

FILED
JAMES BONINI
CLERK

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

2005 NOV 23 A 10:10

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION
COLUMBUS

RICHARD COOEY,

Plaintiff,

Case No.: 2:04cv1156

v.

JUDGE FROST

Magistrate Judge Abel

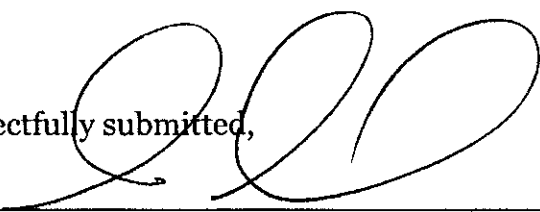
ROBERT TAFT, Governor, et al.

Defendants.

**PLAINTIFF-INTERVENOR'S MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO STAY
HIS EXECUTION PENDING ADJUDICATION OF 42 U.S.C. § 1983
CLAIMS CHALLENGING DEFENDANTS' CRUEL AND UNUSUAL
EXECUTION PROCEDURES**

NOW COMES Plaintiff-Intervenor, John R. Hicks, through counsel, and moves this Court for a temporary restraining order and preliminary injunction preventing defendants from using their current procedures for carrying out executions by lethal injection to execute him before the merits of his pending civil rights complaint are fully adjudicated. Plaintiff-Intervenor, John R. Hicks is scheduled to be executed by the challenged execution procedures on November 29, 2005. Accordingly, irreparable harm will be suffered if the requested relief is denied.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke.

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Attorney for John R. Hicks

MEMORANDUM

I. Introduction

This action challenges the State of Ohio's official policy of executing prisoners by lethal injection. The Court denied defendants' motion to dismiss this action in March 2005. (Doc. No. 14). The Court has certified an interlocutory appeal of its decision on defendants' motion to dismiss to the Sixth Circuit, which remains pending at this time. Accordingly, it remains possible that plaintiffs will prevail on the § 1983 claims presented in this case and that the state's official method of execution, which according to the complaint constitutes torture and cruel and inhuman punishment, will be found unconstitutional.

Plaintiff-Intervenor John R. Hicks has joined in this action and stated claims under 42 U.S.C. § 1983. He is scheduled to be executed by lethal injection on November 29, 2005. Thus, unless his execution is stayed by this Court, he will be deprived of his right to have this Court decide his claims on their merits.

Like Mr. Coeey, Mr. Hicks initiated his habeas action in 1994 -- prior to the State of Ohio's adoption of lethal injection as the official method of execution. Mr. Hicks' execution became "imminent" within the meaning of this Court's March 28, 2005 Order (Doc. No. 14), and the statute of limitations began to run on Mr. Hicks' § 1983 claims, on August 1, 2005, when the Supreme Court denied rehearing of his petition for certiorari. (See Supreme Court Docket attached as Ex. A). This action has been brought only a few months thereafter. Accordingly, Mr. Hicks has presented timely and potentially

meritorious claims. In the absence of preliminary injunctive relief, he will be irreparably deprived of his right to have these claims adjudicated on their merits.

II. Facts

John Hicks is a death row inmate scheduled to die on November 29, 2005. Mr. Hicks was convicted and sentenced to death in Hamilton County, Ohio in February 1986. After exhausting state court appeals, Hicks initiated habeas proceedings in the U.S. District Court for the Southern District of Ohio on March 10, 1994 (Case No. C-1-94-177). As in Mr. Cooley's case, Mr. Hicks did not raise an Eighth Amendment challenge to death by lethal injection in his habeas petition because the State of Ohio had not yet adopted it as the method of execution. The district court denied Mr. Hicks' petition on April 17, 2001.

Mr. Hicks appealed to the Sixth Circuit, which affirmed in a panel decision with one judge dissenting on September 15, 2004. The U.S. Supreme Court denied Mr. Hicks' petition for a writ of certiorari on May 16, 2005. Mr. Hicks sought rehearing before the Supreme Court based on its decision in *Rompilla v. Beard*, 125 S.Ct. 2456 (2005). The Supreme Court denied his petition for rehearing on August 1, 2005. From that day forward including the date of this filing, Plaintiff's counsel has vigorously pursued a recommendation for executive clemency pursuant to Ohio law. It was not until November 15, 2005 that the Ohio Parole Board issued its negative recommendation to Governor Taft. The Governor has not yet acted on that recommendation.

On August 12, 2005, the Sixth Circuit issued the mandate to carry out Mr. Hicks' sentence. Thereafter, Ohio's Department of Corrections scheduled his execution for November 29, 2005. Mr. Hicks' request for clemency remains pending before the Governor of the State of Ohio, however, the Parole Board has issued a recommendation against the grant of clemency. Accordingly, his execution is imminent.

