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JAMES BONINI
CLERK

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

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

RICHARD COOEY,

Plaintiff,

Case No.: 2:04cv1156

v.

**JUDGE FROST
Magistrate Judge Abel**

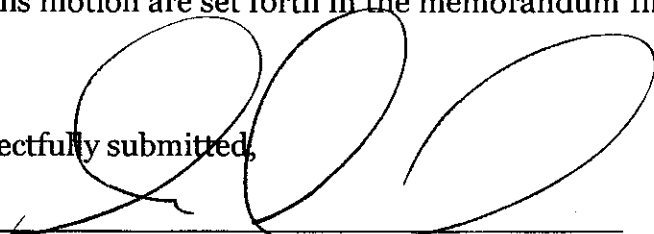
ROBERT TAFT, Governor, et al.

Defendants.

EMERGENCY MOTION TO INTERVENE

NOW COMES movant, John R. Hicks, through counsel, and moves this Court pursuant to Rule 24 of the Federal Rules of Civil Procedure for leave to intervene in the above-captioned action as a plaintiff-intervenor. Movant's pleading setting forth the claim upon which intervention is sought pursuant to Rule 24(b) and (c) is attached hereto as Exhibit A. The grounds for this motion are set forth in the memorandum filed herewith.

Respectfully submitted,



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MEMORANDUM

I. Introduction

Movant, John R. Hicks, seeks leave to intervene because his Eighth Amendment claim, detailed in the pleading attached hereto, involves precisely the same issues of law and fact as are presented in this action – the constitutionality of execution by lethal injection pursuant to official protocol adopted by the state of Ohio.

II. Background

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 Hicks' petition for a writ of certiorari and request for rehearing on August 1, 2005. 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.

III. Discussion

Mr. Hicks seeks leave to intervene pursuant to Rule 24(b)(2) because he is asserting precisely the same Eighth Amendment claim asserted by Mr. Cooley in this action. Thus, Mr. Hicks' "claim . . . and the main action have a question of law or fact in common" within the meaning of Rule 24(b)(2).

Rule 24 is to be liberally construed in favor of intervenors. *See Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991). The "rule requires only that [the intervenor's] claim or defense and the main action have a question of law or fact in common." 7C Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 1911, p. 358. "So long as the motion for intervention is timely and there is at least one common question of law or fact, the balancing of undue delay, prejudice to the original parties, and any other relevant factors" is within the discretion of the Court. *See Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). Intervention has been held appropriate in cases such as this where the intervenor seeks to challenge the constitutionality of the same statute or practice challenged in the main action and in which the same constitutional rights are at issue. *See e.g. Marte v. Immigration & Naturalization Serv.*, 562 F.Supp. 92 (S.D.N.Y. 1983); *Swift v. Toia*, 450 F.Supp. 983 (S.D.N.Y. 1978); *aff'd* 598 F.2d 312 (2d Cir. 1979); *Dawson v. Vance*, 329 F.Supp. 1320 (S.D.Tex. 1971).

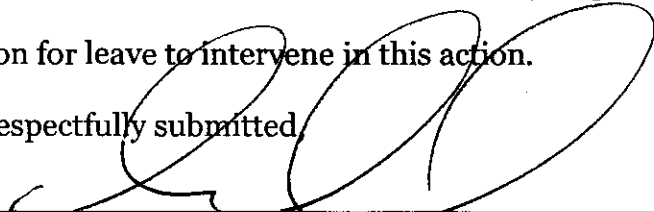
In this case, Mr. Hicks seeks to vindicate precisely the same rights as are at issue in the main action. Both he and Mr. Cooley are to be executed under the state of Ohio's official policy of death by lethal injection. Accordingly, the requirement of common issues of fact and law is satisfied. The remaining factors are easily fulfilled in this case. The Cooley action is in its early stages with no discovery having been taken. Indeed, the only matter yet addressed has been Defendants' motion to dismiss, the denial of which is pending before the Sixth Circuit on an interlocutory appeal. Accordingly, the motion to intervene is both timely and will not unduly delay the proceedings.

