

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 88-0351

Appellee

v.

RICHARD WADE COOEY, II

DEATH PENALTY CASE

Appellant

STATE'S MEMORANDUM IN OPPOSITION

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FILED

OCT 08 2008

CLERK OF COURT
SUPREME COURT OF OHIO

STATE'S MEMORANDUM IN OPPOSITION

Richard W. Cooley, II is scheduled to be executed by lethal injection on October 14, 2008 pursuant to the order of this Court dated July 11, 2008. On October 6, 2008 Cooley filed a Motion for Stay of Execution. By entry dated October 6, 2008 this Court ordered a response to the motion by October 8, 2008. For the following reasons the State requests that the motion be denied. Undersigned believes that an amicus brief will be filed by the Ohio Attorney General. For that reason this Memorandum will not repeat arguments that it is anticipated that the Ohio Attorney General intends to make.

PROCEDURAL HISTORY

Richard W. Cooley, II was sentenced to death on December 5, 1986 by a three judge panel in Summit County for the aggravated murders of Wendy Offredo and Dawn McCreery; Cooley and two friends incapacitated Wendy Offredo's motor vehicle by tossing a large piece of concrete onto the vehicle as it passed under a bridge over an interstate highway. Cooley and one of his friends ended up driving the women to a field where the women were raped, robbed, stabbed, choked, and bludgeoned to death; the other friend left after Cooley demanded that he tie the women up. The Ninth District Court of Appeals affirmed the convictions. *State v. Cooley* (Dec. 23, 1987), 9th Dist. App. No. 12943. This Court affirmed. *State v. Cooley* (1989), 46 Ohio St.3d 20, cert. denied (1991), 499 U.S. 954.

Two petitions for post-conviction relief were denied. Those orders were affirmed. *State v. Cooley* (May 25, 1994), 9th Dist. App. Nos. 15895, 15966; *State v. Cooley* (March 24, 2004), 9th Dist. App. No. 21672. An application to re-open was denied. This Court affirmed. *State v. Cooley*, 73 Ohio St.3d 411, 1995-Ohio-328.

In the federal courts the 6th Circuit affirmed the denial of a habeas corpus petition, in *Cooley v. Coyle* (6th Cir. 2002), 289 F.3d 882. In *Cooley v. Strickland* (6th Cir. March 2, 2007), Case No. 05-4057 the 6th Circuit affirmed the dismissal of Cooley's Section 1983 challenge to the Ohio lethal injection protocol finding that the claim, that the protocol would subject Cooley to excruciating pain if not administered properly, was barred on statute of limitations grounds.

Recently Cooley filed another federal case in which he asserted that the lethal injection protocol violated his right to be free from cruel and unusual punishment and also violated his alleged property right to a quick and painless death flowing from R.C. 2949.22, because his obesity and medication would impair ability to access his veins and increase the risk that he would suffer pain if the protocol was not properly administered. On September 30, 2008 the United States District Court for the Southern District of Ohio dismissed the complaint on statute of limitations grounds. *Cooley v. Strickland* (S.D. Oh. 2008) Case No. 2:08-cv-747.

Significantly, in the course of the decision Judge Frost noted that R.C. 2949.22 has contained language that a death sentence executed by lethal injection be quick and painless since 1993 and that a claim based on that language has potentially existed since that time.

¹This Court recently recognized in another protocol-challenge case that a due process claim predicated on Ohio Rev. Code § 2949.22 has potentially existed since 1993, stating:

The quick-and-painless death for lethal injections component of Ohio Rev. Code § 2949.22 has existed in former versions of that statute since 1993, which means that Reynolds' § 1983 claim based on that provision accrued at least at the same time his Eighth Amendment § 1983 claim did. *Compare* Ohio Rev. Code § 2949.22(A) (“[A] death sentence shall be executed by causing the application to the

person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death.”) *with* former Ohio Rev. Code § 2949.22(B)(1) (“[T]he person’s death sentence shall be executed by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death instead of by electrocution as described in division (A) of this section.”). In other words, Reynolds is years late in asserting this challenge. The fact that a state court recently recognized the challenge does not excuse Reynolds’ delay in bringing a § 1983 claim that existed well before those state court proceedings.

