

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

JOHN G. SPIRKO, JR.,)	
)	
Plaintiff,)	
)	Case No. 2:04cv1156
v.)	
)	Judge Gregory L. Frost
ROBERT TAFT, Governor, et al.)	Magistrate Judge Mark R. Abel
)	
Defendants)	
)	
)	

**JOHN SPIRKO'S MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION TO INTERVENE**

Movant, John G. Spirko, Jr., seeks leave to intervene because his Eighth Amendment claim, detailed in the pleading attached, 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.

I. Background

John G. Spirko, Jr. is a death row inmate facing execution on April 17, 2007. He is currently awaiting DNA test results that he believes will add to an already voluminous record of exculpatory evidence leading to the conclusion that he is innocent of the crimes for which he was convicted and that he was wrongly and unconstitutionally convicted. Mr. Spirko has a petition for clemency pending before Governor Taft. The Attorney General of the State of Ohio consented to this DNA testing and has multiple times requested a reprieve to provide time to complete the testing, and each time Governor Taft has granted the requested reprieve. Most

recently, on October 20, 2006, Governor Taft granted a fifth reprieve of execution until April 17, 2007.

Mr. Spirko was convicted and sentenced to death in Van Wert County, Ohio, in 1984. After exhausting state court remedies, Mr. Spirko initiated habeas proceedings in the U.S. District Court for the Northern District of Ohio in 1995, *Spirko v. Mitchell*, Case No. 1:99cv00382. Mr. Spirko did not raise an Eighth Amendment challenge to death by lethal injection in his habeas petition. The District Court denied Mr. Spirko's petition on July 11, 2000. Mr. Spirko filed a timely appeal. By a 2-1 decision, a Sixth Circuit panel affirmed the denial of habeas relief on May 17, 2004. *Spirko v. Mitchell*, 368 F.3d 603, 614 (6th Cir. 2004). Mr. Spirko's Petition for Writ of Certiorari was denied on March 28, 2005.

On June 12, 2006, Mr. Spirko filed a grievance with the Inspector of Institutional Services of the Ohio Department of Rehabilitation and Correction ("DRC") regarding Ohio's lethal injection protocol.¹ On June 13, 2006, the Inspector denied the grievance (attached as Exhibit B). Mr. Spirko appealed this decision to the Chief Inspector of the DRC. On August 28, 2006, the Chief Inspector affirmed the Inspector's denial of the grievance (attached as Exhibit C).

II. Argument

Mr. Spirko seeks leave to intervene pursuant to Federal Rule of Civil Procedure 24(b)(2) because he is asserting precisely the same Eighth Amendment claim asserted by Mr. Coeey in this action. Rule 24(b) states: "Upon timely application anyone shall be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the

¹ Counsel for Mr. Spirko is attempting to obtain a copy of this grievance from the Ohio Department of Rehabilitation and Correction. If and when it is available, counsel will submit the grievance to the court.

intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Fed. R. Civ. P. 24(b). A party seeking to intervene must therefore show four things: (1) common question of law or fact; (2) timeliness of the motion; (3) the intervention must not unduly delay the proceedings to prejudice the adjudication of the rights of the original parties; and (4) granting the motion must not be a futile act. *Cooley v. Taft*, Order, Jan. 9, 2006, Dkt. No. 35 (order granting Jeffrey Hill’s Emergency Motion to Intervene). Spirko’s claim meets all four factors.

Common Question of Law or Fact

Mr. Spirko 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. The issues set forth in the Sixth Circuit’s August 24, 2005, order granting Mr. Cooley permission to appeal could likely prove dispositive of Mr. Spirko’s claims under 42 U.S.C. Section 1983 as well. Accordingly, the requirement of common issues of fact and law is satisfied.

Thus, Mr. Spirko’s “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.² The “rule requires only that [the intervenor’s] claim or defense and the main action have a question of law or fact in common.”³ “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.⁴ Intervention has been held appropriate in cases such as this where the intervenor seeks to

² See *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991).

³ 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 911 (2d ed. 1986).

challenge the constitutionality of the same statute or practice challenged in the main action and in which the same constitutional rights are at issue.⁵ Recently, this Court granted similar requests to intervene from plaintiffs Jeffrey Hill, John Hicks, Johnnie Baston, Arthur Tyler, and Jeffrey Lundgren.⁶ Plaintiffs Cooley, Hill, Baston, and Tyler have all consented to Mr. Spirko intervening in this action.⁷ Defendants have not consented.