Finally, no prejudice will inure to either party if intervention is allowed. The issues raised in the Cooley case have the potential to dramatically impact the administration of the death penalty in Ohio. Indeed, given the significance of the issues the presence of additional parties to ensure that the issues are fully and vigorously presented will redound to the benefit of the parties, the Court and the public in general.

IV. Conclusion

For all of the foregoing reasons, movant John R. Hicks respectfully requests that the Court grant his emergency motion for leave to intervene in this action.

Respectfully submitted,

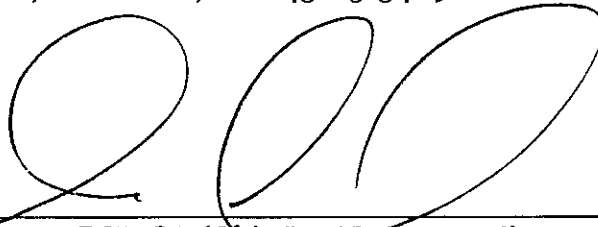


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CERTIFICATE OF SERVICE

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 2nd day of November, 2005.

A handwritten signature in black ink, consisting of three large, stylized loops, positioned above a horizontal line.

MARC D. MEZIBOV (Ohio Bar No. 0019316)

EXHIBIT A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**JOHN R. HICKS,
Inmate #189-423
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44091,**

Plaintiff,

v.

**ROBERT E. TAFT, JR., GOVERNOR,
State Of Ohio
77 S. High Street
30th Floor
Columbus, Ohio 43215**

**PLAINTIFF'S COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

and

**REGINALD A. WILKINSON, DIRECTOR
Ohio Department of Rehabilitation and
Correction
1050 Freeway Drive North
Columbus, Ohio 43229**

and

**JAMES HAVILAND, WARDEN
Southern Ohio Correctional Facility
1724 St. Route 728
Lucasville, Ohio 45699,**

Defendants.

Plaintiff, John R. Hicks, for his Complaint for Injunctive and Declaratory Relief states as follows:

INTRODUCTION

1. Plaintiff is a death row inmate awaiting execution of his death sentence which is scheduled for November 29, 2005. This action is brought under 42 U.S.C. §1983 for violations and threatened violations of Plaintiff's right to be free from cruel and unusual punishment under the Eight and Fourteenth Amendments of the United States Constitution. More particularly, Plaintiff believes and therefore asserts that he will be subjected to torture by means of lethal injection if his death sentence is carried out in accordance with current methods of execution employed by the state of Ohio. Plaintiff seeks declaratory and injunctive relief sparing him from death in an unconstitutional manner.

2. In this action Plaintiff asserts that Ohio's current method of lethal injection can and will, in effect, cause him to be tortured to death. It is impermissible for Ohio or any state under the United States Constitution to intentionally, negligently or otherwise, use methods of execution that are inherently unreliable and which therefore raise an unreasonable risk of causing death in an exceedingly painful way.

3. To the best of Plaintiff's present information and belief, Ohio intends to execute him on November 29, 2005 by means of drugs that include a paralyzing agent that can and will cast a chemical veil over the exceedingly painful effects of death by suffocation and heart attack. Ohio's lethal injection protocol includes an ultra-short

acting anesthetic that, if used to execute Plaintiff, will leave him conscious and able to experience the process of suffocation and heart failure. Ohio's lethal injection protocol utilizes unreliable and arbitrary selection of drugs administered by personnel who are not sufficiently qualified or trained in the humane administration of lethal injections so as to prevent Plaintiff from suffering excessive pain during the process of his execution.

4. Plaintiff seeks temporary, preliminary and permanent injunctive relief preventing the state of Ohio from executing him by means currently employed for carrying out a sentence of death by lethal injection. Plaintiff further seeks a declaration from this Court that Ohio's current method for conducting a sentence of death by means of lethal injection violates the Eighth and Fourteenth Amendments of the United States Constitution.

JURISDICTION AND VENUE

5. Plaintiff brings this action to enforce and protect rights conferred by the Eighth and Fourteenth Amendments of the United States Constitution. This action to vindicate these rights is brought pursuant to 42 U.S.C. §1983.

6. This Court has jurisdiction over the subject matter of this complaint pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343 (a)(3)(4) as well as 28 U.S.C. §2201(a) and 28 U.S.C. §2202 providing for, respectively, declaratory and injunctive relief.

7. This Court is the appropriate venue for this matter because all decisions and procedures affecting the administration of death sentences in the state of Ohio by

means of lethal injection occur in Columbus, Franklin County, Ohio, which is the seat of state government.

ADMINISTRATIVE REMEDIES

8. The precondition to this lawsuit of exhaustion of administrative remedies under the Ohio Administrative Code §5120-9-31 pursuant to the Prison Litigation Reform Act, 42 U.S.C. §1997(e)(a), is inapplicable or in these circumstances futile. The precise grounds for relief sought by this action, the unconstitutionality of Ohio's system of lethal injection has been rejected by state officials in a parallel administrative procedure. *See Cooley v. Robert Taft, et al* Case No. 2-04cv1156, United States District Court, Southern District of Ohio, Eastern Division. There is no reasonable basis to conclude, therefore, that exhaustion of administrative remedies in this instance will result in a different decision. Moreover, the time frame established by state regulations for exhaustion of administrative remedies is such that it is unlikely that that process can be concluded prior to Plaintiff's scheduled execution date. Nevertheless, Plaintiff has initiated a grievance pursuant to §5210-9-31. On November 22, 2005 the DRC waived the informal complaint step and informed Plaintiff's counsel that Plaintiff could file a formal written complaint to the Inspector of Institutional Services. As of the time and date of the filing of this Complaint, Plaintiff has not received a written response to his grievance.

PARTIES

9. Plaintiff is a death-sentenced inmate in the custody of the state of Ohio and under the control and supervision of the Ohio Department of Rehabilitation and Correction. (DRC). DRC maintains the Mansfield Correctional Institution in Mansfield, Ohio where Plaintiff is currently confined.

10. Defendant Robert Taft, Jr. is the duly elected Governor of Ohio. Governor Taft has final executive authority over all departments, agencies and offices of the state of Ohio. Governor Taft has statutory and constitutional responsibility for the execution of all sentences of death in Ohio including the manner and means in which those sentences are carried out.

11. Defendant Reginald A. Wilkinson is the duly appointed and acting director of the Department of Rehabilitation and Correction (DRC). DRC is a department of the state of Ohio created and maintained under RC 5120 *et. seq.* Defendant Wilkinson is responsible for the administration of rules and regulations of the DRC including those involving the operations and procedures for the execution of death sentences.

12. Defendant James Haviland is the duly appointed Warden of the Southern Ohio Correctional Facility (SOCF) located in Lucasville, Ohio. According to rules and procedures of DRC, the sentences of death are carried out at SOCF. Under Ohio Statute, ORC §5120.38, Warden Haviland is in charge with management of SOCF including the execution of death sentences carried out at that facility. (All of the named defendants

are sued solely in their official capacities; accordingly defendants are referred to herein collectively as the state of Ohio.)

STATEMENT OF THE CASE

13. To the best of Plaintiff's present information and belief the state of Ohio intends to execute Plaintiff by employing the same means and methods of lethal injection as has been used in Ohio since it resumed executions in 1999.

14. To the best of Plaintiff's present information and belief the state of Ohio intends to execute Plaintiff by injection of the following drugs: two grams of Thiopental Sodium in normal saline concentration; 100 mg of Pancuronium Bromide in normal saline concentration; and 100 milli equivalents of Potassium Chloride in normal saline concentration. At least the following equipment will be utilized: angiocath abbocath-T; Primary IV set No. 1820 (70 inch); and 0.9% Sodium Chloride, 1000 ml.

15. To the best of Plaintiff's present information and belief, the state of Ohio has consistently deferred to publicly disclose all material details surrounding the process by which an inmate sentenced to die will be executed pursuant to lethal injection; nor has the state of Ohio published details surrounding the qualifications and training of the personnel involved in the administration of lethal injection.

