UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 10–99021

JEFFREY TIMOTHY LANDRIGAN, Petitioner, v. ERNEST TRUJILLO, et al., Warden of Arizona State Prison Complex-Eyman, and CHARLES L. RYAN, Director of the Arizona Department of Corrections, Respondents.	(Capital Case)

MOTION TO LIFT STAY

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The State of Arizona requests that this Court lift a stay imposed by United States District Judge Roslyn Silver in the instant case. Timothy Landrigan is scheduled to be executed on Tuesday, October 26, 2010. On October 20, 2010, Landrigan filed a complaint under 42 U.S.C. § 1983 alleging that he is entitled to information relating to the drugs to be used in his execution and that the State should not be permitted to use non-FDA approved drugs.

The State of Arizona has provided the names of the drugs, their expiration dates, and an avowal that the process of shipping and receiving the chemicals was cleared and approved by U.S. Customs and Food and Drug Administration ("FDA") officials. Additionally, the State provided information for *in camera* review by Judge Silver, including information identifying the manufacturers of the drugs to be used in the execution. Notwithstanding that disclosure, Judge Silver issued an order staying the execution and further ordered the State to disclose to Landrigan the information that was provided for *in camera* review.

Judge Silver's Order accepts Plaintiff's assertion that because ADC's supply of sodium thiopental lacks the appropriate safeguards, it could be "contaminated with toxins that cause pain, as opposed to unconsciousness" or could fail to properly anesthetize him, thus resulting in excruciating pain when the second and third drugs are administered. (Order, at 8–9.) Plaintiff's assertion is simply

speculation and does not give rise to a colorable claim under *Baze v. Rees*, 553 U.S. 35 (2008).

Judge Silver states in her Order that "Defendants make *no effort* to rebut Plaintiff's claim that there is a risk the sodium thiopental, if contaminated, could itself cause unnecessary pain and suffering." (Order, at 10, emphasis original.) However, the State avowed that the drugs were lawfully obtained with the approval of U.S. Customs and FDA officials, and the State provided documents for *in camera* review detailing the source of the drugs.

Landrigan first raised this issue in state court when the State filed a motion asking the Arizona Supreme Court to issue an execution warrant. In briefing filed in the Arizona Supreme Court, the State avowed that it had the necessary drugs in sufficient quantity to carry out the execution. The State declined Landrigan's request to disclose additional information relating to the source of the drugs based on an Arizona statute, A.R.S. § 13–757, which requires that information identifying executioners and persons performing ancillary functions to an execution remain confidential. The Arizona Supreme Court denied Landrigan's request for a stay. The State respectfully submits that the Arizona Supreme Court, rather than Judge Silver, correctly decided this issue, and Judge Silver's stay order should be lifted.

I. Landrigan Is Not Entitled To A Stay To Discover The Source Of The Drugs To Be Used In His Execution.

The additional information Landrigan seeks beyond what has been provided

to him relating to the source of the chemicals is not subject to disclosure under A.R.S. § 13–757(C), because the statute prohibits disclosure of confidential information relating to the identity of individuals and entities involved in carrying out the execution and those performing ancillary functions.

Second, to the extent Landrigan complains that the drug used to anesthetize him (sodium thiopental) may not work properly and may result in suffering if the drug fails to render him unconscious, his concern is unfounded. There are extensive procedures and protocols in place, including the use of medical equipment and physical monitoring by a member of the Medical Team, that will ensure that an inmate is in fact unconscious before lethal drugs are administered.

Third, Landrigan has not cited to any authority for his assertion that the State should be limited to using drugs manufactured by a single manufacturer—Hospira, or that FDA regulations govern the use of sodium thiopental in executions or otherwise preclude acquisition of sodium thiopental from a manufacturer other than Hospira.

Fourth, the United States Supreme Court has made clear that challenges to an execution protocol brought under 42 U.S.C. § 1983 should not be used as an improper delay tactic. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006). Landrigan's belated attempt to raise this issue should not be countenanced, particularly since he had an opportunity to fully litigate issues relating to Arizona's

lethal injection protocol in post-conviction proceedings in state court during the past 3 years.

