

ORIGINAL

No. 2014-1091
IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. TIMOTHY J. McGINTY,

Relator,

vs.

THE COURT OF APPEALS FOR THE EIGHTH APPELLATE
DISTRICT,

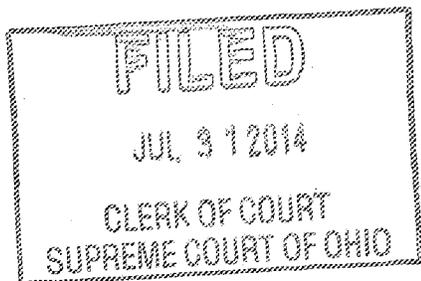
Respondent,

**MOTION OF MICHAEL MADISON, REAL PARTY IN INTEREST,
TO INTERVENE AS RESPONDENT**

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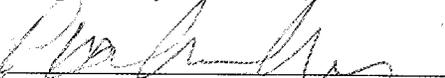
Respondent,

**MOTION OF MICHAEL MADISON, REAL PARTY IN INTEREST,
TO INTERVENE AS RESPONDENT**

Michael Madison, through undersigned counsel, moves for leave to intervene as respondent pursuant to Civ.R. 24.

Reasons for this motion are set forth in the accompanying memorandum.

Respectfully submitted,



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MEMORANDUM

Introduction

By his application in this Court, relator Cuyahoga County Prosecutor asked for a peremptory writ ordering respondent Eighth District Court of Appeals to dismiss the appeal of Michael Madison, proposed intervenor-respondent, in that court. That appeal challenges the trial court's order which directed him to submit to a psychiatric examination for the state's use in the capital case against him.

Mr. Madison asks leave to intervene as of right pursuant to Civ.R. 24(A)(2) as he is the real party in interest or by permission under Civ.R. 24(B)(2). While the respondent court has an interest in its docket, whether it does or does not hear Madison's appeal is of no particular consequence to it. Mr. Madison, by contrast, has a real and direct interest in the appeal and the issues underlying it. As he sets forth below, Madison brought the appeal that the relator seeks to dismiss because the State obtained an order from the trial court requiring him to submit to a psychiatric examination the state hopes to use in the pursuit of a death sentence against him. In effect, the state wants Mr. Madison to serve as a co-conspirator in his own prosecution and eventual execution.

Procedural History

Michael Madison faces capital charges in Cuyahoga County Common Pleas Court, Case No. 579539 assigned to the docket of Judge Nancy R. McDonnell. On May 22, 2014, in a pre-trial motion in that case, the prosecutor filed a motion asking the trial court to order Mr. Madison to submit to an evaluation by a psychiatrist for the state's use in the case against him. There is neither indication nor suggestion that Mr. Madison is incompetent, and he has neither asserted a

defense of not guilty by reason of insanity nor suggested that he might do so. At a hearing on June 2, the prosecutor told the court that their expert, one Dr. Steven Pitt from Arizona , would be “flying into town tomorrow . . . to examine the defendant.” (Hearing transcript of June 2, 2014, Relator’s Exhibit 3 at 11.) Over vigorous defense objection, Judge McDonnell granted the motion.

The next day, June 3, Madison filed a notice of appeal and emergency motion to stay in the Eighth District Court of Appeals, Case No. 101478. At the same time, Madison as relator filed in the Eight District Court of Appeals a petition for writ of prohibition against Judge McDonnell as respondent, Case No. 101481. Also that day, the prosecutor filed a memorandum opposing the motion to stay. The next day, June 4, the court of appeals granted the motion to stay. Dr. Pitt had already begun his examination of Madison.

Also on June 4, the court of appeals denied the state’s motion to dismiss Madison’s appeal. The next day, the court denied the state’s motion for reconsideration. On June 9 the state moved to have the appeal put on the accelerated calendar, a motion the court denied on June 11. The court of appeals has not ruled on Judge McDonnell’s motion to dismiss the writ or on Madison’s motion to stay consideration of the writ application until after the appeal is resolved.

On June 30, the Cuyahoga County Prosecutor as Relator filed this action against Respondent Eighth District Court of Appeals. Relator asks this Court to issue a peremptory writ requiring that the court of appeals dismiss the appeal and remand the case to the trial court for Dr. Pitt to conclude his examination and the trial to go forward.

Argument

The rules regarding original actions in this court provide that they are to be supplemented by the Ohio Rules of Civil Procedure “unless [they are] clearly inapplicable.” S.Ct.Prac.R.

