

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, :
-vs- : Case No. 96-1956
LAWRENCE REYNOLDS, :
Appellant. :

APPELLANT'S OPPOSITION TO STATE'S
MOTION TO SET NEW EXECUTION DATE

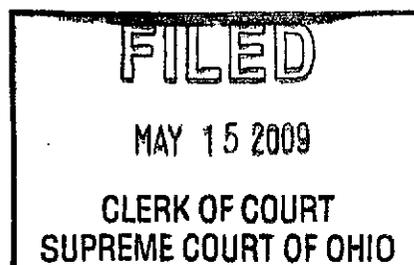
Office of the
Ohio Public Defender

Robert K. Lowe – 0072264
Assistant State Public Defender
Counsel of Record

Kathryn L. Sandford – 0063985
Assistant State Public Defender

250 East Broad Street
Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 – Fax

Counsel for Appellant



IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, :
-vs- : Case No. 96-1956
LAWRENCE REYNOLDS, :
Appellant. :

APPELLANT'S OPPOSITION TO STATE'S
MOTION TO SET NEW EXECUTION DATE

Now comes Appellant, Lawrence Reynolds, and files his opposition to the State's Motion to Set New Execution Date. The reasons for this Motion are delineated in the attached Memorandum in Support.

Respectfully submitted,

Office of the
Ohio Public Defender

By: 

Robert K. Lowe – 0072264
Assistant State Public Defender
Counsel of Record

Kathryn L. Sandford – 0063985
Assistant State Public Defender

250 East Broad Street
Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 – Fax

Counsel for Appellant

MEMORANDUM IN SUPPORT

On May 5, 2009, the State filed a Motion to Set New Execution Date for Appellant. The State asserts that Appellant does not have any litigation currently pending in either state or federal court. However, Appellant does have litigation presently ongoing.

Appellant is the named plaintiff in Reynolds v. Strickland, et al., case no. 08-4144 (6th Cir.) before the Sixth Circuit Court of Appeals. (Ex. A). In that case, on September 17, 2008, Appellant filed a notice of appeal with the Sixth Circuit from the district court's dismissal of his lawsuit challenging the constitutionality of Ohio's lethal injection protocol on August 28, 2008. Reynolds v. Strickland, et al., 2008 U.S. Dist. LEXIS 78977, Case No. 2:08-cv-442 (S.D. OH Aug. 28, 2008). The Sixth Circuit has not taken any action on Appellant's litigation. Therefore, one can infer that the Sixth Circuit has not dismissed Appellant's lawsuit as frivolous.

Appellant is one of the original plaintiffs in the case Otte v. Strickland, et al., Case No. 08-cv-013337 (Franklin Co. Common Pleas), (Ex. B) filed September 18, 2008, which is also a lawsuit that asserts Ohio's lethal injection protocol is unconstitutional. The Otte case currently has a trial date scheduled for September 17, 2009.

There are two significant opposing decisions in Ohio concerning Ohio's lethal injection protocol. In State v. Rivera, Case Nos. 04CR065940, 05CR068067 (Lorain Cty. Common Pleas)¹, the trial court conducted an evidentiary hearing concerning whether Ohio's lethal injection protocol was constitutional. The court held that the use of two of the drugs in the three-drug protocol creates an "unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death." According to R.C. 2949.22(A), Appellant has a right to an

¹ The Ninth District Court of Appeals dismissed the appeals filed by both parties for lack of a final, appealable order. State v. Rivera, Case Nos. 08CA009426, 08CA009427, 2009 Ohio 1428, 2009 Ohio App. LEXIS 1245 at *19-20 (9th Dist. Ct. App. Mar. 30, 2009).

execution that is a painless death. The Lorain court held that Ohio's lethal injection protocol as it presently exists, violates a death-sentenced individual's constitutional right according to R.C. 2949.22(A). Rivera, Case Nos. 04CR065940, 05CR068067 (Lorain Cty. Common Pleas June 10, 2008) (Ex. C - Judgment Entry at pp. 6-7).

In Cooey v. Strickland, 2009 U.S. Dist. LEXIS 38222, Case No. 2:04-cv-1156 (S.D. OH Apr. 21, 2009) the federal district court held a preliminary injunction hearing on the same issue as in Rivera. The court concluded that Biros, the petitioner in the Cooey litigation, had not presented enough evidence for the district court to continue the preliminary injunction that had previously been granted which had stayed the execution date. However, in so ruling, the court stated:

This is not to say that Biros or any of the various plaintiffs involved in this litigation are incapable of ultimately prevailing in this litigation. Ohio's method of execution by lethal injection is a system replete with inherent flaws that raise profound concerns and present unnecessary risks, even if it appears unlikely that Biros will demonstrate that those risks rise to the level of violating the United States Constitution. Thus, although the fact that the evidence at this stage of the litigation does not present a likelihood of **Biros** prevailing on his claim of a constitutional violation proves dispositive of his request for a continued stay of execution, it does not foreclose the possibility that additional evidence will indeed prove that the problems with Ohio's policies and practices rise to the level of constitutional error.

Today's decision therefore neither holds that Ohio's method of execution by lethal injection is constitutional nor unconstitutional. Rather, today's decision reflects only that at this juncture, Biros has not met his burden of persuading this Court that he is substantially likely to prove unconstitutionality. It would wholly confound this Court and no doubt many if not most of the people of the State of Ohio, however, if Defendants regarded today's interlocutory decision as a wholesale endorsement of Ohio's protocol, practices, and policies, both written and unwritten, and then did nothing to improve them. Such a misconstrued legal victory for Defendants would be Pyrrhic given that Defendants are charged with carrying out humane and constitutional executions and not with simply prevailing in litigation.

Director Collins appears to recognize as much, given that he testified that the ultimate goal is for Ohio to be as humane as possible and as professional as possible in carrying out its lawful executions. These are

indisputably correct goals. But Collins also testified that he believes Ohio's procedures are as humane and the best they can be right now, and he is incorrect. Thus, despite Defendants' victory on the narrow issue of injunctive relief today, the aspirations of the State would suggest that the question should not be simply what *must* be done under compulsion by the Constitution, but also what *should* be done to meet the professed laudable goals of the State of Ohio.

Id. at *262-264.

The ruling of the district court on Biros' preliminary injunction hearing in Cooley is not dispositive of the lethal injection litigation. The district court made it clear that "the hearing can not even provide a conclusive decision on the merits of Biros' claims. This is because any findings of fact and conclusions of law made by a district court in addressing a request for injunctive relief are not binding at a trial on the merits." Cooley, Doc. No. 409 at pp. 1-2 (Ex. D). (citations omitted).

