

File Name: 09a0415p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD WADE COOEY II, et al., <i>Plaintiffs,</i>	} No. 09-4474
KENNETH BIROS (Intervenor), <i>Plaintiff-Appellant,</i>	
v.	
TED STRICKLAND, Governor, et al., <i>Defendants-Appellees.</i>	}

Filed: December 7, 2009

Before: SILER, GIBBONS, and SUTTON, Circuit Judges.

ORDER

The court received a petition for rehearing en banc, stay of execution and issuance of a briefing schedule, and the petition was circulated not only to the original panel members but also to all other active¹ judges of the court. Less than a majority of the judges having favored the suggestion, the petition was therefore referred to the original panel.

The panel has further reviewed the petition for rehearing and other relief and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

¹Judge Cook recused herself from participation in this ruling.

GRIFFIN, Circuit Judge (dissenting), with whom WHITE, Circuit Judge, joins. I am troubled by the procedural posture of this case and “Plan B” of the new protocol. Although the opinions are comprehensive, this appears to be a classic rush-to-judgment. On December 3, 2009, Biros filed a motion to amend his complaint to challenge the new, November 30, 2009 protocol. On December 4, the district court granted the motion and ordered an evidentiary hearing to commence 4 1/2 hours later. In my view, basic procedural due process demands more. On this issue, the final page of Judge Frost’s opinion is revealing: “It is not clear whether Biros could discover and present facts evincing a viable claim that would enable him to prevail in this litigation so that Ohio would need to find another method by which to execute him.” I would GRANT the petition for rehearing en banc and STAY the execution.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk