

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Case No: 98-287
 :
-vs.- :
 : Death Penalty Case
JAMES J. FILIAGGI, :
Appellant. :

RESPONSE IN OPPOSITION TO FILIAGGI'S
MOTION TO STAY THE EXECUTION DATE

The State of Ohio respectfully requests this Court to deny defendant James J. Filiaggi's Motion to Stay his April 24, 2007 execution date. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Introduction

James Filiaggi is a death-sentenced prisoner who is scheduled to be executed on April 24, 2007. On July 29, 1999, this Court affirmed Filiaggi's conviction and death sentence on direct appeal. *State v. Filiaggi* (1999), 86 Ohio St.3d 230. On March 31, 2004, the federal district court denied Filiaggi's petition for a writ of habeas corpus. *Filiaggi v. Bagley*, Case No. 1:01-CV-54 (N.D. Ohio 2004). On April 14, 2006, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision. *Filiaggi v. Bagley* (6th Cir. 2006), 445 F.3d 851. On October 10, 2007, the State moved this Court to set a final execution date, and *Filiaggi did not oppose the state's motion*. On November 30, 2006, the Court granted the State's motion and scheduled Filiaggi's execution for February 13, 2007. On January 19, 2007, the Governor issued a reprieve and re-scheduled Filiaggi's execution for April 24, 2007.

In the interim, Richard Cooley, another death-sentenced prisoner, filed with the federal district court a suit in which he claimed that Ohio's use of lethal injection as a method of execution will violate his constitutional rights. The district court permitted Cooley's lawsuit to proceed, denying the State's motion to dismiss on statute of limitations and other procedural grounds. However, upon the State's interlocutory appeal, the Sixth Circuit ordered the dismissal of the lawsuit, agreeing with the State that the suit is time-barred. *See Cooley v. Strickland* (6th Cir. 2007), 479 F.3d 412. The Sixth Circuit's decision is pending Cooley's request for en banc reconsideration.

On the evening of Thursday, April 19, 2007 -- two business days before his scheduled execution, Filiaggi filed with the federal district court a motion to intervene in Cooley's suit. At about 1:00 p.m. on Friday, April 20, 2007, Filiaggi filed with the district court a motion to enjoin

his execution. Filiaggi's motions remain pending before the district court. Simultaneous with his recent filings with the district court, Filiaggi filed with this Court a motion to stay his execution ostensibly for the purpose of permitting him to complete his recently initiated federal litigation.

The State opposes Filiaggi's motion. As the State explains below, Filiaggi's motion to intervene in Coeey's lawsuit is an unjustifiable, eleventh-hour attempt to delay his execution. Accordingly, this Court should deny Filiaggi's request for a stay.

Argument in Opposition

The Supreme Court of the United States on several occasions has addressed challenges to the state's method of execution lodged by death-row prisoners who ostensibly have reached the "end of the line" in the appellate process. The Supreme Court of the United States has declined to establish a categorical rule precluding such challenges via a civil suit as opposed to a petition for a writ of habeas corpus. But the High Court also recognized the important interest of the state and victims in the timely enforcement of a sentence of death. *Hill v. McDonough* (2006), ___ U.S. ___, 126 S.Ct. 2096, 2103, citing *Calderon v. Thompson* (1998), 523 U.S. 538, 556. In rejecting a categorical prohibition, the High Court's decisions "do not diminish that interest, nor do they deprive federal courts of the means to protect it." *Id.* "Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim," and, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." *Nelson v. Campbell* (2004), 541 U.S. 617, 649-650, citing *Gomez v. United States Dist. Court for Northern Dist. of Cal.* (1992), 503 U.S. 653 (1992) and 18 U.S.C. Section 3626(a)(1).

This Court similarly has recognized the important interest of the state and victims in the timely enforcement of a sentence of death:

"A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands. * * * There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility."

State v. Steffen (1994), 70 Ohio St. 3d 399, quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners* (1963), 76 Harv.L.Rev. 441, at 452-453.

In the instant case, Filiaggi's actions speak for themselves. Filiaggi did not oppose the state's motion to set an execution date, filed after the Sixth Circuit issued its mandate. Filiaggi waited months to file his motion to intervene in Cooley's lawsuit, even though he was fully aware that it was pending. In the latter regard, the State notes that as late as Wednesday, April 18, 2007, Filiaggi's attorneys represented to counsel for the State that they did not intend to initiate further actions on Filiaggi's behalf. Filiaggi chose to intervene in Cooley's lawsuit, rather than bring his own action, while aware that Cooley's suit had been stayed at the district court pending an interlocutory appeal by the state, which could and probably will result in a dismissal of the suit. Finally, Filiaggi made no attempt to present his claims to the administrative channels provided by prison authorities, as required by federal law.

In short, Filiaggi's motion to intervene in Cooley's lawsuit is an unjustifiable, eleventh-hour attempt to delay his execution. This Court should not sanction such inequitable conduct by granting Filiaggi a stay of execution.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail notification upon counsel for Filiaggi, Jeffrey M. Gamso, Law Offices of Jeffrey M. Gamso, P.O. Box 306, Toledo, Ohio 43697-4046 and Spiros P. Cocoves, 610 Adams Street, Second Floor, Toledo, Ohio 43604-1423 this 20th day of April, 2007.

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