Additionally, the district court issued an Order in Cooley stating that discovery on lethal injection will be afforded to other parties. Cooley, Doc. No. 425. (Ex. E). On May 11, 2009, the district court scheduled a Preliminary Pretrial Conference for June 23, 2009 in this lethal injection case. Cooley, Doc. No. 482. (Ex. F).

The issue of the constitutionality of Ohio's lethal injection protocol is far from over. The Sixth Circuit has remanded two additional death penalty cases to the district court for "factual development on lethal injection." Jones v. Bradshaw, Case No. 07-3766 (6th Cir. Jan. 30, 2009) (Ex. G); Adams v. Bradshaw, Case No. 07-3688 (6th Cir. Feb. 13, 2009) (Ex. H).

The notion of comity generally refers to federal courts requiring the state courts being given the first opportunity to rule on an individual's claims raised in an appeal to "minimize friction between our federal and state systems of justice." Picard v. Connor, 404 U.S. 270, 275 (1971). However, lethal injection lawsuits are properly filed under 42 U.S.C. § 1983. Hill v.

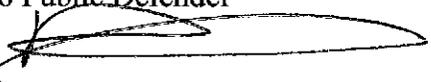
McDonough, 547 U.S. 573 (2006), Wilkinson v. Dotson, 544 U.S. 74, 82 (2005). Since these lawsuits originate in federal court, after the inmate has first exhausted his state administrative remedies, comity necessitates the state courts respect the federal court province in 42 U.S.C. §1983 actions and the decisions reached. Should a federal court in Ohio decide that Ohio's lethal injection protocol is unconstitutional, the State would not be allowed to execute a death-sentenced individual using the current procedures employed. Since the litigation concerning the constitutionality of lethal injection in Ohio is still ongoing, this Court should not set an execution date for Appellant but, rather, allow the federal courts to fully determine this issue.

CONCLUSION

Due to the holding in Rivera, the district court's inconclusive ruling on the constitutionality of Ohio's lethal injection protocol in Cooey and the pending litigation both in state and federal courts, Appellant requests this Court deny the State's motion to set an execution date.

Respectfully submitted,

Office of the
Ohio Public Defender

By: 

Robert K. Lowe – 0072264
Assistant State Public Defender
Counsel of Record

Kathryn L. Sandford – 0063985
Assistant State Public Defender

250 East Broad Street
Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 – Fax
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **Appellant's Opposition To State's Motion To Set New Execution Date** was forwarded by regular U.S. Mail to Richard Kasay, Assistance Prosecuting Attorney, Summit County, 53 University Avenue, Akron, Ohio 44307 on this 15th day of May, 2009.

By: 

Robert K. Lowe - 0072264
Counsel for Appellant

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

Appellee,

:

-vs-

:

Case No. 96-1956

LAWRENCE REYNOLDS,

:

Appellant.

:

APPENDIX

[Court Home](#)
[Case Search](#)
[Calendar](#)
[Opinions](#)
[Orders/Judgments](#)
[Billing History](#)
[XML](#)
[TXT](#)
[Logout](#)
[Help](#)

General Docket
United States Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 08-4144 **Docketed:** 09/17/2008
Nature of Suit: 3550 Prisoner: Civil Rights
 Lawrence Reynolds v. Ted Strickland, et al
Appeal From: Southern District of Ohio at Columbus

Case Type Information:

- 1) Prisoner
- 2) State
- 3) Prisoner Civil Rights

Originating Court Information:

District: 0648-2 : 08-00442
Trial Judge: Gregory L. Frost, U.S. District Judge
Date Filed: 05/14/2008
Date Order/Judgment: 08/28/2008

Date NOA Filed:
 09/02/2008

Prior Cases:

None

Current Cases:

None

LAWRENCE REYNOLDS
 Plaintiff - Appellant

Gregory William Meyers, Attorney
 Direct: 614-466-5394
 [COR LD NTC Appointed]
 Ohio Public Defender's Office
 250 E. Broad Street
 Suite 1400
 Columbus, OH 43215

Pamela J. Prude-Smithers, Assistant State Public
 Defender
 Direct: 614-466-5394
 [NTC Appointed]
 Ohio Public Defender's Office
 250 E. Broad Street
 Suite 1400
 Columbus, OH 43215

Kimberly Sue Rigby, Assistant State Public Defender
 Direct: 614-466-5394
 [COR Appointed]
 Ohio Public Defender's Office
 250 E. Broad Street
 Suite 1400
 Columbus, OH 43215

EXHIBIT

A

v.

TED STRICKLAND
Defendant - Appellee

Charles L. Wille
Direct: 614-728-7055
[COR LD NTC Retained]
Office of the Ohio Attorney General
150 E. Gay Street
16th Floor
Columbus, OH 43215

LAWRENCE REYNOLDS,

Plaintiff - Appellant

v.

TED STRICKLAND, et al.,

Defendants - Appellees

- 09/17/2008  Prisoner Case Docketed. Notice filed by Appellant Lawrence Reynolds. Transcript needed: n.
- 09/17/2008 The case manager for this case is: Laura Jones
- 09/25/2008  MOTION to INTERVENE filed by Brie A. Friedman for Gregory Bryant-Bey. Certificate of Service: 09/25/2008.
- 09/25/2008  TRANSCRIPT ORDER FORM filed by Ms. Kimberly S. Rigby for Lawrence Reynolds; No hearings held in District Court. Certificate of Service: 09/25/2008.
- 09/25/2008  DESIGNATION of RECORD filed by Attorney Ms. Kimberly S. Rigby for Appellant Lawrence Reynolds Certificate of Service: 09/25/2008.
- 09/25/2008  APPEARANCE filed for Appellant Lawrence Reynolds by Kimberly S. Rigby. Certificate of Service: 09/25/2008.
- 09/25/2008  MOTION to INTERVENE filed by Kimberly S. Rigby for Melvin Bonnell. Certificate of Service: 09/25/2008.
- 09/26/2008  MOTION to INTERVENE filed by Randall L. Porter for John Fautenberry. Certificate of Service: 09/26/2008.
- 09/26/2008  APPEARANCE filed for Appellant Lawrence Reynolds by Gregory W. Meyers. Certificate of Service: 09/26/2008.
- 09/26/2008  MOTION to INTERVENE filed by Kelly L. Schneider for Richard Cooley. Certificate of Service: 09/26/2008.
- 09/26/2008  MOTION to INTERVENE filed by Kelly L. Schneider for William Garner. Certificate of Service: 09/26/2008.
- 09/26/2008  MOTION to INTERVENE filed by Kelly L. Schneider for Marvellous Keene. Certificate of Service: 09/26/2008.
- 09/26/2008  MOTION to INTERVENE filed by Kelly L. Schneider for Billy Slagle. Certificate of Service: 09/26/2008.
- 09/26/2008  MOTION to INTERVENE filed by Kelly L. Schneider for Gary Otte. Certificate of Service: 09/26/2008.
- 09/26/2008  MOTION to INTERVENE filed by Linda E. Prucha for Clarence Carter. Certificate of Service: 09/26/2008.
- 09/29/2008  MOTION to INTERVENE filed by Randall L. Porter for Michael Benge. Certificate of Service: 09/29/2008.
- 09/29/2008  MOTION to INTERVENE filed by Randall L. Porter for Charles Lorraine. Certificate of Service: 09/29/2008.
- 09/29/2008  MOTION to INTERVENE filed by Randall L. Porter for Warren Henness. Certificate of Service: 09/29/2008.
- 09/29/2008  MOTION to INTERVENE filed by Linda E. Prucha for Sidney Cornwell. Certificate of Service: 09/29/2008.
- 09/29/2008  MOTION to INTERVENE filed by Linda E. Prucha for Daniel Bedford. Certificate of Service: 09/29/2008.
- 09/30/2008  APPEARANCE filed for Intervenors Daniel Lee Bedford, Clarence Carter and Sidney Cornwell by Linda E. Prucha. Certificate of Service: 09/30/2008.

