No. 15-31

In The
Supreme Court of the United States

ALFREDO PRIETO,

Petitioner,

v.

HAROLD C. CLARKE, ET AL.,

Respondents.

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

SUPPLEMENT TO MOTION TO INTERVENE OR JOIN ON BEHALF OF MARK ERIC LAWLOR

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SUPPLEMENT TO MOTION TO INTERVENE OR JOIN ON BEHALF OF MARK ERIC LAWLOR

On September 9, 2015, Mark Eric Lawlor ("Movant") moved to intervene—or, in the alternative, to join—in the above-captioned matter as an additional petitioner. As movant explained, his intervention or joinder in this action became necessary when Virginia scheduled petitioner's execution for October 1, 2015, threatening to render petitioner inadequate to represent movant's substantial interest in this case.

Yesterday, on October 1, 2015—before this Court could review petitioner's final stay application—Virginia executed petitioner. It is now clear, therefore, that movant's interest in this important case will be extinguished unless the motion to intervene or join is granted. Because the motion was ripe for decision prior to petitioner's execution, this Court unmistakably retains the authority to grant the motion, thereby permitting it to resolve the petition for a writ of certiorari in the ordinary course. Moreover, because petitioner's execution would now render this matter moot *unless* movant's intervention or joinder is permitted, intervention or joinder is strongly warranted under the unique circumstances of this case.

I. THIS COURT RETAINS JURISDICTION TO GRANT THE MOTION TO INTERVENE OR JOIN AND DECIDE THE PETITION FOR A WRIT OF CERTIORARI IN THE ORDINARY COURSE.

Under well-established precedent, this Court retains authority to resolve the motion to intervene or join notwithstanding petitioner's execution. "[T]he rule established by the general concurrence of the American and English courts is, that where the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the

multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up." *Mitchell v. Overman*, 103 U.S. 62, 64-65 (1881).

That principle is fully applicable here. Movant sought to intervene or join on September 9, 2015, and the motion became ripe for decision before petitioner's execution, no later than September 21, 2015, when respondents filed their opposition. This Court was well within its discretion to defer resolving the motion until its October 9, 2015 Conference, so that it could consider the motion together with the petition for a writ of certiorari in this matter. But "[i]n such [a] case[], upon the maxim actus curiae neminem gravabit,[1]—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice,—it is the duty of the court to see that [movant] shall not suffer by the delay." *Mitchell*, 103 U.S. at 65.

Courts routinely enter orders *nunc pro tunc* when a party's death occurs after a question is "taken under advisement." *Id.* at 65. *Mitchell*, for instance, involved a matter ripe for decision during a state court's October 1868 Term. *Id.* at 62. Although the court did not decide the matter until 1872, several years after the prevailing party's death, it entered its decree *nunc pro tunc* "as of the sixteenth day of October, 1868." *Id.* at 63. This Court approved, explaining that it was "entirely clear that the State court had the power, upon well-settled rules of practice, both in courts of law and of equity, to enter the decree" at an earlier time when the party was alive and the matter "was

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[1] "An act of the court shall prejudice no one."

finally submitted for decision." *Id.* at 65-66. Indeed, this Court has itself issued orders *nunc pro tunc* to account for a party's intervening death in numerous cases. *See, e.g.*, *McDonald v. Maxwell*, 274 U.S. 91, 99 (1927); *Quon Quon Poy v. Johnson*, 273 U.S. 352, 359 (1927); *Coughlin v. District of Columbia*, 106 U.S. 7, 11 (1882).[2]

Courts also routinely grant motions to intervene *nunc pro tunc*. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 (1980) (noting trial court had "granted appellants' motion to intervene *nunc pro tunc*"); *Pandora Media, Inc. v. American Soc'y of Composers, Authors & Publishers*, 785 F.3d 73, 76-77 (2d Cir. 2015) (noting motion to intervene was granted *nunc pro tunc*); *Parker v. Director, Office of Workers' Compensation Programs*, 75 F.3d 929, 935 (4th Cir. 1996) (granting motion to intervene *nunc pro tunc*), *overruled on other grounds by Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248 (1997). Some courts have even considered it unnecessary to enter such orders *nunc pro tunc*, reasoning that "[t]he timeliness of intervention should be measured as of the time the application to intervene was made." *Swan v. Stoneman*, 635 F.2d 97, 99, 102 n.6 (2d Cir. 1980) (granting motion to intervene five months after plaintiff's death, where motion to intervene was filed three days before plaintiff's death).