"A preliminary injunction is an 'extraordinary and drastic remedy[.]'" *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995)). A litigant has no inherent right to such an extraordinary remedy. *Winter v. Natural Resources Defense Council*, 555 U.S. ___, 129 S. Ct. 365, 376 (2008). A petitioner seeking a preliminary injunction must demonstrate: (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tip in his favor," *and* (4) "that an injunction is in the public interest." *Winter*, 129 S. Ct. at 374; *see also Jones v. Bank of America*, 2010 WL 2572997, *3 (D. Ariz. 2010). The petitioner must clearly show that he is entitled to relief. *Winter*, 129 S. Ct. at 376; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*).

A. *Landrigan is not likely to succeed on the merits*

To establish an Eighth Amendment cruel and unusual punishment claim, the petitioner must demonstrate that the risk is "*sure or very likely* to cause serious illness and needless suffering," and give rise to "sufficiently *imminent* dangers." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993) (emphasis original)). In other words, "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.'" *Baze*, 553 U.S. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 n.9 (1994)). A mere risk of accidental harm is insufficient. *Baze*, 553 U.S. at 50. To the extent an inmate proposes an alternative procedure, it "must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Baze*, 553 U.S. at 53.

Under Arizona's lethal injection protocol, no such objectively intolerable risk exists, and Landrigan has not proffered a feasible, readily implemented alternative procedure that would significantly reduce a substantial risk of severe pain. Thus, he has not demonstrated a likelihood of success on the merits.

Judge Silver states that Defendants have chosen to ignore that "there may be a substantial risk of serious harm due to the administration of the sodium thiopental." However, a mere assertion that the drugs may be from another country does not establish the showing necessary to prevail under *Baze*.

1. ADC has lawfully obtained the necessary chemicals to carry out Landrigan's pending execution and ADC has provided necessary information relating to the execution protocol. Contrary to Landrigan's assertions, ADC has not been secretive about the execution protocol and the protocol in fact has been available on ADC's website since September 2009.

The information ADC has declined to provide (other than for *in camera* review) is confidential under A.R.S. § 13–757(C), which provides:

> The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter I, article 2.1.

Individuals or entities providing the necessary chemicals to ADC are performing ancillary functions in the execution process. Requiring ADC to provide information such as the source of the chemicals, labels, lot numbers, and chain-of-custody, would lead to the identity of those individuals and entities. Landrigan's pleadings demonstrate that he has been attempting to ascertain the identity of the manufacturer who supplied the drugs to be used for the execution by tracking expiration dates or other information that can be traced to the manufacturer. The source information Landrigan seeks is confidential under § 13–757(C) and is not subject to disclosure.[1]

Judge Silver states in her Order that "Defendants could have submitted an affidavit stating that the drug was obtained through reputable sources and there

[1] In a footnote, Judge Silver states that "Defendants' claim that this statute prevents the disclosure of the manufacturer of the sodium thiopental is puzzling given Defendants' willingness to disclose Hospira as its prior source of the sodium thiopental." The State is unaware of any such representations. At oral argument before the Arizona Supreme Court on October 20, 2010, the State's attorney was asked whether the drugs ADC acquired came from Hospira and answered that they had not.

was no reason to question that it would function as intended." However, the State has in fact made repeated avowals that the drugs were obtained legally, and that the process of shipping and receiving the chemicals was cleared and approved by U.S. Customs and Food and Drug Administration ("FDA") officials. The Arizona Supreme Court accepted the State's avowals. Judge Silver has found them wanting notwithstanding any evidence that the State has done anything other than attempt to carry out its responsibilities in as humane a manner as possible.

2. There is no compelling need to require ADC to disclose the confidential information requested. Landrigan speculates that ADC might have somehow acquired substandard sodium thiopental that might not work properly in rendering him unconscious during the execution process. However, Arizona's lethal injection protocol already provides several safeguards to ensure that a defendant is unconscious before administering the lethal chemicals. In *Dickens v. Brewer*, No. CV07–1770–PHX–NVW, 2009 WL 1904294 (D.Ariz. July 1, 2009), in rejecting a lethal injection protocol challenge raised by several other Arizona inmates, Judge Neil Wake noted that, as with a surgical procedure in a hospital, a patient's depth of consciousness is generally determined by physical examination:

> The examination may begin by telling the patient to open his eyes or squeeze his hand. If the patient does not respond, the anesthesiologist may look for a simple reflex response to stroking the patient's eyelashes or another tactile stimulus. Electronic monitors may be used to measure brain activity, but observing a patient's spontaneous breathing is as good or better an indicator of the depth of anesthesia.