- 09/30/2008 APPEARANCE filed for Intervenor Clarence Carter by Joseph E. Wilhelm. Certificate of Service: 09/30/2008.
- 09/30/2008 APPEARANCE filed for Intervenor Richard Wade Cooley, II, William Garner, Marvellous Keene, Gary Otte and Billy Slagle by Kelly L. Schneider. Certificate of Service: 09/30/2008.
- 09/30/2008 APPEARANCE filed for Intervenor Michael W. Bengel, John Fautenberry, Warren K. Henness and Charles L. Lorraine by Randall L. Porter. Certificate of Service: 09/30/2008.
- 09/30/2008 MOTION to INTERVENE filed by Gerald W. Simmons for Lawrence Landrum. Certificate of Service: 09/30/2008.
- 09/30/2008 MOTION to INTERVENE filed by Tyson Fleming for Kevin Keith. Certificate of Service: 09/30/2008.
- 09/30/2008 MOTION to INTERVENE filed by Tyson Fleming for Johnnie Baston. Certificate of Service: 09/30/2008.
- 09/30/2008 MOTION to INTERVENE filed by Mark A. Vander Laan for Billy Joe Sowell. Certificate of Service: 09/30/2008.
- 09/30/2008 APPEARANCE filed for Intervenor Lawrence Landrum by Gerald W. Simmons. Certificate of Service: 09/30/2008.
- 09/30/2008 APPEARANCE filed for Intervenor Billy Joe Sowell by Mark A. Vander Laan. Certificate of Service: 09/30/2008.
- 10/01/2008 APPEARANCE filed for Intervenor Johnnie Baston by Tyson Fleming. Certificate of Service: 10/01/2008.
- 10/01/2008 APPEARANCE filed for Intervenor Kevin Keith by Tyson Fleming. Certificate of Service: 10/01/2008.
- 10/01/2008 APPEARANCE filed for Intervenor Billy Joe Sowell by Christopher R. McDowell. Certificate of Service: 10/01/2008.
- 10/02/2008 APPEARANCE filed for Intervenor Gregory L. Bryant-Bey, Lawrence Landrum and Billy Joe Sowell by Randall L. Porter. Certificate of Service: 10/02/2008.
- 10/02/2008 APPEARANCE filed for Intervenor Gregory L. Bryant-Bey by Brie Friedman. Certificate of Service: 10/02/2008.
- 10/02/2008 APPEARANCE filed for Appellee Ted Strickland by Charles L. Wille. Certificate of Service: 10/02/2008.
- 10/02/2008 MOTION to INTERVENE filed by Pamela Prude-Smithers for Joseph Murphy. Certificate of Service: 10/02/2008.
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3850522-2]; previously filed by Gregory Bryant-Bey. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008. --[Edited 10/03/2008 by LAJ to include intervenor's name].
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3850830-2]; previously filed by Melvin Bonnell. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008. --[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3851213-2]; previously filed by John Fautenberry. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3851738-2]; previously filed by

Richard Cooley. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008. --[Edited 10/03/2008 by LAJ to include intervenor's name]

- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3851744-2]; previously filed by William Garner. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3851748-2]; previously filed by Marvellous Keene. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3851749-2]; previously filed by Billy Slagle. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008. --[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3851750-2]; previously filed by Gary Otte. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3851814-2]; previously filed by Clarence Carter. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3852262-2]; previously filed by Michael Benge. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3852268-2]; previously filed by Charles Lorrain. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3852277-2]; previously filed by Warren Henness. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3852409-2]; previously filed by Sidney Cornwell. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3852413-2]; previously filed by Daniel Bedford. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3853415-2]; previously filed by Lawrence Landrum. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3853518-2]; previously filed by Kevin Keith. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE in opposition filed regarding a motion to intervene, [3853538-2]; previously filed by Johnny Baston. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/02/2008 RESPONSE filed regarding a motion to intervene, [3853612-2]; previously filed by Billy Joe Sowell. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/02/2008.--[Edited 10/03/2008 by LAJ to include intervenor's name]
- 10/03/2008 APPEARANCE filed for Intervenor Joseph D. Murphy by Pamela Prude-Smithers. Certificate of

Service: 10/03/2008.

