

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)
Plaintiff-Appellee,) Case No. 96-2346
)
vs.)
)
JASON GETSY,)
Defendant-Appellant.)
)

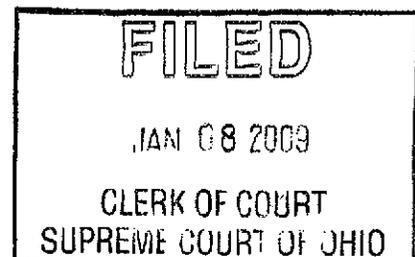
MEMORANDUM IN OPPOSITION TO
MOTION TO SET EXECUTION DATE

Dennis Watkins (0009949)
LuWayne Annos (0055651)
Trumbull County Prosecutors Office
160 High St. N.W. 4th Floor
Warren, OH 44481
330.675.2426
330.675.2431 FAX

Counsel for State of Ohio

MICHAEL J. BENZA (0061454)
17850 Geauga Lake Road
Chagrin Falls, OH 44023
216.319.1247

Counsel for Jason Getsy



MEMORANDUM

On December 31, 2008, the State of Ohio, through the Trumbull County Prosecuting Attorney, moved this Court to set an execution date for Jason Getsy, setting forth a detailed procedural history of the litigation in this death penalty case. Getsy generally does not take issue with this account of the litigation in the trial court, on appeal, in post-conviction, and in federal habeas corpus.

As the state concedes, however, Getsy has an appeal pending in the United States Court of Appeals for the Sixth Circuit, from the United States District Court's improper dismissal of his § 1983 challenge to Ohio's lethal injection procedures. *Getsy v. Strickland*, Case No. 08-4199. The state's allegations as to the status of this case are misleading.

The procedural posture of this litigation is critical to this Court's decision. Richard Cooley initially challenged Ohio's lethal injection procedures as unnecessarily causing undue pain and suffering in a § 1983, lawsuit in 2004. *Cooley v. Strickland*, Case No. 04-1156. The state filed a Motion to Dismiss claiming that Cooley's petition fell outside the two year statute of limitation for § 1983 suits under Ohio law. Following the district court's denial of the state's Motion to Dismiss, the state took an interlocutory appeal to the 6th Circuit Court of Appeals. During the time that the appeal was pending in the 6th Circuit, Getsy filed a Motion to Intervene in

the lethal injection lawsuit on May 2, 2007. Getsy's Motion to Intervene was granted and his Complaint was filed on June 25, 2007. (Orders 203, 208, Case No. 04-1156).

As the state acknowledges, the Sixth Circuit Court of Appeals eventually concluded - over a dissent - that Richard Cooley's Complaint had been filed beyond the statute of limitations. *Cooley v. Strickland*, 479 F. 3d 412 (6th Cir. 2007). After a Petition for Rehearing *En Banc* and a Petition for *Certiorari* were denied, Richard Cooley's case was remanded to the district court with specific instructions to dismiss his complaint. The Court of Appeals did not instruct the district court to dismiss any of the intervenor complaints. (Order 276, 07/03/2008).

Upon remand, the district court dismissed Richard Cooley's complaint but required the state to file individual and separate Motions to Dismiss for the remaining intervening plaintiffs. (Order 277, 07/07/2008). The state eventually did file separate motions to dismiss on all of the remaining intervening plaintiffs, including Jason Getsy. On August 26, 2008, the district court entered an order dismissing Jason Getsy's Intervenor Complaint as being beyond the statute of limitations as interpreted by the 6th Circuit in *Cooley*. Even though the district court recognized that Getsy had unique factual issues that distinguished his case from many of the other intervening plaintiffs. (Order 360, at 2-3, 08/26/2008). The district court in the various cases involving intervening plaintiffs, including Getsy, made individual determinations of

the status of the cases, whether or not there had been relief granted at any time, and whether that relief tolled the time for filing the complaint. In the case of Kenneth Biros, the district court has ordered that an evidentiary hearing be held to determine if he is entitled to a temporary injunction. (Orders 361, 08/26/2008). In the case of Jerome Henderson, the court denied the Motion to Dismiss. (Order 358, 08/26/2008) In the case of Jason Getsy, the district court granted the state's motion to dismiss, making the fine distinction between Getsy and Biros and Henderson that the relief granted to Getsy by the 6th Circuit had never been finalized and therefore did not toll the time. (Order 360 at 2-3).

Getsy timely appealed that decision to the 6th Circuit Court of Appeals. (Order 387) (*Getsy v. Strickland*, 6th Cir. Case No. 08-4199). The court of appeals has not dismissed the appeal. Neither the court of appeals nor the district court have decided that the appeal is frivolous, as the state now suggests. To the contrary, both the district court and the court of appeals have treated this as a normal appeal from an order of the district court. The state has not moved to dismiss the appeal as frivolous. The state's only attempt to dismiss the appeal was on the grounds that there was not a final appealable order from the district court. The district court has subsequently certified its previous Orders as final appealable orders. (Order 442, 443)(EX. A Attached) Contrary to the state's contentions here, the 6th Circuit Court of Appeals

has not addressed the identical issue in *Cooey*. There are significant factual distinctions between *Cooey* and *Getsy*. *Getsy* has the right to vindicate these differences in the Sixth Circuit as well as in the Supreme Court of the United States. The fact that the Supreme Court denied *certiorari* in *Cooey* did not decide the statute of limitations issue for all litigants for all time. The denial of *certiorari* is specifically not a ruling on the merits of the claims. See *Velazquez v. Arizona*, 128 S.Ct. 2078 (2008) (Stevens, J., concurring in denial of *certiorari*). Significant factual differences are present in *Getsy*'s case that were not present in Richard *Cooey*'s case. *Getsy* has the right to pursue this appeal. Setting an execution date will significantly impair *Getsy*'s ability to vindicate these rights.

