

The Supreme Court of Ohio

State of Ohio, : Case No. 1988-0351
: :
Appellee, : :
: :
v. : :
: :
Richard Wade Cooney, II, : :
: :
Appellant. : :

AMICUS CURIAE RESPONSE TO APPELLANT'S MOTION FOR STAY OF EXECUTION

Respectfully submitted,

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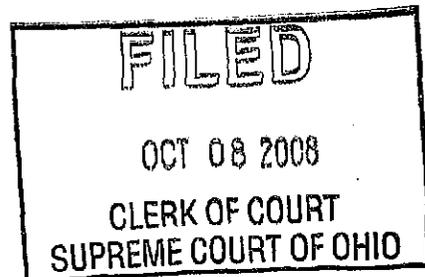


TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE, THE OHIO ATTORNEY GENERAL.....1

INTRODUCTION.....1

ARGUMENT2

**I. The lower court rewrote RC § 2949.22(A) in order to find it
 unconstitutional.....3**

II. Revised Code § 2949.22(A) does not create a property right.....5

**III. A property right that is created by a legislative grant cannot be
 used to declare the same legislative grant unconstitutional.6**

CONCLUSION7

CERTIFICATE OF SERVICE8

TABLE OF AUTHORITIES

CASES

Barry v. Barchi (1979), 443 U.S. 55, 64..... 5

Bd. of Regents v. Roth (1972), 408 U.S. 564 7

Cleveland Board of Education v. Loudermill (1985), 470 U.S. 532 6

Columbus v. Kim, 118 Ohio St.3d 93, 2008-Ohio-1817, 886 N.E.2d 217..... 4

Columbus-Suburban Coach Lines, Inc. v. Public Utilities Com. (1969), 20 Ohio
St.2d 125, 254 N.E.2d 8..... 4

Connel v. Higginbotham(1971), 403 U.S. 207 5

Cooley v. Taft (S.D. Oh. Sept. 30, 2008), 2:08-cv-00747, 2008 U.S. LEXIS 57630 4

Crown v. Trustees of Patrolmen's Variable Supplements Fund (S.D.N.Y. 1987),
659 F. Supp. 318 6

Groch v. GMC, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377 7

Kraynak v. Youngstown City Sch. Dist. Bd. of Educ., 118 Ohio St.3d 400, 2008-
Ohio-2618, 889 N.E.2d 528..... 4

Mathews v. Eldridge (1976), 424 U.S. 319..... 5

State ex rel. Horvath v. State Teachers Retirement Bd., 83 Ohio St.3d 67, 74,
1998-Ohio-424; 697 N.E.2d 644 6, 7

State v. Rivera, Case No. 04CR065940 (Lorain County Common Pleas June 10, 2008) .. 1, 2, 4, 6

State v. Sinito (1975), 43 Ohio St.2d 98, 72 O.O.2d 54, 330 N.E.2d 896 3, 4

State v. Steffen (1994), 70 Ohio St.3d 399, 639 N.E.2d 67..... 2

Town of Castle Rock v. Gonzales (2005), 545 U.S. 748 5

STATUTES

O.R.C. § 2949.22 1, 3, 4

O.R.C. § 2949.22(A)..... 1, 2, 5

OTHER AUTHORITIES

Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885 (2000)..... 5

STATEMENT OF INTEREST OF AMICUS CURIAE, THE OHIO ATTORNEY GENERAL

The issue before the Court involves two cases: a Lorain County Common Pleas trial court decision that is currently pending on appeal before the Ninth District Court of Appeals, and a declaratory judgment action in the Franklin County Court of Common Pleas. The cases involve the constitutionality of RC § 2949.22 and Ohio's lethal injection protocol, and therefore implicate the Ohio Attorney General's independent obligation to defend the constitutionality of Ohio legislation as well as the Attorney General's representation of the Department of Rehabilitation and Correction. The Attorney General is directly involved in the underlying litigation, and therefore has an interest in the resolution of the pending stay request.