For all these reasons, this Court can and should grant the motion to intervene or join notwithstanding petitioner's execution.

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[2] This Court also has issued orders *nunc pro tunc* in other situations far less exceptional than the death of a named party. *See, e.g.*, *United States v. Jimenez Recio*, 537 U.S. 1185, 123 S. Ct. 1342, 1342-43 (2003) (granting motion for appointment of counsel *nunc pro tunc*); *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 1006 (2001) (granting motion for leave to file a brief as *amicus curiae nunc pro tunc*).

II. MOVANT SHOULD BE PERMITTED TO INTERVENE OR JOIN IN LIGHT OF PETITIONER'S EXECUTION.

Petitioner's execution solidifies that movant should be permitted to intervene or join this matter. Respondents concede that movant possesses an "obvious interest" in this case. Opp. to Mot. to Intervene 1. Respondents also acknowledge that movant "possesses the same interest as petitioner, seeks the same relief, and will present no new arguments on the merits." *Id.* at 12 (quoting Mot. to Intervene 8). In light of petitioner's execution, that substantial interest will be extinguished unless this Court grants the motion to intervene or join. The motion should therefore be granted.

Petitioner's execution constitutes exactly the kind of "special circumstances" that this Court has found to justify the intervention or joinder of a party. *Id.* at 2. Respondents themselves admit that such circumstances are found in a case when "justice require[s] the addition" of an interested party to overcome "a [jurisdictional] issue raised by the defendant for the first time only after the case reached this Court." *Id.* at 4 (discussing *Mullaney v. Anderson*, 342 U.S. 415 (1952)). That is precisely what occurred here. Only days after this Court called for a response to the petition for a writ of certiorari, Virginia scheduled petitioner's execution for October 1, 2015,[3] before the time for petitioner to even *file* a petition for a writ of certiorari respecting his habeas claims would have expired—and then cited that execution date as a reason why this

[3] Respondents point out that Virginia requires that an execution be scheduled after the inmate's habeas appeal to the United States Court of Appeals for the Fourth Circuit. Opp. to Mot. to Intervene 6. Nothing prevented Virginia, however, from scheduling petitioner's execution for a date after this Court was due to consider the petition for a writ of certiorari in this case. Or, as is commonly done in extraordinary circumstances like this, *see* Opp. to Mot. to Intervene 4, respondents could have agreed not to oppose movant's intervention or joinder. Respondents did neither.

case is "nearly-moot." Opp. 41. Indeed, the case for intervention or joinder is even stronger than *Mullaney* on the unusual facts of this case, where respondents' own actions—now including executing petitioner—have precipitated the need for movant to intervene or join.

Respondents argue that the execution "does not present the special circumstances that justify intervention or joinder at this late date" because movant did not move to intervene or join this case while it was pending before the Fourth Circuit. *See* Opp. to Mot. to Intervene 5-7. But intervention would have been improper at that time. Federal Rule of Civil Procedure 24(a)(2) specifically provides that intervention should not be permitted when "existing parties adequately represent [a would-be intervenor's] interest." When, as here, "an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). In such cases, intervention is not allowed. *See South Carolina v. North Carolina*, 558 U.S. 256, 276 n.8 (2010) ("Charlotte would not be entitled to intervene in this dispute because an existing party—North Carolina—adequately represents Charlotte's interest."). Similarly, the Fourth Circuit has concluded that joinder is inappropriate when the prospective party's interest is identical to an existing party's. *See National Union Fire Ins. Co. v. Rite Aid of S.C.*, 210 F.3d 246, 251 (4th Cir. 2000).

Having conceded that movant "possesses the same interest as petitioner, seeks the same relief, and will present no new arguments on the merits," Opp. to Mot. to Intervene at 12, intervention or joinder would have been inappropriate *until*

petitioner's pending execution rendered him inadequate to represent movant's undisputed interest in this case. It would be manifestly unjust to penalize movant for following binding precedent and declining to seek intervention or joinder at a point at which neither was permissible under the Federal Rules of Civil Procedure.

Respondents' only remaining objections for why petitioner's execution does not warrant intervention or joinder are unpersuasive. Respondents first argue that they would be prejudiced by movant's addition because the record in this case does not include evidence of what mental harm movant has suffered from his prolonged assignment to solitary confinement. Opp. to Mot. to Intervene 11-13. That is simply wrong. Neither of the two questions presented require this Court to delve into movant's mental health, which is wholly irrelevant to whether (1) inmates must satisfy the Second and Fourth Circuit's "two-part analysis" to establish a liberty interest; or (2) what conditions within a jurisdiction establish the "ordinary incidents of prison life." Pet. i. The answers to those questions do not turn on an individual prisoner's personal reaction to prison conditions. Indeed, this Court resolved *Wilkinson v. Austin* as a class action, making clear that the subjective responses of particular inmates to their conditions is not relevant to whether a liberty interest exists. 545 U.S. 209, 223-24 (2005).