Timeliness

Timeliness is left to the discretion of the trial judge because Rule 24 does not set forth a standard for determining timeliness. *Cooley v. Taft*, Order, Jan. 9, 2006, Dkt. No. 35, at 2 (order granting Jeffrey Hill's Emergency Motion to Intervene), citing *FMC Corp. v. Keizer Equip. Co.*, 433 F.2d 654, 656 (6th Cir. 1970). The statute of limitations on Mr. Spirko's Section 1983 claim did not begin to run until his execution was imminent (i.e., March 28, 2005, when the Supreme Court of the United States denied Mr. Spirko's Petition for Writ of Certiorari) and when he knew or had reason to know of the facts giving rise to his claim. The Supreme Court declined to hear Mr. Spirko's case on March 28, 2005, and two weeks later, on April 13, 2005, the *Cooley* action was stayed. The *Cooley* litigation remains in its early stages, with no discovery having been taken. There is no basis for concluding that the original parties to this litigation will be

⁴ See *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997).

⁵ See, e.g., *Marte v. Immigration & Naturalization Serv.*, 562 F. Supp. 92 (S.D.N.Y. 1983); *Swiff 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).

⁶ Order, Jan. 9, 2006, Dkt. No. 35 (order granting Jeffrey Hill's Emergency Motion to Intervene); Order, Nov. 23, 2005, Dkt. No. 23 (order granting John Hicks's Motion to Intervene when Plaintiff Hicks was within days of execution); Order, June 16, 2006, Dkt. No. 54 (order granting Johnnie Baston's Motion to Intervene and Arthur Tyler's Motion to Intervene); Order, Oct. 17, 2006, Dkt. No. 92 (order granting Jeffrey Lundgren's Second Amended Emergency Motion to Intervene and Amended Emergency Motion for a Preliminary Injunction when Plaintiff Lundgren was within days of execution).

⁷ Mr. Hicks was terminated from this action on January 4, 2006, following his execution. Order, Jan. 4, 2006, Dkt. No. 34 (order dismissing Intervenor Plaintiff John R. Hicks as a party to this litigation). Mr. Lundgren was executed on October 24, 2006, after the United States Court of Appeals for the Sixth Circuit reversed this Court's order dated October 17, 2006, Dkt. No. 92, granting Mr. Lundgren a preliminary injunction to stay his execution.

prejudiced by the timing of this intervention. Therefore, Mr. Spirko's motion to intervene is timely.

No Undue Delay

In addition, Mr. Spirko's intervention does not unduly delay the proceedings to prejudice the adjudication of the rights of the original parties. Because the *Cooley* action is in its early stages, Mr. Spirko's intervention would not delay the proceedings. Currently, the *Cooley* action is stayed in the district court while the denial of the Defendants' motion to dismiss 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.

Granting the Motion is Not Futile

Finally, granting the motion must not be a futile act. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section . . . 1983 . . . until such administrative remedies as are available are exhausted."). Mr. Spirko now has exhausted his available administrative remedies in regard to his claim.

On June 12, 2006, Mr. Spirko filed a grievance with the Inspector of Institutional Services of the Ohio Department of Rehabilitation and Correction ("DRC"). On June 13, 2006, the Inspector denied the grievance (attached as Exhibit B). Mr. Spirko appealed this decision to the Chief Inspector of the DRC. The Chief Inspector affirmed the Inspector's denial on August 28, 2006. Decision of the Chief Inspector on a Grievance (attached as Exhibit C). The Chief Inspector's decision states that because the grievance "relates to the means used to carry out the lethal injection . . . any argument that this procedure is cruel and unusual punishment must be addressed through the Court." Through this decision, the Chief Inspector has refused to address

Mr. Spirko's grievance through the administrative process and has directed that Mr. Spirko seek judicial relief.

The Chief Inspector's denial of Mr. Spirko's grievance is unlike his denial in the Baston grievance, where the Chief Inspector "directly addressed the core issue of Baston's grievance: the protocol used in executing the inmate." Opinion and Order, Sept. 20, 2006, Dkt. No. 73, at 6 (order dismissing Jeffrey Lundgren's Motion to Intervene). Instead, the Chief Inspector's decision in Mr. Spirko's case was akin to those issued for similar grievances, where, "[t]o the extent that the Chief Inspector *did* touch upon the core issue of the grievance, he 'punted the issue to the judicial branch.'" *Id.* at 7. By responding in this manner, the Chief Inspector thereby served notice that "the administrative remedy was unavailable during the pendency of this litigation on the specific method-of-execution claim involved here." *Id.*

Regardless of the exact nature of the Chief Inspector's response, Mr. Spirko has exhausted all administrative remedies to the extent they were available. Accordingly, granting this motion would not be futile.

III. Conclusion

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. For all of the foregoing reasons, the Court should grant this emergency motion to intervene in this action.

DATED: November 6, 2006

Respectfully submitted,

/s/ David C. Stebbins

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2006, a true and correct copy of the foregoing John G. Spirko, Jr.'s Emergency Motion to Intervene has been electronically filed. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ David C. Stebbins