INTRODUCTION

The question before this Court is whether Richard Cooley is entitled to stay of execution based on his assertion that RC § 2949.22(A) creates a constitutional property right that it also violates. Cooley is scheduled to have his sentence of death carried out executed on October 14, and accordingly the pending stay request is likely to be the last request he makes to this Court. For that reason, the interests of justice are best served by this Court's thoughtful deliberation on the merits of the underlying action.

This Court should consider the merits of Cooley's argument to determine the validity of the stay request. If the Court finds that the argument Cooley is advancing is unsound, then it should deny his requested stay. Cooley seeks a stay based on a declaratory judgment action he has filed in the Franklin County Court of Common Pleas. That action is an extension of an unrelated case from the Lorain County Court of Common Pleas, in which a trial court held that Ohio's execution protocol violated the statute it was derived from. *State v. Rivera*, Case No. 04CR065940 (Lorain County Common Pleas June 10, 2008). This Court should find that *Rivera*

was wrongly decided, and therefore Cooley's declaratory judgment is not likely to be successful. Because Cooley's argument will not ultimately prevail, this Court should deny Cooley's request for a stay. Conversely, the Court should grant Cooley's stay request if the Court finds that he is likely to succeed on the merits of his argument.

ARGUMENT

The sole question before this Court is whether Cooley is entitled to a stay because he is likely to succeed on the merits. Cooley's argument rests entirely on one incorrect holding of the Lorain County Court of Common Pleas. In *State v. Rivera*, Common Pleas Judge Burge found that Ohio's execution protocol violated R.C. 2949.22. The *Rivera* ruling was made in a pre-trial hearing, and is currently pending appeal before the Ninth District Court of Appeals. The State has conceded neither that the *Rivera* decision applies to Cooley,¹ nor that the doctrine of collateral estoppel controls under these circumstances. However, those issues are not relevant in this action. This Court alone has the authority to stay an execution. *State v. Steffen* (1994), 70 Ohio St.3d 399, 639 N.E.2d 67. Even if this Court set aside the rigorous standard of *Steffen* in favor of a merits review, the Court is not bound by lower court decisions. The stay should be denied because Cooley's underlying *Rivera* argument is flawed and has no realistic chance for successful.

The lower court's ruling can be summarized as: 1) the phrase "quick and painless" in R.C. 2949.22(A) means "without arbitrary risk of pain or anxiety of pain"; 2) an inmate has a property interest in avoiding arbitrary risk or anxiety; 3) the Director of the Department of Rehabilitation

¹ Cooley assertion that the State conceded *Rivera's* application in a Motion to Expedite before the Ninth District Court of Appeals is a mischaracterization. The text of motion specifically indicates that Judge Burge's rulings were vague and therefore it was impossible to determine what applicability the rulings had. The State requested the appeal be expedited in order to avoid the precise circumstances Cooley now seeks to exploit.

and Correction ("DDRC") has adopted a three-drug protocol that carries an arbitrary risk of pain, 4) therefore the "or combination of drugs" part of the statute is unconstitutional.

In finding the statute unconstitutional, the *Rivera* trial court 1) added words to the statute that do not exist—contrary to this Court's precedent; 2) found a property right where none has ever been found before—contrary to the economic requirement required by the Supreme Court of the United States; and 3) found that a protocol adopted by DDRC can cause a statute to become unconstitutional—in violation of this Court's precedent.

In Ohio, courts must apply all rules of construction in favor of finding a statute constitutional if at all possible. *State v. Sinito* (1975), 43 Ohio St.2d 98, 101, 72 O.O.2d 54, 330 N.E.2d 896. The *Rivera* trial court did the opposite: it misapplied the rules of construction in favor of finding the statute unconstitutional. For these reasons, this Court should find that Coeey has no reasonable chance of success on the merits, and should deny the stay.