Respondents also suggest that movant would not be prejudiced by petitioner's execution or the mooting of this case if he is not permitted to intervene or join. Having conceded that movant's interest in this case is "obvious," Opp. to Mot. to Intervene 1, however, it is equally obvious that movant would be prejudiced "as a practical matter"

if his interest in this case is extinguished, Fed. R. Civ. P. 24(a)(2). If movant is not permitted to intervene or join, the petition would be mooted, leaving movant powerless to protect his significant interest in this case. Respondents argue that movant could simply "raise his due process claim anew." Opp. to Mot. to Intervene 1-2. But courts have found Rule 24(a)(2) satisfied merely because denying intervention would leave a would-be-movant subject to *stare decisis*. *See* Mot. to Intervene 10. Here, there is even more reason why movant must intervene or join to protect his interest. Even assuming movant could refile his claim if the decision below is *not* reversed, *but see id.* (noting language of court's dismissal order), respondents concede that "it will take some time for Lawlor to refile his claim and to litigate it up to this Court," Opp. to Mot. to Intervene 13-14. By the time that day arrived, movant's own execution might well be imminent, preventing movant from obtaining review and permitting respondents to again avoid review of the important questions presented by this case.

Finally, respondents argue that the motion to intervene or join was untimely because it was filed months after movant knew of his interest in this case and "22 days after Prieto's execution was scheduled." Opp. to Mot. to Intervene 9. That is untenable. To begin with, as explained *supra* at 5-6, movant could not have intervened before Virginia scheduled petitioner's execution date, threatening to make him inadequate to represent movant's interest in this case. Moreover, courts have consistently recognized that intervention is timely when a motion is made soon after a movant is placed on notice that an existing party is inadequate to protect his interest. *See* 6-24 *Moore's Federal Practice - Civil* § 24.21; *Geiger v. Foley Hoag LLP Ret. Plan*,

521 F.3d 60, 65 (1st Cir. 2008) (application for intervention was timely even though would-be-intervenor knew of lawsuit for nine months because she had reason to believe her interests would be protected by existing party until shortly before seeking intervention); *United States v. Carpenter*, 298 F.3d 1122, 1124-25 (9th Cir. 2002) (motion to intervene was timely even though filed after lengthy settlement negotiations when motion was filed promptly after intervenors first had notice that government may not have adequately represented their interests); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (motion to intervene by government was timely when made less than 30 days after officials became aware that litigation would affect U.S. interests). Here, after learning of petitioner's imminent execution, movant—who has been assigned for years to solitary confinement on Virginia's death row—took only three weeks to secure counsel and file a motion to intervene. That is hardly unreasonable.

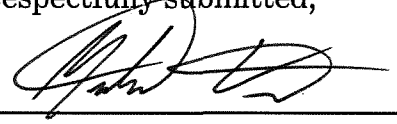
Petitioner's execution has proven movant correct that his intervention or joinder is indispensable to preserve his interest in this important case. Particularly in light of petitioner's execution, movant meets all the requirements to justify intervention or joinder in this Court. And respondents' full-throated defense of assigning inmates to undeniably severe conditions of long-term solitary confinement without process as "warranted," Opp. 37, and their continued insistence that even years of such solitary confinement imposes no mental harm on the inmates who endure it, Opp. to Mot. to Intervene 12, leaves little doubt that the movant remains at substantial risk respecting the Virginia Department of Corrections practice challenged in this case.

Unless the motion to intervene or join is granted, movant will likely—as a practical matter—have little opportunity to obtain this Court's review of the practice challenged in this case, leaving Virginia free to impose undeniably severe conditions of long-term solitary confinement without due process. There is no reason to permit that unwarranted result. As it has in other cases presenting similar circumstances, this Court should grant the motion to intervene or join so that this Court may review the questions presented by the petition for a writ of certiorari in this important case.

CONCLUSION

For the foregoing reasons, the motion to intervene or join should be granted, and this Court should proceed to consider the petition for a writ of certiorari in this matter in the ordinary course.

Respectfully submitted,



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