> If the patient changes his pattern of breathing in response to certain surgical stimuli, the patient is not adequately anesthetized. If the patient is breathing too slowly or too shallowly, the patient is too deeply anesthetized. If the surgery requires that the patient be paralyzed and unable to breathe independently, then the patient's breathing would not indicate depth of consciousness. If a patient were paralyzed and conscious, his heart rate and blood pressure probably would increase.

Id. at *12.

Judge Wake further noted the protections in place to ensure that the inmate is unconscious prior to the administration of lethal drugs. Those protections include the use of a microphone, a high resolution camera and physical inspection by medically trained personnel to ensure that the inmate is unconscious. *Id*. at *21. Thus, having a properly trained and credentialed individual examine the inmate after the administration of the sodium thiopental "mitigates the risk that the inmate will suffer excruciating pain during his execution." *Id*. at *12.

Because there are multiple procedures in place to ensure that an inmate is unconscious before lethal chemicals are administered, Landrigan's speculative complaints about possible problems with a "defective" dose of sodium thiopental do not create a colorable claim. Landrigan will only suffer harm if lethal drugs are administered while he is conscious, and the protocol described above adequately protects against such harm.

Moreover, in *Baze*, the Supreme Court rejected an argument that a one-drug protocol, or additional monitoring by trained personnel to ensure the adequate

delivery of sodium thiopental, identified a significant risk of harm actionable under the Eighth Amendment. *Id*. at 51. The plurality dismissed this argument holding:

> Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining "best practices" for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with a an earnest desire to provide for a progressively more humane manner of death.

553 U.S. at 51 (citation omitted).

Here, by accepting at face value Landrigan's argument that only FDA-approved or manufactured chemicals can be used in an execution, and by suggesting a need to "weigh the relative risks of using non-FDA approved drugs, and their effectiveness, compared to that of drugs manufactured by an FDA-approved source," the district court has essentially transformed itself into a board of inquiry to determine a "best practice" for executions.

3. Landrigan has not cited to any authority for his assertion that the State should be limited to using drugs manufactured by a single manufacturer—Hospira, or that FDA regulations govern the use of sodium thiopental in executions or otherwise preclude acquisition of sodium thiopental from a manufacturer other than Hospira. The Arizona Protocol does not require that the State acquire sodium thiopental from any particular source, and it would be illogical to do so, since the

drug is simply a chemical compound, and Landrigan has not established that any one manufacturer has an exclusive patent on that compound.

Landrigan cites to FDA regulations, which relate generally to consumer protection—the Food, Drug & Cosmetic Act's purpose is to protect the health and safety of the public by preventing adulterated, misbranded, or untested articles from entering interstate commerce. *See United States v. Sullivan*, 332 U.S. 689 (1948). However, Landrigan has not proffered any authority suggesting that the "health and safety" concerns regulated by the FDA are applicable in the context of acquiring drugs for use in an execution. In fact, there is authority to the contrary. *See Heckler v. Chaney*, 470 U.S. 821, 823–25 (1985) (holding that the FDA's refusal to initiate enforcement proceedings under the federal Food, Drug, and Cosmetic Act with respect to drugs used to perform lethal injections is not subject to judicial review). *See also Use of Drug Challenged in Death Penalty Case*, New York Times, dated October 22, 2010 (quoting FDA spokeswoman Shelly Burgess as stating that executions are "clearly not under our purview or authority").

