

FILED
LORAIN COUNTY

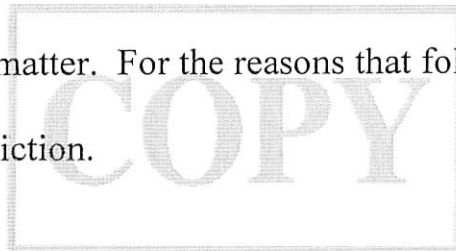
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IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

STATE OF OHIO, : Case No. 04CR065940
Plaintiff, : Judge James Burge
vs. : **JOURNAL ENTRY**
RUBEN RIVERA, :
Defendant. :

Defendant has asked this Court to preclude the possibility of a death sentence in this case on the basis that lethal injection as practiced in Ohio is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and of Section 9, Article I of the Ohio Constitution. The State asserts that the question is not ripe for resolution and that, accordingly, this Court has no jurisdiction to hold a hearing or rule on the matter. For the reasons that follow, the Court holds that it does have jurisdiction.



The State argues that the constitutionality of lethal injection in Ohio is not ripe for adjudication because Defendant Rivera has not been sentenced to death and may never be. Should he be sentenced to die, the State says, litigation might be proper to determine how he will be executed. Until then, there is nothing to decide.

Were the purpose of Mr. Rivera's motion to determine how he can be executed if he should be sentenced to death, the State might well be correct. But the State misconstrues the Defendant's motion. Mr. Rivera does not ask for a declaration that Ohio's current method of carrying out executions is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and of Section 9, Article I of the Ohio Constitution. Rather, the Defendant asks that the Court "remove death as a sentencing option in this case because the only current method of executing prisoners in Ohio is by a punishment which is unconstitutional and, therefore, imposing a death sentence would be imposing the infliction of a cruel and unusual punishment."

Thus, the basic question before the Court is not whether the current lethal injection protocol is unconstitutional but whether death should be a sentencing option in this case. The Constitutionality of lethal injection is a predicate issue, not the ultimate one. The Court concludes that the ultimate

issue is ripe for review at this time and that, therefore, the predicate issue must also be addressed.

A case must be ripe in order to be litigated. “Ripeness ‘is peculiarly a question of timing.’” *Regional Rail Reorganization Act Cases* (1974), 419 U.S. 102, 140. The ripeness doctrine keeps the courts “from entangling themselves in abstract disagreements over administrative policies.” *Abott Laboratories v. Gardner* (1967) 387 U.S. 136, 148.

The issue of ripeness, however, is not jurisdictional but prudential.

As the Supreme Court of California has explained:

[T]he ripeness requirement does not prevent us from resolving a concrete dispute if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question.

Hunt v. Superior Court of Sacramento County (Cal. 1999), 21 Cal.4th 984, 998, 987 P.2d 705, 716. As the constitutionality of lethal injection is being litigated around the country¹, it is clearly a matter of great consequence and interest. This is particularly true in this state, which has had two lethal injections go awry in just over a year.²

¹ Though not, for the moment, in Ohio, where the Sixth Circuit Court of Appeals has halted the litigation. See *Cooley v. Strickland* (CA 6, 479 F.3d 412, rehearing denied (June 1, 2007), ___ F.3d ___, No. 05-4057.

² It took the State 87 minutes to execute Joe Clark on May 2, 2006, during which time the prisoner is reported to have sat up and told the executioners, “It don’t work. It don’t work.” Just over one year later, on May 24, 2007, it took the State over two hours to execute Christopher Newton who, it is reported, was convulsing after receiving the drug which should have paralyzed him.

Furthermore, in other capital case contexts, it is clear that the possibility of a death sentence may be litigated before a sentence is imposed or the question of guilt determined. In the context of mental retardation, the claim that death cannot be a sentencing option is adjudicated before trial begins. See *State v. Lott* (2002), 97 Ohio St.3d 303. The same question is adjudicated pre-trial in cases where the accused was under eighteen years of age at the time of the alleged offense. See R.C. 2929.023. Finally, courts routinely rule pre-trial on motions to preclude the possibility of death because the death penalty is unconstitutional and because it violates international law. Such a motion was filed in this very case on November 29, 2006.³ In each of these situations, it is possible that the issue could be deemed not to be ripe since the ultimate question might not be reached. But the question is addressed anyway, and properly so, since their results determine what sort of trial will follow.⁴

If a sentence of death is an option, then the jurors who sit on the case will be death-qualified. There will be an extensive proceeding in which each prospective juror is questioned regarding his or her views of the death penalty and the sorts of circumstances under which he or she would or would not be willing or able to vote for a sentence of death. Moreover,

³ That motion is still pending.

⁴ The State contended, during oral argument on this issue, that the Constitutional motion to dismiss is also not ripe for adjudication pre-trial.

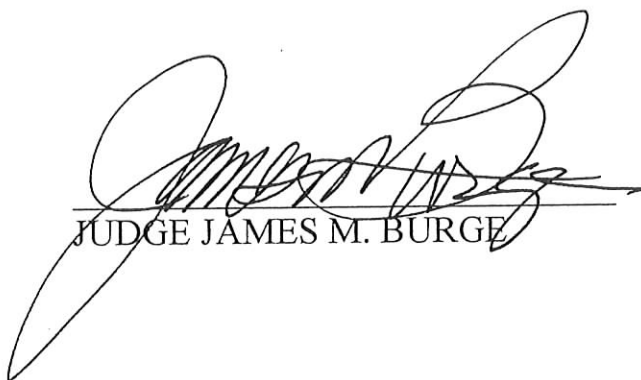
when death is an option, a change in the focus and strategy of the trial is likely to occur. Both the State and the defense will present their cases with an eye toward what may happen after a guilty verdict of both aggravated murder and a specification is reached. Finally, it is impossible to ignore the fact that the possibility of an execution changes the odds of the verdict. Study after study demonstrates that a death-qualified jury is more likely to find a defendant guilty. See, e.g., *Grigsby v. Mabry* (S.D. Ark. 1980), 483 F.Supp. 1372, 1387, fn. 18. While that may not be an unconstitutional consequence, see *Lockart v. McRee* (1986), 476 U.S. 162, it is a prudential one.⁵

ACCORDINGLY, the Court holds that whether to preclude death as a sentencing possibility because the only current method of execution in Ohio is unconstitutional is properly raised and may properly be determined at this time. As a consequence, the Court will conduct a hearing on whether lethal injection as practiced in Ohio is constitutional.

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⁵ Although the Supreme Court, in *Lockart* rejected the *Grigsby* court's analysis and conclusions, it did not reject its determination that a death-qualified jury is more likely to convict.

IT IS SO ORDERED.



JUDGE JAMES M. BURGE

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