect that "'[p]rejudice is the heart of the timeliness requirement.'"[30] Although prejudice is instructive, it is only one of several factors to be considered. As this Court explained in *NAACP v. New York*—and the Fifth Circuit reiterated in *Jones v. Caddo Parrish School Board*—the timeliness inquiry considers the totality of circumstances, including "the length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case."[31] As shown above, that factor counsels strongly in favor of denying Lawlor's belated intervention motion.

Second, the Commonwealth never suggested that Lawlor's participation in this case would violate the district court's stay in *Porter v. Clarke*. The district court entered that stay order on August 12, 2015, after the Commonwealth relaxed the conditions of confinement on death row; the district court stayed discovery for 90 days simply to permit the parties "to evaluate whether defendants' changes to plaintiffs' conditions of confinement are sufficient to resolve this litigation."[32] Lawlor did not need that court's permission to seek intervention in this case, something Lawlor admitted when he filed his motion for clarification in that

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[30] *Id.* at 7 (quoting *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 946 (5th Cir. 1984) (en banc)). Lawlor's quotation from *Jones* actually is from Judge Rubin's dissent, not the majority opinion. *Jones*, 735 F.2d at 946 (Rubin, J., dissenting).

[31] *Jones*, 735 F.2d at 934; *see also NAACP*, 413 U.S. at 366.

[32] Order, *Porter v. Clarke*, No. l:14cvl588 (E.D. Va. Aug. 12, 2015), ECF No. 88.

court.[33] Lawlor, in short, needed no "reassurance" before he could file his intervention motion here.

Lawlor's delay continued even after August 18, 2015—the day the Virginia circuit court set Prieto's October 1 execution date. Lawlor waited another 13 days, until August 31, before making his first filing in the district court about his alleged concerns about the stay.[34] He then waited until September 9, the same day that the Commonwealth was required to file its response to Prieto's petition for writ of certiorari, to file his intervention motion here.

Lawlor plainly "failed to protect [his] interest in a timely fashion."[35]

B. The Commonwealth will be prejudiced by Lawlor's last-minute addition.

Adding Lawlor as a new party at this stage will prejudice the Commonwealth. The case pending in this Court is tied to the facts related to Prieto; this case is not a class action challenging the conditions of confinement on behalf of all death-row inmates. Because material evidence from Lawlor's separate district court case is not in the record, allowing Lawlor to intervene would

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[33] Mem. in Supp. of Emergency Mot. for Clarification at 3, *Porter v. Clarke*, No. 1:14-cv-1588 (E.D. Va. Aug. 31, 2015), ECF No. 94 ("Plaintiffs understand that counsel for Defendants . . . agree that intervention by one of the Plaintiffs in this suit in the separate *Prieto* litigation would not violate the letter or the spirit of the Stay Order.").

[34] *See id.* at 4.

[35] *NAACP*, 413 U.S. at 367.

prevent the Commonwealth from showing that Lawlor's individual claims lack merit.

Lawlor is incorrect that the Commonwealth will not be prejudiced simply because Lawlor "possesses the same interest as petitioner, seeks the same relief, and will present no new arguments on the merits."[36] Prieto's due process claim challenged his conditions of confinement as they related to his *own* individual mental health, relying on an expert report from a psychologist who evaluated Prieto.[37] But the record is devoid of any such evidence about Lawlor. By contrast, the Commonwealth served an expert report in *Porter* from an eminent psychiatrist who thoroughly evaluated the plaintiffs' claims, including Lawlor's. Dr. Gregory Saathoff concluded that: "Based upon my interviews [of the plaintiffs] and review of the extensive collateral materials available to me, it is my opinion that the conditions on Death Row have not caused mental, social or behavioral deterioration in these four plaintiffs."[38] Because that expert report is not in the record in this case, allowing Lawlor to intervene will deny the Commonwealth the ability to rely on that evidence.

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[36] Lawlor Motion, *supra* note 1, at 8.

[37] CAJA-401, 419-23.

[38] Report of Gregory B. Saathoff, M.D. at 29, *Porter v. Clarke*, No. 1:14-cv-1588 (E.D. Va. Aug. 24, 2015). Dr. Saathoff is a licensed and Board-Certified psychiatrist and Associate Professor of Research in the Department of Public Health Sciences and the School of Medicine at the University of Virginia. *Id.* at 2.

Given the factual differences between this case and Lawlor's, as well as the fact that conditions of confinement on Virginia's death row have changed significantly since this case was decided in the district court,[39] the better course is to let Lawlor's case proceed in the district court where a proper record can be developed.

C. Lawlor will not suffer any prejudice by denying him leave to intervene.

Denying Lawlor's motion will not prejudice him. Lawlor disagrees, arguing that: (1) his right to refile his due process claim consistent with his Rule 41(a)(1)(A)(ii) voluntary dismissal "will be compromised"; and (2) his due process claim will be impeded by stare decisis. Neither contention has merit nor overcomes the prejudice to the Commonwealth described above.

First, under the stipulated dismissal, Lawlor's due process claim was dismissed *without prejudice*.[40] So denying Lawlor's motion to intervene or join here will not deprive him of his right to refile his due process claim in district court. True, it will take some time for Lawlor to refile his claim and to litigate it

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[39] *See* Br. in Opp'n to Pet. for Writ of Cert. at 7-8, *Prieto v. Clarke*, No. 15-31 (2015). Thus, there is no danger that Lawlor will endure "[y]ears on end of near-total isolation." *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

[40] Fed. R. Civ. P. 41(a)(1)(B); Stipulation of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(ii) at 1, *Porter v. Clarke*, No. 1:14-cv-1588 (E.D. Va. Mar. 19, 2015) ("Plaintiffs' Fourteenth Amendment Due Process claim (Count I) is voluntarily dismissed, without prejudice . . . ."), ECF No. 30.

up to this Court.[41] But Lawlor chose that route by electing to dismiss his due process claim without prejudice, rather than to have the district court dismiss it on the merits in light of the Fourth Circuit's *Prieto* ruling. Had Lawlor done that instead, he could have advanced his appeal much more quickly. His different tactical decision should not be rewarded by advancing his claim directly to this Court in the first instance, depriving the Commonwealth of the factual record showing Lawlor's claim to be without merit.[42]

Second, the stare decisis impediment that Lawlor complains about would not be caused by denying his intervention motion or by denying Prieto's cert petition. It is caused by the Fourth Circuit's decision below. Nothing this Court does will preclude Lawlor from continuing to preserve his due process claim for appeal and eventually seeking certiorari in his own case. Lawlor has demonstrated no prejudice that warrants allowing him to make an end-run around the lower courts through the extraordinary relief he requests here.

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[41] Alternatively, Lawlor could simply seek leave to amend his complaint in *Porter* under Federal Rule of Civil Procedure 15 to reinstate his due process claim.

[42] *See* Shapiro, *supra* note 2, at 360 (listing cases where certiorari was dismissed as improvidently granted when "the record may not be 'sufficiently clear and specific to permit decision of the important constitutional questions involved in this case'" (citation omitted)).

CONCLUSION

The motion for leave to intervene or join by Mark Eric Lawlor should be denied.

Respectfully submitted,

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