- 10/06/2008  APPEARANCE filed for Intervenors Melvin Bonnell and Richard Wade Cooley, II by Kimberly S. Rigby. Certificate of Service: 10/06/2008.
- 10/08/2008  MOTION to INTERVENE filed by Kathryn L. Sandford for Kareem Jackson. Certificate of Service: 10/08/2008.
- 10/08/2008  MOTION to INTERVENE filed by Kathryn L. Sandford for Arthur Tyler. Certificate of Service: 10/08/2008.
- 10/09/2008  APPEARANCE filed for Intervenors Kareem Jackson, Joseph D. Murphy and Arthur Tyler by Kathryn L. Sandford. Certificate of Service: 10/09/2008.
- 10/14/2008  REPLY filed by Mr. Mark A. Vander Laan for Billy Joe Sowell regarding *In Support of Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Mr. Randall L. Porter for Billy Joe Sowell, Charles L. Lorraine, Michael W. Benge, Gregory L. Bryant-Bey, Lawrence Landrum, John Fautenberry and Warren K. Henness regarding *Fautenberry's Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Mr. Randall L. Porter for Billy Joe Sowell, Charles L. Lorraine, Michael W. Benge, Gregory L. Bryant-Bey, Lawrence Landrum, John Fautenberry and Warren K. Henness regarding *Bryant-Bey's Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Mr. Randall L. Porter for Billy Joe Sowell, Charles L. Lorraine, Michael W. Benge, Gregory L. Bryant-Bey, Lawrence Landrum, John Fautenberry and Warren K. Henness regarding *Henness' Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Mr. Randall L. Porter for Billy Joe Sowell, Charles L. Lorraine, Michael W. Benge, Gregory L. Bryant-Bey, Lawrence Landrum, John Fautenberry and Warren K. Henness regarding *Benge's Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Mr. Gerald W. Simmons for Lawrence Landrum regarding *Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Ms. Kelly L. Schneider for Billy Slagle, William Garner, Richard Wade Cooley, II, Gary Otte and Marvellous Keene regarding *Gary Otte*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Ms. Kelly L. Schneider for Billy Slagle, William Garner, Richard Wade Cooley, II, Gary Otte and Marvellous Keene regarding *Billy Slagle's Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Ms. Kimberly S. Rigby for Melvin Bonnell and Richard Wade Cooley, II regarding *Melvin Bonnell's Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Ms. Kelly L. Schneider for Billy Slagle, William Garner, Richard Wade Cooley, II, Gary Otte and Marvellous Keene regarding *Marvellous Keene's Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Ms. Kelly L. Schneider for Billy Slagle, William Garner, Richard Wade Cooley, II, Gary Otte and Marvellous Keene regarding *William Garner's Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Mr. Randall L. Porter for Billy Joe Sowell, Charles L. Lorraine, Michael W. Benge, Gregory L. Bryant-Bey, Lawrence Landrum, John Fautenberry and Warren K. Henness regarding *Lorraine's Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Ms. Linda Eleanor Prucha for Sidney Cornwell, Clarence Carter and Daniel Lee Bedford regarding *Cornwell's Motion to Intervene*. Certificate of Service: 10/14/2008.

- 10/14/2008  REPLY filed by Ms. Linda Eleanor Prucha for Sidney Cornwell, Clarence Carter and Daniel Lee Bedford regarding *Bedford's Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/14/2008  REPLY filed by Mr. Joseph E. Wilhelm for Clarence Carter regarding *Motion to Intervene*. Certificate of Service: 10/14/2008.
- 10/20/2008  NOTIFICATION filed by Ms. Kelly L. Schneider for Billy Slagle, William Garner, Richard Wade Cooley, II, Gary Otte and Marvellous Keene regarding Suggestion of death of Richard Cooley. Certificate of Service: 10/20/2008.
- 10/24/2008  RESPONSE in opposition filed regarding a motion to intervene, [3859064-2]; previously filed by Kareem Jackson. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/24/2008.--[Edited 10/27/2008 by LAJ to add intervenor's name]
- 10/24/2008  RESPONSE in opposition filed regarding a motion to intervene, [3859066-2]; previously filed by Arthur Tyler. Response from Attorney Charles L. Wille for Appellee Ted Strickland Certificate of Service:10/24/2008.--[Edited 10/27/2008 by LAJ to add intervenor's name.]
- 10/27/2008  REPLY filed by Ms. Kathryn Louise Sandford for Arthur Tyler, Joseph D. Murphy and Kareem Jackson regarding *Tyler's Reply to Defendant's Memorandum in Opposition to his Motion to Intervene*. Certificate of Service: 10/27/2008.
- 10/27/2008  REPLY filed by Ms. Kathryn Louise Sandford for Arthur Tyler, Joseph D. Murphy and Kareem Jackson regarding *Jackson's Reply to Defendant's Memorandum in Opposition to his Motion to Intervene*. Certificate of Service: 10/27/2008.
- 05/11/2009  MOTION to INTERVENE filed by Kimberly S. Rigby for Abdullah Sharif Kaazim Mahdi, f/k/a Vernon Smith. Certificate of Service: 05/11/2009.

PACER Service Center			
Transaction Receipt			
05/11/2009 11:36:55			
PACER Login:	oh0003	Client Code:	Reynolds/Sandford
Description:	Docket Report (filtered)	Search Criteria:	08-4144
Billable Pages:	5	Cost:	0.40

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
GENERAL DIVISION

GARY OTTE

#264-667
Ohio State Penitentiary
878 Coitsville-Hubbard Road
Youngstown, Ohio 44505,

CASE NO. **08 CVH 09 13337**

**Complaint for Declaratory
Judgment and Injunctive Relief**

MARVELLOUS KEENE

#286-363
Ohio State Penitentiary
878 Coitsville-Hubbard Road
Youngstown, Ohio 44505,

EVIDENTIARY HEARING REQUESTED

BILLY SLAGLE

#203-172
Ohio State Penitentiary
878 Coitsville-Hubbard Road
Youngstown, Ohio 44505,

MELVIN BONNELL

#204-019
Ohio State Penitentiary
878 Coitsville-Hubbard Road
Youngstown, Ohio 44505,

LAWRENCE REYNOLDS

#296-121
Ohio State Penitentiary
878 Coitsville-Hubbard Road
Youngstown, Ohio 44505,

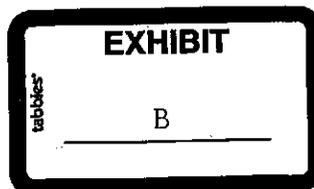
WILLIAM GARNER

#264-900
MANSFIELD CORRECTIONAL
P.O. BOX 788
MANSFIELD, OHIO 44901

RICHARD COOEY

#194-016
OHIO STATE PENITENTIARY
878 COITSVILLE-HUBBARD ROAD
YOUNGSTOWN, OHIO 44505

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2008 SEP 18 AM 10:32
CLERK OF COURTS