(Case No. 2:08-cv-442, Doc. # 100, at 4-5.)

Cooley v. Strickland (S.D. Oh. 2008) Case No. 2:08-cv-747, 4, FN 1. Judge Frost’s Opinion and Order is attached. On September 30, 2008 Cooley filed a notice of appeal, attached, from Judge Frost’s Opinion and Order.

Most recently, on September 18, 2008, Cooley, along with fifteen other capital defendants filed a complaint for declaratory judgment and injunctive relief in the Franklin County Court of Common Pleas. *Otte et al. v. Strickland, et al.*, Case No. 08 CVH 09 13337. That case is premised on an alleged federal due process property right in a painless death arising from R.C. 2949.22 and relies on the decision of Judge James M. Burge of the Lorain County Court of Common Pleas in the capital case of *State v. Rivera, et al.*, Case Nos. 04CR065940 and 05CR068067 filed June 10, 2008. There the court, ruling on a pretrial motion, found that the three drug protocol could not be used consistently with R.C. 2949.22 since the protocol, if not properly administered, creates “an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death.” The court went on to find that R.C. 2949.22 created a federal due process property right to a painless death and that the current protocol violated the Fifth and Fourteenth Amendments to the United States Constitution and

Section 16, Article 1 (due process) of the Ohio Constitution. Judge Burge's decision dated June 10, 2008 is attached to Cooley's motion for stay.

In the declaratory judgment action the inmate plaintiffs seek an injunction barring the State from executing them in a manner contrary to R.C. 2949.22 (based on the due process right identified in *State v. Rivera et al.*, supra); a declaration that the current protocol and manner of administering the protocol violates the Ohio Constitution and R.C. 2949.22; alternatively an order that the executions be carried out with a single drug consistently with the constitutional right to a quick and painless death.

The decision(s) in *State v. Rivera, et al.*, supra is presently on appeal to the Ninth District Court of Appeals. The Entry dated September 26, 2008 conditionally granting the State's motion for leave to appeal and establishing a briefing schedule is attached. No decision can be expected from the Ninth District Court of Appeals prior to October 14, 2008.

COOLEY'S ARGUMENTS

In his motion for stay Cooley principally relies on the decision in *State v. Rivera, et al.*, supra; as stated above that decision forms the foundation for the declaratory judgment action filed in the Franklin County Court of Common Pleas. Cooley also inserts claims made in the federal case dismissed by Judge Frost, relating to his obesity and medications. Cooley asserts that as long as the decision in *State v. Rivera, et al.* stands and the declaratory judgment action remains pending that this Court should stay the execution.

APPLICABLE LAW AND ARGUMENT

This Court stated the principles applicable to a motion for stay of execution in *State v. Steffen*, 70 Ohio St.3d 399, 1994-Ohio-111. There, referring to *McCleskey v. Zant* (1991), 499 U.S. 467, this Court stated:

The court adopted the “cause and prejudice” standard for determining whether a federal court could entertain a successive habeas petition. Under this standard, the petitioner must show “ ‘some objective factor external to the defense impeded counsel’s efforts’ ” to raise the claim in his prior petition. *Id.* at 493, 111 S.Ct. at 1470, 113 L.Ed.2d at 544. Interference by public officials, a showing that the factual or legal basis for the claim was not reasonably available, or the ineffective assistance of counsel could constitute such just cause. *Id.* at 493-494, 111 S.Ct. at 1470, 113 L.Ed.2d at 544. After the petitioner has shown such cause, he must then show actual prejudice flowing therefrom. *Id.* at 494, 111 S.Ct. at 1470, 113 L.Ed.2d at 544.