I. The *Rivera* court rewrote RC § 2949.22(A) in order to find it unconstitutional.

The *Rivera* decision is flawed at its core because the trial judge had to alter the unambiguous terms of R.C. 2949.22 to find it unconstitutional. R.C. 2949.22 states, "a 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." However, the *Rivera* court found that "RC 2949.22 demands the avoidance of any unnecessary risk of pain, and, as well, any unnecessary expectation by the condemned person that his execution may be agonizing, or excruciatingly painful." Order, p.7, ¶15 (emphasis added). The trial judge wrote into the statute a prohibition on "any unnecessary risk" and "any unnecessary expectation" of pain.

Bedrock principles of statutory interpretation instruct that, "[i]n determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used *or to insert words not used.*" *Columbus-Suburban Coach Lines, Inc. v. Public Utilities Com.* (1969), 20 Ohio St.2d 125, 126, 254 N.E.2d 8 (emphasis added). When a statute is unambiguous, its plain meaning is applied. *Kraynak v. Youngstown City Sch. Dist. Bd. of Educ.*, 118 Ohio St.3d 400, 2008-Ohio-2618, ¶10, 889 N.E.2d 528. "Moreover, this court must apply all rules of statutory construction in favor of constitutionality if possible." *Columbus v. Kim*, 118 Ohio St.3d 93, 2008-Ohio-1817, ¶18, 886 N.E.2d 217 (O'DONNEL, J., concurring), citing *Sinito*, 43 Ohio St.2d at 101.

Judge's Burge's conclusion that R.C. 2949.22 is unconstitutional is founded entirely on the notion of risk and anxiety. *Rivera* collapses once those words are removed and the statute is restored to its original form. In essence, the trial judge rewrote the mandate to encompass issues of risk and anxiety. By rewriting the statute, the trial judge sought to impose his own view of what R.C. 2949.22 should say; not what the statute actually says.

But the General Assembly's mandate was plain: DDRC must adopt a lethal injection protocol that is quick and painless. Had Judge Burge accepted this mandate, he would have been left with the uncontroverted fact that a full dose sodium thiopental renders the condemned insensate to pain. Cooley has conceded as much, and the United States District Court agreed. *Cooley v. Taft* (S.D. Oh. Sept. 30, 2008), 2:08-cv-00747, 2008 U.S. LEXIS 57630, *8-9. This should have ended the judicial inquiry under R.C. 2949.22. If risk and anxiety are matters subject to judicial review, they are only reachable through the constitutional prohibition on cruel and unusual punishment.

Thus, if a court finds that Ohio's lethal injection protocol cause death in a manner that is quick and painless, it must end its inquiry. The trial judge went beyond the plain language of the statute, altered the mandate of the General Assembly, and used those alterations to strike down the statute.

II. R.C. 2949.22(A) does not create a property right.

Cooley cannot have a "property right" in something that cannot be categorized as property. The General Assembly, in enacting R.C. 2949.22(A) did not convey a property or economic entitlement that could be construed as creating a constitutional property right. Accordingly, this Court should find that Cooley's stay is unlikely to be successful.

The Supreme Court of the United States has held that a person does not have a property right in the enforcement of a temporary protection order, in part, because "as *Roth* and its progeny show, the right to have a restraining order enforced does not 'have some ascertainable monetary value,' as even our '*Roth*-type property-as-entitlement' cases have implicitly required." *Town of Castle Rock v. Gonzales* (2005), 545 U.S. 748, 766 (quoting Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 964 (2000)). Just as having a restraining order enforced does not have any ascertainable monetary value, the enforcement of R.C. 2949.22(A) also has no ascertainable monetary value.

Thus, while modern property rights can include licenses, employment, and disability benefits,² a property right cannot include the means or method of the execution of sentence. There is no ascertainable monetary value to DDRC's decision to use one or more drugs. Therefore, the basis of the lower court's finding that R.C. 2949.22(A) is unconstitutional is an inaccurate and unwarranted extension of constitutional principles.

² *Barry v. Barchi* (1979), 443 U.S. 55, 64; *Connel v. Higginbotham* (1971), 403 U.S. 207; and *Mathews v. Eldridge* (1976), 424 U.S. 319, 332.