16. Plaintiff is unaware of any efforts by or assurances from the state of Ohio with respect to the adoption and implementation of methods of lethal injection that are in keeping with contemporary medical, community and constitutional standards that

proscribe the infliction of cruel and unusual punishment in the administration of the death sentence by lethal injection.

17. According to the opinions of qualified medical experts and other reliable sources detailed at length in pleadings filed in *Cooey v. Taft, supra*, it cannot be established to a reasonable degree of medical certainty that the drugs administered in the lethal injection process will adequately sedate Plaintiff so as to spare him the excruciating pain and suffering that attends death by suffocation and heart failure. More particularly, Plaintiff alleges that Ohio's lethal injection protocol creates an unacceptable risk that he will not be anesthetized to the point of being unconscious and unaware of pain for the duration of the execution procedure.

18. Likewise, the lethal injection protocol adopted by the state of Ohio does not require that a person with adequate medical training administer and monitor the execution so as to detect whether a condemned inmate is suffering pain and if so to determine whether and what appropriate medical steps may be taken to alleviate that pain.

19. To the best of Plaintiff's present information and belief the state of Ohio's lethal injection protocol does not include or require the use of medical equipment designed to effectively and accurately monitor a condemned person's heartbeat, pulse rate or brain waves during the execution. The absence of such equipment from the protocol suggests that the procedures employed by the state of Ohio to cause death by lethal injection are inadequate and indifferent to whether a condemned person

experiences extreme pain and suffering during the course of his or her execution by reasons of any number of factors including but most especially due to the injection of inappropriate drugs or the injection of inadequate doses or combinations of drugs or the improper delivery of drugs into the condemned inmate's body.

20. Plaintiff believes and therefore avers that the means intended by the state of Ohio to execute him are inadequate, unreliable and arbitrary such that the lethal injection process will likely cause Plaintiff to suffer excruciating pain and cruel and unusual punishment in the course of his death.

21. Under the circumstances set forth in this Complaint, Plaintiff faces the risk of irreparable harm in the form of excruciating pain and suffering in the course of his execution for which there is no adequate remedy at law in the absence of temporary, preliminary and permanent injunctive relief enjoining the state of Ohio from utilizing methods of execution that cause cruel and unusual punishment in violation of the Constitution.

CLAIMS FOR RELIEF

22. Plaintiff incorporates paragraphs 1 through 21 as if fully rewritten herein.

23. For the reasons previously stated, the official policies, procedures and protocols adopted by the state of Ohio governing the execution of death sentences by means of lethal injection manifest a callous and deliberate indifference to Plaintiff's constitutional rights to be free from the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

1. Plaintiff requests an Order from this Court declaring that the official policies, procedures and protocols employed by the state of Ohio to execute the sentence of death pursuant to lethal injection violate the Eighth and Fourteenth Amendment of the United States Constitution prohibiting the infliction of cruel and unusual punishment.

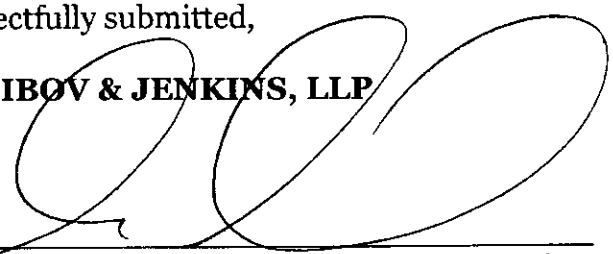
2. Plaintiff requests an Order of the Court temporarily, preliminarily and permanently enjoining the state of Ohio, its agents, officials, representatives and employees or others working in concert or cooperation with them from conducting further executions in the state of Ohio, including the execution of Plaintiff, pending a determination by the federal courts that the procedures employed by the state of Ohio in executing inmates condemned to death by lethal injection satisfy contemporary medical, community and constitutional standards that do not raise an unreasonable risk of inflicting cruel and unusual punishment.

3. Plaintiff requests that the Court award him his reasonable attorney fees and costs pursuant to 42 U.S.C. §1988;

4. Plaintiff requests that the Court grant such further relief as it deems just and appropriate in the premises.

Respectfully submitted,

MEZIBOV & JENKINS, LLP



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