The cause and prejudice standard also includes a failsafe. When a petitioner is unable to make a showing of just cause for failure to raise the claim previously, a federal court may nevertheless entertain the petition in a narrow class of cases where there exist extraordinary circumstances that have probably caused the conviction of one who is not guilty of the crime. The court described this class of cases as those “implicating a fundamental miscarriage of justice.” *Id.* at 494, 111 S.Ct. at 1470, 113 L.Ed.2d at 545.

We therefore hold the following: When a criminal defendant has exhausted direct review, one round of postconviction relief, and one motion for delayed reconsideration under *State v. Murnahan* in the court of appeals and in the Supreme Court, any further action a defendant files in the state court system is likely to be interposed for purposes of delay and would constitute an abuse of the court system.

The defendant wishing to stay his execution to engage in further state court proceedings must petition this court for such a stay. The petitioner must then satisfy the “cause and prejudice” standard as articulated in *McCleskey, supra*. We believe that the *McCleskey* standard properly balances the

need for finality of judgments against the need for protection of those defendants who can demonstrate either cause for failing previously to raise a ground for litigation or circumstances constituting a fundamental miscarriage of justice, if the conviction were to stand.

Id. *411-*412.

The State contends that Coeey cannot meet the cause and prejudice standard. Coeey is subject to the cause and prejudice standard since he is well past direct review, has filed two petitions for post-conviction relief and has filed an application to re-open his appeal. Accordingly, Coeey's participation in the declaratory judgment action filed September 18, 2008 was probably done for purposes of delay.

Initially the State contends that this Court should not concern itself with Coeey's attempt to re-argue the claims dismissed by Judge Frost in *Coeey v. Strickland* (S.D. Oh. 2008) Case No. 2:08-cv-747. Those claims concern Coeey's obesity and his medications, both supposedly increasing the risk that the three drug protocol will not be administered properly. Judge Frost's decision is on appeal to the 6th Circuit Court of Appeals and that court is able to issue a stay of execution should Coeey request it and the court finds that course warranted under the circumstances. Coeey should not be able to argue the merits of a dismissed federal case in support of a request to this Court to stay his execution.

But Judge Frost's decision does contain statements strongly relevant to why this Court should refuse to stay Coeey's execution pending resolution of *State v. Rivera, et al.* supra and the declaratory judgment action founded on *Rivera*. Judge Frost noted that R.C. 2949.22 has supported a due process challenge based on a quick and painless death theory since 1993. *Coeey v. Strickland*, (S.D. Oh. 2008) Case No. 2:08-cv-747, 4, FN 1.

Effective November 21, 2001 R.C. 2949.22 was amended to prescribe lethal injection as the sole means by which a death sentence is executed. The statutory language concerning a quick and painless death remained. Cooley certainly could have brought his due process challenge at or shortly after that time. See *Cooley v. Strickland* (6th Cir. March 2, 2007), No. 05-4057 where the court determined in a 42 U.S.C. Section 1983 action based on a method of injection claim that the two year statute of limitations on Cooley's claim began to run in 2001 when the law was amended to require that Cooley be put to death by lethal injection since Cooley should have known of that amendment. Id. 9.

There is no reason why Cooley could not have brought a federal challenge based on a quick and painless death claim within two years of the November 21, 2001 amendment to R.C. 2949.22. Judge Burge's ruling in *State v. Rivera*, while it cites the Ohio Constitution, is clearly grounded in federal constitutional law. Motion, Exhibit A, 5-6, 8.

Cooley's motion for stay of execution reveals that he was or should have been on notice that the State, in Cooley's words, had botched executions as early as 1999. Motion, 12 (referring to Wilford Berry's execution). The three drug protocol was in use when Berry was executed. *Cooley v. Strickland* (6th Cir. March 2, 2007), Case No. 05-4057, 5.