In rejecting the State's argument, Judge Silver cites to a declaration submitted by Landrigan from Dr. John D. Palmer, a medical doctor with expertise in clinical pharmacology, who asserts that "FDA approval ensures that the product [is] pure and free of potentially harmful contaminants produced in the production of the product" and that it "actually contains the amount and concentration of drug

as indicated on the label." (Order, at 9.) Judge Silver further quotes Dr. Palmer's description of an "example of the importance of FDA involvement in foreign prescription drug production an outbreak of life-threatening adverse reactions from contaminated heparin, a blood thinner, produced in Chinese facilities." (*Id*.) Judge Silver disregards, however, the fact that FDA approval is not required for drugs used in execution and she disregards information provided to her that establishes that the drugs to be used are not from China. The speculative opinion from Dr. Palmer does not provide a basis for granting relief.

4. Landrigan's belated attempt to raise this issue is an improper delay tactic. In *Hill v. McDonough*, the United States Supreme Court ruled that 42 U.S.C. § 1983 provides a vehicle for raising claims that a state's execution protocol violates the United States Constitution. 547 U.S. at 579–80. The Court noted, however, that in considering whether to grant a stay based on a challenge to a state's execution protocol, "courts should not tolerate abusive litigation tactics," *Id*. at 582, and a court must apply "a strong presumption against the grant of a stay where a claim could have been brought at such time as to allow consideration of the merits without requiring entry of a stay." *Id*. at 584 (citing *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

Landrigan litigated the constitutionality of Arizona's execution protocol in a state post-conviction proceeding that commenced in 2007. He did not raise any

concerns relating to whether the Arizona protocol inadequately details how the chemicals used in the execution are to be obtained, and it is too late to do so now. Landrigan has not provided a plausible explanation for waiting to file a § 1983 action until less than 5 days before his scheduled execution, and there is no reasoned basis in law or equity for granting the relief requested.

B. *Landrigan is not likely to suffer irreparable harm*

Landrigan has not demonstrated a likelihood that he will suffer irreparable harm if injunctive relief is not granted. The harm at issue is not his death, but rather constitutionally impermissible pain. Landrigan has not demonstrated how such pain is likely, particularly given the extensive protections outlined above for ensuring that an inmate is unconscious before lethal drugs are administered.

"Unlike a surgical context where an anesthesiologist must avoid too deeply anesthetizing the patient," the use of anesthesia in an execution is much less complicated; the only concern is ensuring that the inmate is unconscious. *Dickens*, 2009 WL at *21. The Arizona protocol requires a 5-gram dose of sodium thiopental, which is 11 to 18 times more than required to produce a loss of consciousness. *Id*. at *11. The dose administered will cause burst suppression in less than 3 minutes and last at least 45 minutes, *Id*. at *22, which is much longer than the 7 to 8 minute duration of the execution process. Given the "overdose" of sodium thiopental required by Arizona's protocol, and most importantly, given the

careful monitoring of the inmate's consciousness throughout the process, Landrigan has not established a likelihood that he will be conscious and/or experience unnecessary pain during the execution process.

C. *The balance of equities favor the State, and denying the request for an injunction would serve the public interest.*

This Court must exercise its discretion in balancing the competing claims in deciding whether to grant relief. *Winter*, 129 S. Ct. at 376. In doing so, this Court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 376–77 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

By promulgating A.R.S § 13–757(C), the State of Arizona has made the policy decision that information relating to the identity of individuals involved in the execution process, including those who perform ancillary functions, should remain confidential. This policy enables participation in the execution process (a function mandated by Arizona law) without fear of harassment or intimidation by those who may oppose capital punishment. Given that the information Landrigan seeks is not critical to ensure that he does not suffer unnecessarily during his execution, the confidentiality provisions of A.R.S. § 13–757 should be honored.

Given the Supreme Court's directive in *Hill v. McDonough* that challenges to an execution protocol be viewed with skepticism when filed as a last minute attempt to delay an execution, and given Landrigan's counsel's prior awareness of

the issue Landrigan now raises, his assertions of potential harm mandating immediate court intervention ring hollow. Landrigan has not established an equitable basis for the relief he has requested, and this Court should lift any stays that are imposed based on this issue.

DATED this 25th day of October, 2010.

Terry Goddard
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/s/
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CERTIFICATE OF SERVICE

I hereby certify that on October 25th, 2010, I electronically filed this motion with the U.S. Court of Appeals for the Ninth Circuit, by using the Court's Case Management/Electronic Case Files (CM/ECF) system.

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