12.01(A)(2)(b). Accordingly, Mr. Madison moves to intervene in this action as of right under the authority of Civ.R. 24(A)(2) providing for intervention of right. That rule provides:

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In the alternative, Mr. Madison moves for permissive intervention pursuant to Civ.R.

24(B)(2) which provides:

Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Civ.R. 24 is to be "given a liberal construction in favor of intervention." *State ex rel.*

Smith v. Frost, 74 Ohio St.3d 107, 108, 656 N.E.2d 673 (1995).

Intervention of Right

Mr. Madison has an interest in this case that is clear, is distinct from the interest of either relator or respondent, and that neither party can adequately address. Relator wants him to submit to a psychiatric examination that may be used against him in his capital trial despite the fact that he has raised neither his competence nor his sanity as issues in this case. The trial court ordered that he submit to that examination. Madison insists that the examination (which began while an emergency motion for stay was pending in the court of appeals), would violate his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In order that he may vindicate those rights and ensure that he not be made a co-conspirator in his own demise, Madison filed an appeal to respondent Eighth District Court of Appeals. Relator moved to dismiss that appeal, and when that was denied filed what it captioned an "Emergency Motion for Reconsideration." After that, too, was denied, relator filed this action and asks that this Court both order the court of appeals to dismiss Madison's appeal *and* order him to submit to the psychiatric examination.

As Madison argues separately and more fully in the Motion to Dismiss/Motion for Judgment on the Pleadings filed concurrently with this motion, the examination relator demands he undergo clearly violates his constitutional rights and lacks statutory authority. The cases relied on by respondent are inapposite and properly distinguished. Further, should Madison be convicted, and especially should he be sentenced to die, any post-hoc evaluation of the harm flowing from the unconstitutional examination would necessarily be speculative and unreliable, almost surely leaving his infringed rights without meaningful vindication. Finally, the court of appeals does, indeed, have jurisdiction to hear his appeal.

Respondent court of appeals has an interest only in the last of those points, and that purely as a matter of affirming the integrity of its rulings. Respondent court has no interest, nor should it at this juncture, in the merits of Madison's appeal or in his constitutional rights and arguments. It is his liberty, his life, which is ultimately on the line in this proceeding and only he has the relevant interest in protecting them.

Accordingly, this Court should grant Mr. Madison leave to appeal as of right.

Permissive Intervention

Even if this Court should determine that Mr. Madison is not entitled to intervene as of right, it should grant him permissive intervention. Civ.R. 24(B)(2) provides that intervention

may be allowed "when an applicant's claim or defense and the main action have a question of law or fact in common." In this case, they clearly do. Moreover, allowing Madison to intervene will not "unduly delay or prejudice the adjudication of rights of the original parties."

Accordingly, this Court should grant Mr. Madison permissive intervention.

Constitutional Issues

Although this is a civil proceeding, it is ancillary to a death penalty trial. As such, it implicates Mr. Madison's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and has far-reaching effects on his constitutionally protected life, liberty, and property interests. What follows is that he has a due process right to be heard.

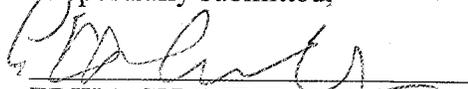
In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 471 L.Ed.2d 18 (1976), addressing the termination of social security disability benefits, the Supreme Court reviewed cases and set forth the fundamental point.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U. S. 539, 557-558 (1974). See, e. g., *Phillips v. Commissioner*, 283 U. S. 589, 596-597 (1931). See also *Dent v. West Virginia*, 129 U. S. 114, 124-125 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965). See *Grannis v. Ordean*, 234 U. S. 385, 394 (1914).

Id. at 333.

This is Mr. Madison's opportunity, his only opportunity, to be heard on the jurisdictional issue raised by relator. Because the resolution of that jurisdictional issue clearly implicates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, this Court should grant him leave to intervene.

Respectfully submitted,



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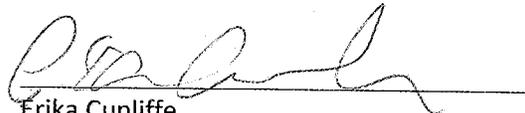
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COUNSEL FOR INTERVENOR-RESPONDENT

CERTIFICATION

This is to certify that copies of the foregoing were served by regular U.S. Mail, postage prepaid, to Katherine Mullin, Assistant Prosecuting Attorney, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel of Record for Relator and to Darlene Fawkes Pettit, Assistant Attorney General, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215, this 31st day of July, 2014.


Erika Cunliffe