Cooley is attempting to halt his execution by invoking a decision rendered on June 10, 2008. But the happenstance that the ruling in *Rivera* was released relatively recently cannot take away the fact that Cooley could have brought the same claim much earlier and did not. To paraphrase the words of Judge Frost, "[Cooley] is years late in asserting this challenge. The fact that a state court recently recognized the challenge

does not excuse [Cooley's] delay in bringing a Section 1983 claim that existed well before those state court proceedings." *Cooley v. Strickland*, (S.D. Oh. 2008) Case No. 2:08-cv-747, 4, FN 1.

The claim that execution by the three drug protocol violated a supposed right to a quick and painless death pre-existed the decision in *State v. Rivera* by years. Cooley cannot show any cause why he did not bring such a challenge sooner; there is no claim or reason arising out of interference by public officials, the unavailability of the factual or legal basis for the claim, or the ineffective assistance of counsel. *State v. Steffen*, supra, *411. Nor can there be any claim that Cooley is innocent of the crimes. *Id.*

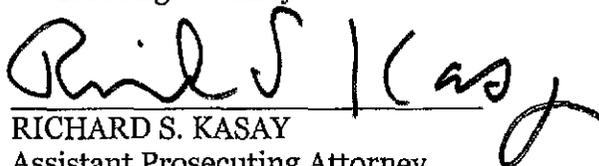
SUMMARY

The State concurs with the arguments advanced by the Ohio Attorney General as additional reasons why the motion should be denied.

Cooley was convicted and sentenced in 1986, almost twenty-two years ago. It is time and past time that the lawfully imposed sentence be executed. There can be no ultimate certitude in these matters. *State v. Steffen*, supra *412. But there should be confidence that Cooley has had every opportunity to fully and fairly litigate all claims available to him. It should be time now for the Ohio courts to move past Richard W. Cooley, II. The motion for stay should be denied.

Respectfully submitted,

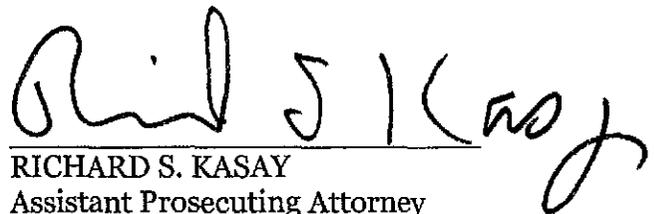
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent by Email c/o Kelly.Schneider@OPD.Ohio.gov, to the Office of the Ohio Public Defender, Gregory W. Meyers, Senior Assistant State Public Defender, Kelly L. Schneider, Supervisor, Death Penalty Division, and Kimberly S. Rigby, Assistant State Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43266-2998; and by Email c/o MKanai@ag.state.oh.us, to Nancy H. Rogers, Attorney General of Ohio, William P. Marshall, Solicitor General, and Matthew A. Kanai, Senior Assistant Attorney General, Capital Crimes Unit Coordinator, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, on this 8th day of October, 2008.


RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

RICHARD COOEY,

Plaintiff,

v.

TED STRICKLAND, et al.,

Defendants.

Case No. 2:08-cv-747

**JUDGE GREGORY L. FROST
Magistrate Judge Mark R. Abel**

OPINION AND ORDER

This matter is before the Court for consideration of Defendants' motion to dismiss (Doc. # 11), Richard Cooley's memorandum in opposition (Doc. # 13), and Defendants' reply memorandum (Doc. # 14). Also before the Court are Cooley's motion for a preliminary injunction (Doc. # 8), Defendants' memorandum in opposition (Doc. # 12), and Cooley's reply memorandum (Doc. # 15). For the reasons that follow, this Court **GRANTS** the motion to dismiss and **DENIES** the motion for a preliminary injunction.