Because of the number of litigants involved in the lethal injection litigation, by analogy, the factors and analysis contained in class action litigation is insightful. The commencement of a potential class action suit tolls the running of the statute of limitations with respect to all purported members of the class who timely move to intervene after class action status has been denied. *American Pipe & Construction Co., v. Utah*, 414 U.S. 538, 552-53 (1974). The rationale for that conclusion is that the named plaintiff, when he files his initial complaint in the class action litigation, places the defendants on notice as to both the substantive claims to be brought against them as well as the potential plaintiffs who may have the same or similar claims. *Id.*

at 554-55. *See also Honda v. Clark*, 386 U.S. 484, 500-01 (1967). Cooney's initial complaint – as well as the intervenor complaints of other inmates that were filed within the statute of limitations – like the initial complaint filed by a named plaintiff in class action litigation, placed defendants and the state on notice as to the specifics of Getsy's complaint and the possibility that Getsy would move to intervene and vindicate his own rights. Because they were on notice, the defendants and the state cannot claim to be prejudiced by Getsy's intervention.

Contrary to the representation in the state's motion, Getsy's legal proceedings continue. The Sixth Circuit's decision in this matter is not a foregone conclusion. Because Getsy's case is presently pending before the 6th Circuit awaiting a briefing scheduled, this Court should not set a date for Getsy's execution until that litigation is completed.

Wherefore, Jason Getsy respectfully requests this Court to deny the state's Motion to Set Execution Date.

Respectfully submitted,


MICHAEL J. BENZA (0061454)
17850 Geauga Lake Road
Chagrin Falls, OH 44023
216.319.1247
Counsel for Jason Getsy

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MEMORANDUM was served by regular US Mail on Dennis Watkins, Prosecuting Attorney, and LuWayne Annos, Assistant Prosecuting Attorney, 160 High St. N.W. 4th Floor, Warren, OH 44481, this 8th day of January, 2009.

Michael J. Benza by Pil (Stall: 0005877)
Michael J. Benza
Counsel for Jason Getsy

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)
Plaintiff-Appellee,) Case No. 96-2346
)
vs.)
)
JASON GETSY,)
Defendant-Appellant.)
)

MEMORANDUM IN OPPOSITION TO
MOTION TO SET EXECUTION DATE

EXHIBIT A

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

RICHARD COOEY, et al.,

Plaintiff,

v.

TED STRICKLAND, et al.,

Defendants.

Case No. 2:04-cv-1156

JUDGE GREGORY L. FROST

Magistrate Judge Mark R. Abel

ORDER

Previously, this Court filed a number of Opinions and Orders dismissing numerous plaintiffs from the captioned litigation. (Docs. # 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 359, 360, 403, 405, 406.) A number of those individuals subsequently filed notices of appeal, and several of those appellants have now asked this Court to certify the relevant prior decisions as immediately appealable pursuant to Federal Rule of Civil Procedure 54(b). That rule provides that “[w]hen an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.” Fed. R. Civ. P. 54(b).

Immediate review of the identified prior decisions best serves the needs of the litigants. This Court therefore concludes that such certification is unquestionably appropriate given the nature of the dismissals and the weighty questions of law involved. Because any inability to proceed with an immediate appeal would be nonsensical, the Court hereby amends the identified orders *nunc pro tunc* to include a Rule 54(b) certification that there is no just reason for the delay

of an appeal. Additionally, in the interest of remedying any potential hurdle to the parties' ability to take an immediate appeal, the Court directs the Clerk to enter a final judgment in regard to these parties that includes the following specific language: "Immediate review of the decisions dismissing plaintiffs from this action best serves the needs of the litigants. The Court therefore concludes that given the nature of the dismissals and the weighty questions of law involved, and because any inability to proceed with an immediate appeal would be nonsensical, there is no just reason for delay of an appeal and the Court hereby certifies its dismissal orders and this Judgment as immediately appealable under Fed. R. Civ. P. 54(b)."

The Sixth Circuit has held that entry of a Rule 54(b) certification following the filing of a notice of appeal cures any prior jurisdictional defect arising from a premature appeal. *Good v. Ohio Edison Co.*, 104 F.3d 93, 96 (6th Cir. 1997). Accordingly, the instant Order should resolve the issue of whether any dismissed plaintiff can proceed on appeal. The Clerk shall therefore designate all pending motions on the docket that seek a Rule 54(b) certification as resolved.

IT IS SO ORDERED.

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN A CIVIL CASE

Richard Cooley, et al.

vs

Case No. C2-04-1156

Ted Strickland, et al.

Judge Frost
Magistrate Judge Abel

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that the Court dismisses the complaint as to Plaintiffs Jeffrey Hill, Clarence Carter, Kevin Keith, Billy Slagle, Arthur Tyler, Romell Broom, Darryl Durr, Michael Turner, Melvin Bonnell, Daneil Wilson, Michael Benge, Michael Beuke, Abdul Hakiym Zakiy (aka Roderick Davie), Brett Hartmann, Maurice Mason, Jason Getsy, Richard Niels, Johnnie Baston and Mark Wiles. Immediate review of the decisions dismissing plaintiffs from this action best serves the needs of the litigants. The Court therefore concludes that given the nature of the dismissals and the weighty questions of law involved, and because any inability to proceed with an immediate appeal would be nonsensical, there is no just reason for delay of an appeal and the Court hereby certifies its dismissal orders and this Judgment as immediately appealable under Fed. R. Civ. P. 54(b).

Date: **December 8, 2008**

James Bonini, Clerk

s/ Scott Miller
By Scott Miller /Deputy Clerk