III. A property right that is created by a legislative grant cannot be used to declare the same legislative grant unconstitutional.

Even if this Court found that a property right existed, it would be impossible for the right to conflict with the statute from which it was derived. This Court has held that property interests "are determined *solely* by the statutes that govern the system." *State ex rel. Horvath v. State Teachers Retirement Bd.*, 83 Ohio St.3d 67, 74, 1998-Ohio-424; 697 N.E.2d 644 (emphasis added). "[P]roperty interests are created not by the Constitution, but rather by existing rules or understandings that stem from an independent source such as state law. As a result, the nature and extent of plaintiffs' protected property rights . . . are determined by reference to state law." *Crown v. Trustees of Patrolmen's Variable Supplements Fund* (S.D.N.Y. 1987), 659 F. Supp. 318, 319-320; citing, among others, *Cleveland Board of Education v. Loudermill* (1985), 470 U.S. 532; cited favorably by *Horvath*. Thus, even if a petitioner has a vested "property right" in the method of execution of his sentence, that right is solely defined by statute. It would be illogical to say that a right that is created and defined by statute can also cause the statute to be unconstitutional.

However, this is precisely what the lower court did. In severing the "or combination of drugs" portion of the statute, the lower court was necessarily stating that while R.C. 2949.22(A) grants a constitutionally protected property right to a defendant, it also violates the very right that it grants. Even the *Rivera* defendants recognized that while the implementation of the protocols could potentially violate R.C. 2949.22 and the Constitution, the statute remained constitutional: "The *protocol can't change the statute* If the statute on its face is constitutional, then the statute is on its face constitutional. The . . . *implementation* of the statute through the protocol may be unconstitutional, and may also violate the statute." *Rivera*, May 6 Tr., 495-496

(emphasis added). Nonetheless, the trial judge used the protocol as justification for changing the RC § 2949.22 by declaring it unconstitutional.

"Before a court may declare unconstitutional an enactment of the legislative branch, *'it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'*" *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶¶ 25-26, 883 N.E.2d 377 (internal citations omitted, emphasis added). In this case, the "constitutional provision" that R.C. 2949.22(A) is incompatible with is the constitutional provision that RC § 2949.22(A) purportedly creates. Property interests "are determined *solely* by the statutes that govern the system." *Horvath*, 83 Ohio St.3d at 74 (emphasis added). A right created by statute cannot be clearly incompatible with the statute from which it derives its authority.

The only possible justification for such a ruling would be an assumption by the trial court that once a statute granted a property right, the property right became an independent substantive constitutional right. But that notion is simply wrong: "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 577. To the extent that state law can create a property right, that right is defined by the contours of the statute that creates it. The right cannot have supremacy over the statute because the right is entirely dependent on the legislative grant.

CONCLUSION

This is the tortured logic that the *Rivera* trial court used to reach its conclusion, and on which Cooley now relies: 1) the court redefined R.C. 2949.22 to include a prohibition against risk or anxiety; 2) it determined there was a constitutional property interest in the prohibition; 3) it determined that the current Ohio protocol violates that property interest; and 4) it then

determined that, because the current protocol was objectionable under the statute as the court had rewritten it, the statute violated the constitutional protection that the statute created. In short, to reach its end goal of finding Ohio's protocol unconstitutional, the trial court rewrote an Ohio statute to include risk and anxiety, created an unheard of constitutional property interest, and then rewrote the Ohio statute again to remove the possibility of using *any* combination of drugs. This is, ultimately, nothing more than legislation by judicial fait. It is inconsistent with the established duty of all Ohio courts to faithfully interpret statutes in favor of constitutionality.

Because *Rivera* is meritless as a matter of law, this Court should find that Coeey has no likelihood of success on the merits. Accordingly, the Court should decline Coeey's stay request.

Respectfully submitted,

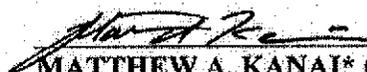
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing response was served on counsel for appellant, Joseph Wilhelm, Assistant State Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio, via hand delivery on this 8th day of October, 2008.


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