MICHAEL BIES

#264-736

OHIO STATE PENITENTIARY
878 COITSVILLE-HUBBARD ROAD
YOUNGSTOWN, OHIO 44505

NATHANIEL JACKSON

#440-891

OHIO STATE PENITENTIARY
878 COITSVILLE-HUBBARD ROAD
YOUNGSTOWN, OHIO 44505

DAVID STEFFEN

#174-024

OHIO STATE PENITENTIARY
878 COITSVILLE-HUBBARD ROAD
YOUNGSTOWN, OHIO 44505

LAWRENCE LANDRUM

#189-982

OHIO STATE PENITENTIARY
878 COITSVILLE-HUBBARD ROAD
YOUNGSTOWN, OHIO 44505

JOHN FAUTENBERRY

#279-989

OHIO STATE PENITENTIARY
878 COITSVILLE-HUBBARD ROAD
YOUNGSTOWN, OHIO 44505

CHARLES LORRAINE

#194-013

OHIO STATE PENITENTIARY
878 COITSVILLE-HUBBARD ROAD
YOUNGSTOWN, OHIO 44505

WARREN HENNESS

#287-375

OHIO STATE PENITENTIARY
878 COITSVILLE-HUBBARD ROAD
YOUNGSTOWN, OHIO 44505

RICHARD NIELDS

#352-374

OHIO STATE PENITENTIARY
878 COITSVILLE-HUBBARD ROAD
YOUNGSTOWN, OHIO 44505

DENNIS MCGUIRE

#305-892

MANSFIELD CORRECTIONAL
P.O. BOX 788
MANSFIELD, OHIO 44901

Plaintiffs,

vs.

TED STRICKLAND, GOVERNOR

State of Ohio
77 South High Street, 30th Floor
Columbus, Ohio 43215,

TERRY COLLINS, DIRECTOR

Ohio Dept. of Rehabilitation & Correction
1050 Freeway Drive North
Columbus, Ohio 43229,

PHIL KERNS, WARDEN

Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #1, EXECUTION TEAM MEMBER

c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #2, EXECUTION TEAM MEMBER

c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #3, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #4, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #5, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #6, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #7, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #8, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #9, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #10, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

JOHN/JANE DOE #11, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

and

JOHN/JANE DOE #12, EXECUTION TEAM MEMBER
c/o Southern Ohio Correctional Facility
1724 State Route 728
Lucasville, Ohio 45699,

Defendants.

Summary of Action

1. All Plaintiffs were indicted, tried, convicted and sentenced to death in the State of Ohio. All Plaintiffs remain on the State of Ohio's death row. If Plaintiffs do not obtain relief in their individual cases or are not granted clemency, they will be executed.

2. The Ohio Legislature has established the procedure for executing persons in the State of Ohio, "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.*" O.R.C. § 2944.22(A) (emphasis added).

3. The Ohio Legislature's use of the term "shall" in O.R.C. § 2944.22(A) imposes a mandatory duty upon the Ohio Department of Rehabilitation and Correction to provide the condemned with an execution that is both quick and painless. *State v. Rivera*, Lorain C.P. No. 04CR065940, p. 5, ¶ 4. [Exhibit A]

4. Because the State has a mandatory obligation to execute a condemned in a manner that is both quick and painless, the condemned has a substantive right to be executed in a manner that is both quick and painless. *State v. Rivera*, pp. 5-6, ¶¶ 5-6.

FILED
LORAIN COUNTY

DB
**LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO**

2008 JUN 10 A 9:41

**RON NABAKOWSKI, Clerk
JOURNAL ENTRY
James M Burge, Judge**

CLERK OF COMMON PLEAS
RON NABAKOWSKI

Date

June 10, 2008

Case No. 04CR065940

05CR068067

STATE OF OHIO

Plaintiff

LORAIN COUNTY PROSECUTOR

Plaintiff's Attorney

VS

RUBEN O. RIVERA
RONALD MC CLOUD

Defendant

KREIG J BRUSNAHAN
DANIEL WIGHTMAN

Defendant's Attorney (440) 930-2600

JUDGMENT ENTRY

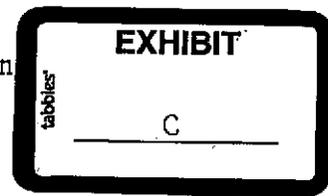
The Case

These causes came on to be heard upon the motion filed by each defendant, challenging the Ohio lethal injection protocol as constituting cruel and unusual punishment, proscribed by the Eighth Amendment to the United States Constitution and by Section 9, Article 1 of the Ohio Constitution.

Defendants argue further that the Ohio lethal injection protocol violates the very statute which mandates that executions in Ohio be carried out by lethal injection, R.C.2949.22. Defendants claim that the three-drug protocol currently approved for use by the Ohio Department of Rehabilitation and Correction violates R.C.2949.22 because the drugs used create an unnecessary risk that the condemned will experience an agonizing and painful death. Defendants argue that the use of this protocol is contrary to the language of the statute, which mandates that the method of lethal injection cause death "quickly and painlessly." Defendants maintain that the use of this three-drug protocol arbitrarily abrogates the condemned person's statutorily created, substantive right to expect and to suffer a painless execution.

The state of Ohio has responded that the current lethal injection protocol conforms to the statute because death is caused quickly, and unless an error is made in conducting the execution, which the state claims is extremely unlikely the drugs used will cause a painless death.

The court conducted hearings over two days and heard expert testimony from the defense (Mark Heath, M.D.) and from the state (Mark Dershwitz, M.D.). After reviewing the reports of the physicians, together with other written materials submitted with each



report, and after evaluating the testimony provided by each physician, the court makes the following findings of fact, draws the following conclusions of law, and enters its judgment accordingly.

Findings of Fact

1. The state of Ohio uses a three-drug lethal injection protocol consisting of sodium thiopental, pancuronium bromide and potassium chloride, administered in the above order, as follows:
 - A. sodium thiopental: 40 cc;
 - B. sodium thiopental: 40 cc;
 - C. saline flush: 20 cc;
 - D. pancuronium bromide: 25 cc;
 - E. pancuronium bromide: 25 cc;
 - F. saline flush: 20 cc;
 - G. potassium chloride: 50 cc;
 - H. saline flush: 20 cc.

2. The properties of the above drugs produce the following results:
 - A. sodium thiopental – anesthetic;
 - B. pancuronium bromide – paralytic;
 - C. potassium chloride – cardiac arrest.