I. Discussion

Plaintiff, Richard Cooley, asserts claims in this litigation under 42 U.S.C. § 1983 challenging the lethal injection protocol by which the State of Ohio intends to execute him. Previously, Cooley had before this Court a similar case, Case No. 2:04-cv-1156, which the Sixth Circuit directed this Court to dismiss on statute of limitations grounds. *See Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007). Following dismissal, Cooley then filed the instant action in which he asserts that (1) the protocol violates Cooley's right to be free from cruel and unusual punishment by failing to address adequately the asserted difficulty in accessing his veins and by failing to account for potential dosage insufficiency, and (2) the protocol violates Cooley's right

to due process by unconstitutionally depriving him of a property interest in a quick and painless death.

Defendants move for dismissal under Federal Rule of Civil Procedure 12(b)(6) on the ground that the Sixth Circuit's decision in *Cooley* requires dismissal of the § 1983 claims asserted here. This Court issued an Opinion and Order in *Cooley*'s prior case that discussed at length the Sixth Circuit's construction in *Cooley* of the statute of limitations for such § 1983 claims. (Case No. 2:04-cv-1156, Doc. # 344.) Because the analysis of the appellate precedent discussed in that opinion also informs the instant case, this Court adopts and incorporates herein the entirety of that prior decision and attaches it to the instant decision for ease of reference.

As this Court noted in its incorporated decision, *Cooley* teaches that § 1983 claims of the sort asserted in this case begin to accrue upon conclusion of direct review in the state courts and when a plaintiff knows or has reason to know about the act providing the basis of his or her injury. *Id.* at 422. Even in light of recent changes to the lethal injection protocol and the United States Supreme Court's issuance of *Baze v. Rees*, 128 S. Ct. 1520 (2008)—the latter of which predated issuance of the *Cooley* mandate—the court of appeals issued *Cooley* as binding authority. This authority reasons that a plaintiff knew or had reason to know about the act providing the basis of his or her injury when Ohio made lethal injection the exclusive method of execution in December 2001. *Cooley*, 479 F.3d at 422. The Sixth Circuit has thus set the binding parameters for analysis of when the two-year statute of limitations begins to run.

Defendants argue that *Cooley*'s vein-access claim is barred by the statute of limitations because he knew or had reason to know of this § 1983 claim at least as of 2003. This Court agrees. In his Complaint, *Cooley* indicates that, when prison personnel were preparing for a July

2003 execution date for Cooley, he advised them that he had a issue with accessing his veins. (Doc. # 2 ¶ 15.) This indicates that Cooley knew or should have known of the vein issue in July 2003, which means that the statute of limitations on this issue expired at least by July 2005. Even assuming *arguendo* that the vein issue is unrelated to Cooley's prior lawsuit, his August 1, 2008 filing of the instant case is well beyond the applicable limitations period.

Cooley attempts to salvage his claim in part by arguing that since 2003, he has gained weight and that his increased weight may make accessing his veins more difficult. But this argument does not resurrect the time-barred claim. The core of that claim is still vein access, and the fact that there may be less access today does not mitigate the fact that Cooley still knew of and could have filed suit over vein access prior to July 2005. In other words, the fact that his alleged condition may have become worse does not restart the clock when he asserts that the issue existed even before his weight gain. *Regardless of any possible merit to his vein access claim*, Cooley's § 1983 claim is therefore barred by the statute of limitations.

This leaves the second component of Cooley's case: that he is on the medication Topamax, or topiramate, as part of treatment for cluster migraines. Cooley argues that this drug may decrease his sensitivity to sodium thiopental, part of Ohio's three-drug protocol, and that he thus could remain aware during the execution process. He pleads that use of Topamax means that a failure to administer successfully the full dose of the anesthetic component of the three-drug protocol can allegedly decrease the "margin of safety" present in the execution process so that he might be more vulnerable than an individual who is not on Topamax. (Doc. # 2 ¶ 20.) Cooley also asserts that the dosage of sodium thiopental employed in the three-drug protocol may be insufficient in light of his significant weight to adequately anesthetize him. (Doc. # 2 ¶ 20.)