III. Discussion

Mr. Hicks' claims are clearly cognizable, as demonstrated by this Court's denial of the defendants' motion to dismiss. Moreover, the Eighth Amendment's proscription against cruel and unusual punishment forbids the infliction of unnecessary pain in the execution of a sentence of death. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (opinion of Reed, J.); *Fierro v. Gomez*, 865 F.Supp. 1387, 1413 (N.D.Cal. 1994) (holding execution by lethal gas in California to be unconstitutional because of suffering during fifteen seconds to one minute of consciousness); *aff'd*, 77 F.3d 301, 308 (9th Cir. 1996), *vacated on other grounds*, 519 U.S. 918 (1996). Punishments are "cruel when they involve . . . a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). Indeed, a punishment is especially offensive to the Eighth Amendment if it involves foreseeable infliction of suffering. *See Furman v. Georgia*, 408 U.S. 238, 273 (1973).

Under the foregoing principles, and based on the facts alleged in the pleadings which remain uncontroverted at this stage of the proceedings, plaintiffs contend that the State of Ohio's official policy of executing prisoners by lethal injection violates the Eighth Amendment's proscription against cruel and unusual punishment. Pursuant to

42 U.S.C. § 1983, the Court may grant equitable relief for such violations of the Constitution and laws. Preliminary injunctive relief such as that sought in this case is appropriate under Rule 65 where: 1) there is a likelihood of plaintiff's success on the merits; 2) the plaintiff will suffer irreparable harm without the injunction; 3) issuance of the injunction would not cause substantial harm to others; and, 4) the injunction would serve the public interest. See *Ohio Asphalt Paving, Inc. v. Board of Commissioners of Coshocton County, Ohio*, 2005 WL 1705140 (S.D. Ohio) (attached) (citing *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004)). "[T]he four considerations applicable to preliminary injunctions are factors to be balanced and not prerequisites that must be satisfied. These factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *In re Eagle-Picher Industries, Inc.*, 963 F.2d 855 (6th Cir. 1992) (citations omitted). Further, no single factor is dispositive of the outcome and a court may view each factor in light of the compelling circumstances of the case. See *Frisch's Restaurant v. Shoney's, Inc.*, 759 F.2d 1261 (6th Cir. 1985).

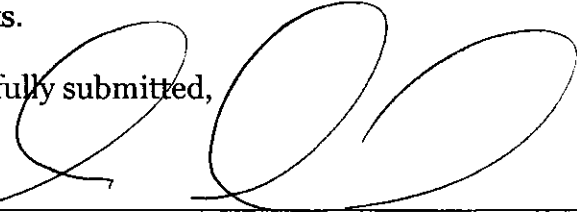
It cannot be disputed that, in the absence of preliminary injunctive relief, plaintiff will suffer irreparable harm. This element weighs heavily in favor of granting the requested relief. The requested relief will harm no one. Moreover, the public interest is served by avoiding irreparable constitutional violations. Finally, plaintiff has raised truly weighty constitutional claims that cannot be easily dismissed. Indeed, defendants have not even tried to dismiss the claims raised in this action on their merits preferring

to raise statute of limitations and res judicata defenses, thereby tacitly recognizing the potential merit of plaintiffs' claims. On balance, therefore, the factors to be considered by the Court strongly favor the issuance of the requested relief.

IV. Conclusion

For all of the foregoing reasons, movant John R. Hicks respectfully requests that the Court grant the preliminary injunctive relief requested herein and allow him to adjudicate his § 1983 claims on their merits.

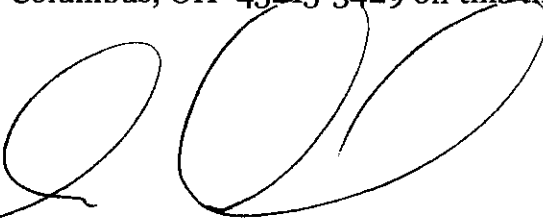
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this document was provided via facsimile and overnight mail to, Charles L. Willie, Asst. Attorney General Capital Crimes Section, State Office Tower, 30 East Broad Street, Twenty-Third Floor, Columbus, OH 43215-3429 on this the 22nd day of November, 2005.



MARC D. MEZIBOV (Ohio Bar No. 0019316)

No. 04-9053 *** CAPITAL CASE ***
 Title: John R. Hicks, Petitioner
 v.
 Terry Collins, Warden
 Docketed: March 11, 2005
 Lower Ct: United States Court of Appeals for the Sixth Circuit
 Case Nos.: (01-3764)
 Decision Date: September 15, 2004
 Rehearing Denied: December 7, 2004

~~~~~Date~~~~~Proceedings and Orders~~~~~

Mar 3 2005    Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed.  
                   (Response due April 11, 2005)  
 Apr 11 2005    Brief of respondent Terry Collins, Warden in opposition filed.  
 Apr 27 2005    DISTRIBUTED for Conference of May 12, 2005.  
 May 16 2005    Petition DENIED.  
 Jun 3 2005     Petition for Rehearing filed.  
 Jul 7 2005     DISTRIBUTED.  
 Aug 1 2005     Rehearing DENIED.

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| ~~~~~Name~~~~~                    | ~~~~~Address~~~~~                                                                | ~~~~~Phone~~~~~ |
|-----------------------------------|----------------------------------------------------------------------------------|-----------------|
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| Party name: John R. Hicks         |                                                                                  |                 |
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| Party name: Terry Collins, Warden |                                                                                  |                 |