3. The issue of whether an execution is painless arises, in part, from the use of pancuronium bromide, which will render the condemned person unable to breath, move, or communicate:

“...it does not affect our ability to think, or to feel, or to hear, or anything, any of the senses, or any of our intellectual processes, or consciousness. So a person who’s given pancuronium...would be wide awake, and - - but looking at them, you would - - they would look like they were peacefully asleep...But they would, after a time, experience intense desire to breathe. It would be like trying to hold one’s breathe. And they wouldn’t be able to draw a breath, and they would suffocate.” (Heath, Tr. 72)

“Pancuronium also would kill a person, but again, it would be excruciating. I wouldn’t really call it painful, because I don’t think being unable to breathe exactly causes pain. When we hold our breath it’s clearly agonizing, but I wouldn’t use the word “pain” to describe that. But clearly, an agonizing death would occur.” (Heath, Tr. 75)

4. The second drug in the lethal injection protocol with properties which cause pain is potassium chloride. The reason is that before stopping the heart,

“it gets in contact with nerve fibers, it activates the nerve fibers to the maximal extent possible, and so it will activate pain fibers to the maximal extent that they can be activated. And so concentrated potassium causes excruciating pain in the veins as it travels up the arms and through the chest.” (Heath, Tr. 73)
5. Based upon the foregoing, and upon the agreement of the expert witnesses presented by each party, the court finds that pancuronium bromide and potassium chloride will cause an agonizing or an excruciatingly painful death, if the condemned person is not sufficiently anesthetized by the delivery of an adequate dosage of sodium thiopental.
6. The following causes will compromise the delivery of an adequate dosage of sodium thiopental:
 - A. the useful life of the drug has expired;
 - B. the drug is not properly mixed in an aqueous solution;
 - C. the incorrect syringe is selected;
 - D. a retrograde injection may occur where the drug backs up into the tubing and deposits in the I.V. bag;
 - E. the tubing may leak;
 - F. the I.V. catheter may be improperly inserted into a vein, or into the soft issue;
 - G. the I.V. catheter, though properly inserted into a vein, may migrate out of the vein;
 - H. the vein injected may perforate, rupture, or otherwise leak.
7. The court finds further that:
 - A. It is impossible to determine the condemned person's depth of anesthesia before administering the agonizing or painful drugs, in that medical equipment supply companies will not sell medical equipment to measure depth of anesthesia for the purpose of carrying out an execution;
 - B. Physicians will not participate in the execution process, a fact which results in the use of paraprofessionals to mix the drugs, prepare the syringes, run the I.V. lines, insert the heparin lock (catheter) and inject the drugs; and,

- C. The warden of the institution is required to determine whether the condemned person is sufficiently anesthetized before the pancuronium bromide and the potassium chloride are delivered, and the warden is not able to fulfill his duty without specialized medical equipment.
8. The experts testifying for each party agreed, and the court finds that mistakes are made in the delivery of anesthesia, even in the clinical setting, resulting in approximately 30,000 patients per year regaining consciousness during surgery, a circumstance which, due to the use of paralytic drugs, is not perceptible until the procedure is completed.
 9. The court finds further that the occurrence of the potential errors listed in finding no. 6, *supra*, in either a clinical setting or during an execution, is not quantifiable and, hence, is not predicable.
 10. Circumstantial evidence exists that some condemned prisoners have suffered a painful death, due to a flawed lethal injection; however, the occurrence of suffering cannot be known, as post-execution debriefing of the condemned person is not possible.

Conclusions of Fact

1. Pancuronium bromide prevents contortion or grotesque movement by the condemned person during the delivery of the potassium chloride, which also prevents visual trauma to the execution witnesses should the level of anesthesia not be sufficient to mask the body's reaction to pain. Pancuronium is not necessary to cause death by lethal injection.
2. Potassium chloride hastens death by stopping the heart almost immediately. Potassium chloride is not necessary to cause death by lethal injection.
3. The dosage of sodium thiopental used in Ohio executions (2 grams) is sufficient to cause death if properly administered, though death would not normally occur as quickly as when potassium chloride is used to stop the heart.
4. If pancuronium bromide and potassium chloride are eliminated from the lethal injection protocol, a sufficient dosage of sodium thiopental will cause death rapidly and without the possibility causing pain to the condemned.

- A. Executions have been conducted where autopsy results showed that cardiac arrest and death have occurred after the administration of sodium thiopental, but before the delivery of pancuronium bromide and potassium chloride.
- B. In California, a massive dose (five grams) of sodium thiopental are used in the lethal injection protocol.

Conclusions of Law

1. Capital punishment is not per se cruel and unusual punishment, prohibited by the Eighth Amendment to the United States Constitution and by Section 1, Article 9 of the Ohio Constitution. Gregg v. Georgia (1976), 428 U.S. 153,187 (FN5.); State v. Jenkins (1984), 15 Ohio St. 3d 164, 167-169.
2. Capital punishment administered by lethal injection is not per se cruel and unusual punishment, prohibited by the Eighth Amendment to the United States Constitution and by Section 1, Article 9 of the Ohio Constitution. Baze v. Rees (2008), 128 S. Ct. 1520, 1537-1538.
3. The Ohio statute authorizing the administration of capital punishment by lethal injection, R.C.2949.22, provides, in relevant part, as follows:

“(A) Except as provided in division (C) of this section, 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*. The application of the drug or combination of drugs shall be continued until the person is dead...” (emphasis supplied)
4. The purpose of division (A), *supra*, is to provide the condemned person with an execution which is “quick” and “painless;” and the legislature’s use of the word, “shall,” when qualifying the state’s duty to provide a quick and painless death signifies that the duty is mandatory.
5. When the duty of the state to the individual is mandatory, a property interest is created in the benefit conferred upon the individual, i.e. “Property interests...are created and their dimensions are defined by existing *rules* or understandings that *stem from an independent source such as state law rules*...that secure certain benefits and that support claims of entitlement to those benefits.” Board of Regents of State Colleges v. Roth (1972), 408 U.S. 564, 577 (emphasis supplied).

6. If a duty from the state to a person is mandated by statute, then the person to whom the duty is owed has a substantive, property right to the performance of that duty by the state, which may not be "arbitrarily abrogated." Wolf v. McDonnell (1974), 418 U.S. 539, 557.
7. The court holds that the use of two drugs in the lethal injection protocol (pancuronium bromide and potassium chloride) creates an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death. Thus, the right of the accused to the expectation and suffering of a painless death, as mandated by R.C.2949.22(A), is "arbitrarily abrogated."
8. The court holds further that the words, "quickly and painlessly," must be defined according to the rules of grammar and common usage, and that these words must be read together, in order to accomplish the purpose of the General Assembly in enacting the statute, i.e. to enact a death penalty statute which provides for an execution which is painless to the condemned. R.C.1.42, 1.47.
9. The parties have agreed and the court holds that the word, "painless," is a superlative which cannot be qualified and which means "without pain."
10. The word, "quickly," is an adverb that always modifies a verb, in this case, the infinitive form of the verb, "to be." It describes the rate at which an action is done. Thus, the meaning of the word, "quickly," is relative to the activity described: to pay a bill "quickly" could mean, "by return mail;" to respond to an emergency "quickly," could mean, "immediately." Hence, the word "quickly" in common parlance means, "rapidly enough to complete an act, and no longer."
11. Therefore, the court holds that when the General Assembly, chose the word, "quickly," together with the word, "painlessly," in directing that death by lethal injection be carried out "quickly and painlessly," the legislative intent was that the word, "quickly," mean, "rapidly enough to complete a painless execution, but no longer."
12. This holding, supra, is consistent with the legislature intent that the death penalty in Ohio be imposed without pain to the condemned, the person for whose benefit the statute was enacted, but that the procedure not be prolonged, a circumstance that has been associated with protracted suffering.
13. Further, because statutes defining penalties must be construed strictly against the state and liberally in favor of the accused (condemned), the court holds that any interest the state may have, if it has such an interest,

in conducting an execution "quickly," i.e. with a sense of immediacy, is outweighed by the substantive, property interest of the condemned person in suffering a painless death. R.C.2901.04(A).