Because the record does not disclose when Coeoy began to take Topamax, this Court cannot address whether he has similarly asserted his claims based on usage of the drug outside the statute of limitations (e.g., Coeoy was using the drug two years before he filed the instant complaint). If Coeoy had indeed started using Topamax early enough, meaning two years prior to filing his recent claims, then that component of his first count based on usage would be time barred, as well as count two, which asserts a § 1983 claim based on an asserted Fourteenth Amendment due process violation of property right created by Ohio Rev. Code § 2949.22.¹ (Doc. # 2 ¶¶ 30-34.)

Regardless of this possibility, the Court must conclude that Coeoy's Topomax claims are still time barred, however, because these claims are contingent on his previously asserted (and found untimely by the Sixth Circuit) claim of faulty administration of sodium thiopental. Coeoy

¹ This Court recently recognized in another protocol-challenge case that a due process claim predicated on Ohio Rev. Code § 2949.22 has potentially existed since 1993, stating:

The quick-and-painless death for lethal injections component of Ohio Rev. Code § 2949.22 has existed in former versions of that statute since 1993, which means that Reynolds' § 1983 claim based on that provision accrued at least at the same time his Eighth Amendment § 1983 claim did. *Compare* Ohio Rev. Code § 2949.22(A) (“[A] death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death.”) with former Ohio Rev. Code § 2949.22(B)(1) (“[T]he person’s death sentence shall be executed by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death instead of by electrocution as described in division (A) of this section.”). In other words, Reynolds is years late in asserting this challenge. The fact that a state court recently recognized the challenge does not excuse Reynolds’ delay in bringing a § 1983 claim that existed well before those state court proceedings.

(Case No. 2:08-cv-442, Doc. # 100, at 4-5.)

pleads in his Complaint that if “a full dose of thiopental [was] successfully delivered into his circulation[,] Plaintiff would be deeply anesthetized regardless of his treatment with Topamax.” (Doc. # 2 ¶ 20 (internal quotation marks omitted).) This assertion presents a challenge to the execution protocol that necessarily relies on faulty administration of the first drug; by Cooley’s own assertion, there is no problem if the administration of the sodium thiopental is successful, even at the dosage Ohio employs.

Cooley’s argument in his briefing that his claim . . . is not “contingent upon maladministration’ ” is therefore a mischaracterization of his own pleading. (Doc. # 13, at 7.) His assertion belies what Cooley actually pled. His claim is not that Topamax itself creates a violation, regardless of the protocol administration and the dosage of sodium thiopental used. Rather, the presence of Topamax in the inquiry is pled as an aggravating factor to faulty administration or insufficient dosing. This is a lethal injection protocol challenge that at its core is simply a reassertion of his 2004 challenge to the procedures and drug amount the state employs.

The Sixth Circuit has explained that among the “core complaints” of Cooley’s 2004 case was “the use and dosage of sodium thiopental.” *Cooley*, 479 F.3d at 424. Even more specifically, the court of appeals characterized Cooley’s prior claims as asserting “that if the sodium thiopental is not administered properly and in sufficient dosage, the prisoner could experience intense pain” *Id.* at 414. Cooley’s Topamax-related claims (and his weight claim, which his expert states exists not separately but “in combination with” the Topamax argument (Doc. # 2-2, at 22)) are therefore not independent from but contingent upon his time-barred 2004 claims asserted in Case No. 2:04-cv-1156. Neither the Topamax nor the weight

matter unless there is a violation of a sort *that has already been rejected as outside the statute of limitations* by the Sixth Circuit. Today's claims simply add to the time-barred precursor claims that have already failed to provide Cooley the relief he seeks. Consequently, adhering to precedent, this Court must also dismiss the remainder of Cooley's claims.