14. Thus, because the Ohio lethal injection protocol includes two drugs (pancuronium bromide and potassium chloride) which are not necessary to cause death and which create an unnecessary risk of causing an agonizing or an excruciatingly painful death, the inclusion of these drugs in the lethal injection protocol is inconsistent with the intent of the General Assembly in enacting R.C.2949.22, and violates the duty of the Department of Rehabilitation and Correction, mandated by R.C.2949.22, to ensure the statutory right of the condemned person to an execution without pain, *and to an expectancy that his execution will be painless.*
15. As distinguished from this case, the Kentucky lethal injection statute has no mandate that an execution be painless, Ky. Rev. Stat. Am. §431.220(1) (a). Thus, the analysis of that statute, having been conducted under the Eighth Amendment "cruel and unusual" standard, is not applicable here because "...the [U.S.] Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Baze, supra*, 128 S. Ct. at 1529. In contrast, the court holds that R.C.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.
16. The purpose of R.C.2949.22 is to insure that the condemned person suffer only the loss of his life, and no more.
17. The mandatory duty to insure a painless execution is not satisfied by the use of a lethal injection protocol which is painless, assuming no human or mechanical failures in conducting the execution.
18. The use of pancuronium bromide and potassium chloride is ostensibly permitted because R.C.2949.22 permits "a lethal injection of a drug or combination of drugs."
19. However, as set forth *supra*, the facts established by the evidence, together with the opinions expressed by the experts called to testify by each party, compel the conclusion of fact that a single massive dose of sodium thiopental or another barbiturate or narcotic drug will cause certain death, reasonably quickly, and with no risk of abrogating the substantive right of the condemned person to expect and be afforded the painless death, mandated by R.C.2949.22.

Analysis

1. The court begins its analysis of R.C.2949.22 with the presumption of its compliance with the United States and Ohio Constitutions, and that the entire statute is intended to be effective. R.C.1.47(A),(B). However, the court holds that the phrase, "or combination of drugs," ostensibly permits the use of substances which, *de facto*, create an unnecessary risk of causing an agonizing or an excruciatingly painful death.
2. This language offends the purpose of the legislature in enacting R.C.4929.22, and thus, deprives the condemned person of the substantive right to expect and to suffer an execution without the risk of suffering an agonizing or excruciatingly painful death.
3. The court holds, therefore, that the legislature's use of the phrase, "or combination of drugs," has proximately resulted in the arbitrary abrogation of a statutory and substantive right of the condemned person, in a violation of the Fifth and Fourteenth Amendments to the United Constitution and Section 16, Article 1 of the Ohio Constitution (due process clause).

Remedy

1. R.C.1.50, however, allows the court to sever from a statute that language which the court finds to be constitutionally offensive, if the statute can be given effect without the offending language. Geiger v. Geiger (1927), 117 Ohio St. 451, 466.
2. The court finds that R.C.2949.22 can be given effect without the constitutionally offensive language, and further, that severance is appropriate. State v. Foster (206), 109 Ohio St. 3d. 1, 37-41.
3. Thus, the court holds that the words, "or a combination of drugs," may be severed from R.C.2949.22; that the severance will result in a one-drug lethal injection protocol under R.C.2949.22; that a one-drug lethal injection protocol will require the use of an anesthetic drug, only; and, that the use of a one-drug protocol will cause death to the condemned person "rapidly," i.e. in an amount of time sufficient to cause death, without the unnecessary risk of causing an agonizing or excruciatingly painful death, or of causing the condemned person the anxiety of anticipating a painful death.

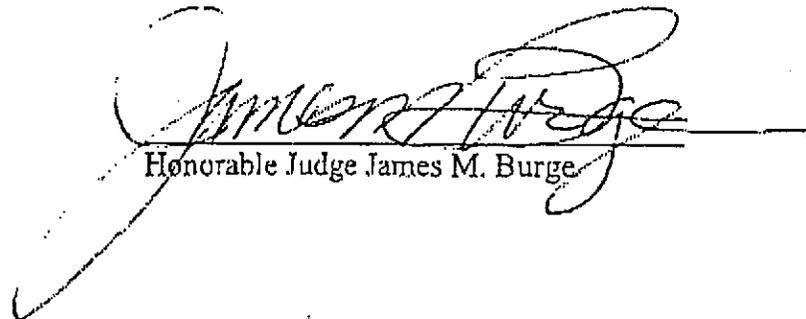
Holding

4. Therefore, the holds that severance of the words, "or combination of drugs," from R.C.2949.22 is necessary to carry out the intent of the legislature and thus, to cure the constitutional infirmity.

ORDER

Accordingly, it is ordered that the words, "or combination of drugs," be severed from R.C.2949.22; that the Ohio Department of Rehabilitation and Correction eliminate the use of pancuronium bromide and potassium chloride from the lethal injection protocol; and, if defendants herein are convicted and sentenced to death by lethal injection, that the protocol employ the use of a lethal injection of a single, anesthetic drug.

It is so ordered.



Honorable Judge James M. Burge

**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

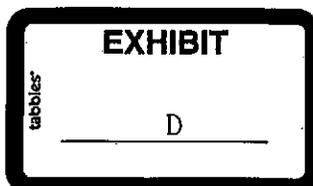
Magistrate Judge Mark R. Abel

ORDER

This matter is before the Court for consideration of the September 24, 2008 Motion to Participate in Plaintiff Biros' Preliminary Injunction Discovery and Evidentiary Hearing Proceedings filed by Plaintiffs James Conway and Marvin Johnson.¹ (Docs. # 401, 402.) In this motion, the moving plaintiffs seek permission to participate in discovery proceedings related to the December 15, 2008 hearing on Kenneth Biros' preliminary injunction. Conway and Johnson also seek to participate in the actual hearing. None of the arguments Conway and Johnson offer to support these requests are persuasive.

Conway and Johnson argue that as plaintiffs, they are entitled to discovery in this litigation. The Court agrees. This Court also recognizes, however, that a case schedule affording the parties ample time for discovery will be set and that the December 15, 2008 hearing is not a trial on the merits of this action. Rather, that hearing involves one specific plaintiff and whether he—*only* he—is entitled to a preliminary injunction. The outcome of that hearing will not and *can not* prove dispositive for the remaining plaintiffs in this litigation; in

¹ Conway and Johnson filed the motion on the docket twice. (Docs. # 401, 402.)



fact, the hearing can not even provide a conclusive decision on the merits of Biros' claims. This is because any findings of fact and conclusions of law made by a district court in addressing a request for injunctive relief are not binding at a trial on the merits. See *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004) (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). Thus, the argument by Conway and Johnson that they must participate to protect their claims rings hollow.

Conway and Johnson also assert that participation is required to avoid redundant discovery proceedings and to preserve judicial resources. Although the requested participation might avoid some redundancy, mere overlap in discovery is insufficient cause under these circumstances to permit parties to intervene in preliminary injunction proceedings that do not affect their claims. To the degree there may be eventual redundant discovery in this litigation, the Court concludes that this is both inherent to such multi-party litigation and acceptable.

Additionally, to the degree that the requested participation might theoretically conserve judicial resources, such as by avoiding multiple discovery disputes, the Court credits this goal but concludes that such conservation would be at best minimal. Moreover, the requested participation might in fact hinder the proceedings by introducing additional parties into a proceeding unnecessarily, which could lead to discovery disputes related to the December 15, 2008 hearing that would otherwise not exist.

Finally, Conway and Johnson make the curious assertion that they must be permitted to participate to "prevent Biros or Defendants from gaining an unfair advantage by getting a 'first bite of the apple' when it comes to developing facts before Conway or Johnson have a chance to develop their claims." (Doc. # 401, at 3; Doc. # 402, at 3.) This odd argument overlooks the

fact that neither Conway nor Johnson are litigating claims against Biros. It also ignores the fact that the merits of this case will not be decided on the basis of which party prepares first, or argues first to the Court. The facts will be what the facts will be, regardless of the timing of their "development."

Given the foregoing, this Court concludes that the requested participation by Conway and Johnson is not necessary to preserve their right to discovery or to protect the development of their claims. The requested participation is also not essential to the ability of these individuals to present their claims at an eventual trial on the merits. The December 15, 2008 hearing involves Biros' preliminary injunction, a notably specific and non-dispositive matter, and this Court will not permit parties to turn that narrow proceeding into an expedited trial on the merits.

The Court in its discretion therefore **DENIES** the September 24, 2008 Motion to Participate in Plaintiff Biros' Preliminary Injunction Discovery and Evidentiary Hearing Proceedings filed by Plaintiffs James Conway and Marvin Johnson. (Docs. # 401, 402.)

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 COOEY, et al.,

Plaintiff,

v.

TED STRICKLAND, et al.,

Defendants.

Case No. 2:04-cv-1156

JUDGE GREGORY L. FROST

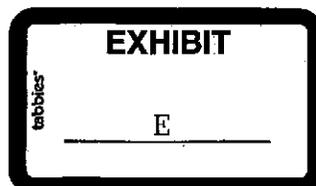
Magistrate Judge Mark R. Abel

ORDER

This matter is before the Court for consideration of the motion to modify the existing protective order filed by Plaintiffs James Conway and Marvin Johnson. (Doc. # 424.) In this motion, the identified plaintiffs seek modification of the protective order governing the Kenneth Biros preliminary injunction discovery so that they can obtain access to that discovery material. Previously, Conway and Johnson sought to participate in the Biros injunction proceeding and its related discovery. (Docs. # 401, 402.) This Court denied that request and specifically explained that "a case schedule affording the parties ample time for discovery will be set." (Doc. # 409, at 1.) The case management plan has not changed. After deciding several pending motions to intervene in the coming weeks, this Court will then conduct a status conference in which it will establish a case schedule that affords the parties sufficient time for discovery. The Court therefore **DENIES** the motion to modify the existing protective order. (Doc. # 424.)

IT IS SO ORDERED.

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



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD COOEY, et al.,

Plaintiffs,

v.

TED STRICKLAND, et al.,

Defendants.

Case No. 2:04-cv-1156

JUDGE GREGORY L. FROST

Magistrate Judge Mark R. Abel

ORDER

In its July 7, 2008 Scheduling Order and Order of Dismissal, this Court stayed the filing of answers until disposition of the then-pending motions to dismiss and the subsequent issuance of a pretrial scheduling order. (Doc. # 277.) Having since resolved all motions to dismiss and the matter of intervening plaintiff Kenneth Biros' preliminary injunction, this Court **ORDERS**:

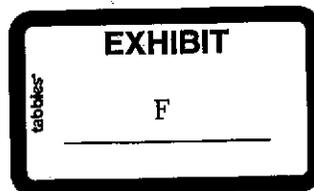
(1) Defendants shall file either separate answers to each complaint or a combined answer to all of the complaints on or before June 1, 2009.

(2) The parties shall file their Fed. R. Civ. P. 26(f) report on or before June 16, 2009.

(3) The preliminary pretrial conference shall be held in Courtroom 5 on June 23, 2009, at 9:00 a.m. The undersigned judicial officer shall continue to handle all scheduling and discovery matters in this litigation unless a specific reference is made to the Magistrate Judge.

IT IS SO ORDERED.

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



No. 07-3766

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JAN 30 2009

LEONARD GREEN, Clerk

ODRAYE G. JONES,)
)
Petitioner - Appellant,)
)
v.)
)
MARGARET BRADSHAW, Warden,)
)
Respondent - Appellee.)

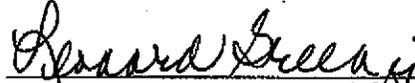
ORDER

Before: MARTIN, MOORE and GRIFFIN, Circuit Judges.

In this capital habeas appeal, the petitioner moves this Court for a remand to the district court for limited discovery and factual development of the lethal injection issue as certified for appeal in this Court's order of July 23, 2008 and to hold briefing in abeyance. The respondent does not oppose a remand for this purpose.

Accordingly, it is ORDERED that this case is remanded to the district court for limited discovery and factual development of the lethal injection issue. Briefing shall be held in abeyance.

ENTERED BY ORDER OF THE COURT


 Leonard Green, Clerk