Having decided that Cooley's claims are time barred, this Court need not and does not discuss in detail the moot motion for a preliminary injunction. The Court notes, however, that even without the motion to dismiss, Cooley could not demonstrate a likelihood of success on the merits for the reasons discussed above. The Court also notes that it expresses no opinion here on whether a preliminary injunction would issue even if Cooley were likely to prevail on timely claims, given the proximity in time of his filing of this action and his pending execution date.

II. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss (Doc. # 11) and **DENIES** Cooley's motion for a preliminary injunction (Doc. # 8). The Clerk is instructed to enter judgment accordingly and terminate this case upon the docket records of the United States District Court for the Southern District of Ohio.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

In The United States District Court
For The Southern District Of Ohio
Eastern Division

Richard Coocy,

Plaintiff-Appellant,

vs.

Ted Strickland, Governor, et. al.,

Defendants-Appellees.

Case No. 2:08-cv-747

**This is a death penalty case.
Execution scheduled on
October 14, 2008.**

Richard Coocy's Notice of Appeal

Notice is hereby given that Plaintiff-Appellant Richard Coocy appeals to the United States Court of Appeals for the Sixth Circuit from the opinion and order entered by this Court in this action on September 30, 2008. (Dkt. 16) Coocy was previously given in forma pauperis status (Dkt. 6), and would request that status continue during his appeal.

Respectfully submitted,

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OHIO PUBLIC DEFENDER

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Certificate of pervice

I hereby certify that the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties.

By: /s/Kelly L. Schneider
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STATE OF OHIO)
) ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FILED
LORAIN COUNTY

STATE OF OHIO 2008 SEP 26 P 12:32

C.A. No. 08CA009426
08CA009427

Appellants
Cross-Appellee
CLERK OF COMMON PLEAS
RON NABAKOWSKI

v.

RUBEN RIVERA

Appellee
Cross-Appellant

RONALD MC CLOUD

Appellee
Cross-Appellant

JOURNAL ENTRY

Appellants have moved this Court for leave to appeal the trial court's June 10, 2008, order. Appellants have also moved to supplement the record with the trial court's July 16, 2008, order; to consolidate the above matters for appeal; and to expedite this matter for accelerated disposition. Appellees have responded by filing a motion to dismiss the appeal and a notice of cross-appeal.

Upon review of the initial filings, we grant appellants' motion for leave to appeal. Appellees' motion to dismiss the appeal for lack of a final, appealable order is denied at this time, but may be subject to further review during the final disposition of the appeal.

This matter will be expedited pursuant to R.C. 2501.09 as a case involving the "constitutionality of a statute * * * in which the questions arising are of general public interest." Therefore, this matter will be disposed of in advance if its order on the docket.

The record will be due on October 6, 2008, and the briefing schedule will be as follows:

1. Assignments of error and brief of the appellant/cross-appellee: ten (10) days after the record is filed;
2. Answer brief, and assignments of error and brief of the appellees/cross-appellants: ten (10) days from service of assignments of error and brief of the appellant/cross-appellee;
3. Reply brief and answer brief of the appellant/cross-appellee: ten (10) days from service of the answer brief and assignments of error of the appellees/cross-appellants;
4. Reply brief of the appellees/cross-appellants: ten (10) days from service of the reply brief and answer brief of the appellant/cross-appellee.

No extensions of time will be granted.

The parties are instructed to include briefing as to the following issues:

- 1) The Court's jurisdiction to hear the cross-appellants' appeal;
- 2) The issue of ripeness as it relates to the June 10, 2008, order and the trial court's authority to issue that order;
- 3) This Court's jurisdiction over the trial court's July 16, 2008, order.
- 4) The trial court's authority to issue an order in a criminal case that affects a non-party.

In addition, the above appeals are hereby consolidated for purposes of filing the record and for oral argument; the parties, however, may file separate briefs. As for appellants' motion to supplement the record with the trial court's July 16, 2008, order, that motion is denied as unnecessary, as the record in this matter has not yet been filed.

The clerk of the appellate court is directed to accept a facsimile filing of this order and to serve this order upon the official court reporter.



Judge