

Case No. 96-423

IN THE SUPREME COURT OF OHIO

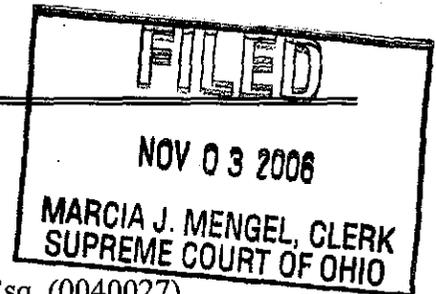
STATE OF OHIO, ) Case No. 96-423  
)  
Plaintiff-Appellee, )  
)  
vs. ) On Appeal from the Ohio Court of Appeals  
) for the Eleventh Appellate District (Case No.  
) 91-T-4632)  
)  
KENNETH BIROS, )  
)  
Defendant-Appellant ) DEATH PENALTY CASE  
) (NO EXECUTION DATE SET)  
)

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DEFENDANT-APPELLANT KENNETH BIROS'S MEMORANDUM IN OPPOSITION  
TO THE STATE'S MOTION TO SET AN EXECUTION DATE

DEATH PENALTY CASE

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**DEFENDANT-APPELLANT KENNETH BIROS'S MEMORANDUM IN OPPOSITION  
TO THE STATE'S MOTION TO SET AN EXECUTION DATE**

Defendant-Appellant Kenneth Biros, pursuant to S.Ct. Rule XIV, Section 4(B), hereby submits his memorandum in opposition to the State of Ohio's motion, filed on October 24, 2006, which asked this Court to set a date for Biros to be executed by lethal injection. The State's motion to set an execution date should be denied for three reasons, any one of which is sufficient to deny the motion.

First, this Court does not have jurisdiction to set an execution date and/or should refrain from exercising that jurisdiction in deference to the federal habeas action which is still pending. Among other reasons for this Court's lack of jurisdiction (see also item three below), Biros's federal habeas case is still pending in the United States Supreme Court, where he timely filed on October 25, 2006, his petition for rehearing of that Court's decision of October 2, 2006, denying Biros's petition for a writ of certiorari.

Second, Biros has timely sought to intervene as a plaintiff in the pending federal court litigation in which Ohio's lethal injection procedures are being challenged under 42 U.S.C. §1983. As this Court knows, the lethal injection litigation is captioned Cooey v. Taft, Case No. 2:04-CV-1156, and is pending in the United States District Court for the Southern District of Ohio. Biros has exhausted the prison grievance procedures as to his claims challenging the State's method of administering lethal injection, and his timely motion to intervene is scheduled to be addressed by the federal court by non-oral hearing on November 8, 2006. Because it is anticipated that Biros will be permitted to intervene in the lethal injection litigation, and, in any event, the federal court has not yet ruled on his pending motion to intervene but is expected to rule in a matter of days, this Court should refrain from setting an execution date at this time and should wait to see if Biros's motion to intervene is granted or not.

If it is granted, as Biros believes it will be, an execution date should not be set, if at all, until the lethal injection litigation is resolved by final judgment or settlement.

Third, Biros was never properly charged with, and the jury never found him guilty of, an offense for which the death penalty may be lawfully imposed under Ohio law. Should Biros be executed by the State of Ohio, he will to our knowledge become the first person executed in this country for committing a crime that, as charged by the State and as presented to and found by the jury, was not and is not an offense for which the death penalty may be imposed under the relevant state law. He is, in other words, being executed for committing an offense for which the Ohio legislature has not provided a sentence of death. The highest court of this state should not permit such a grave injustice to be imposed on any citizen, even one whose crime was a terrible one.

Each of these three grounds is addressed more fully below.

**I. The Court Does Not Have Jurisdiction, and/or Should Refrain from Exercising Jurisdiction, To Set an Execution Date Because the Case is Still Pending in the U.S. Supreme Court.**

The State is correct that the U.S. Supreme Court denied Biros's timely petition for a writ of certiorari on October 2, 2006. However, Biros on October 25, 2006, timely filed in the U.S. Supreme Court a Petition for Rehearing as permitted by Rule 44 of the Supreme Court Rules. A copy of the Supreme Court's docket for Biros's case, showing the filing and docketing of the Petition for Rehearing, is attached hereto as Exhibit 1.

Because Biros's federal habeas action is thus still pending in the U.S. Supreme Court, this Court does not have jurisdiction to set an execution date and/or should refrain from exercising jurisdiction in deference to the proceedings in the U.S. Supreme Court. The U.S. Supreme Court has distributed Biros's Petition for Rehearing for its conference of November 21, 2006. (See Exhibit 1).

Therefore, the U.S. Supreme Court is likely to make a decision on the Petition for Rehearing in an expeditious manner. This Court should not set an execution date, if at all, until at least such time as the U.S. Supreme Court makes its ruling on the pending Petition for Rehearing.

**II. Because Biros Has Timely Sought to Intervene in the Lethal Injection Litigation Pending in the U.S. District Court, this Court Should Refrain From Setting an Execution Date at this Time.**

On October 18, 2006, Biros timely filed his motion to intervene as a plaintiff in the litigation challenging Ohio's method of lethal injection, under 42 U.S.C. §1983, as violative of the U.S. Constitution in certain respects. That litigation is captioned Cooey v. Taft, Case No. 2:04-CV-1156, and is pending in the United States District Court for the Southern District of Ohio before Judge Gregory Frost.

At the time he filed his motion to intervene on October 18, 2006, Biros had attempted to exhaust the prison grievance procedures provided under OAC §5120-9-31. He did so by timely filing his grievance directly with the Office of the Chief Inspector in Columbus, Ohio on September 10, 2006, and, as of the date he moved to intervene, the requisite thirty (30) days by which the Chief Inspector was required to either rule on the grievance or demonstrate the requisite "good cause" for an extension had passed. Instead, by letter dated October 12, 2006, the Chief Inspector unilaterally declared to Biros that he would take more time to address the grievance (without specifying how much time). Then, on October 24, 2006, and still before Biros's pending grievance was addressed, the State of Ohio filed its motion with this Court seeking an execution date.

On the same date (October 24, 2006) as the State filed its motion in this Court to set an execution date, Biros filed a motion with the federal court in the lethal injection action requesting that the federal court expedite its ruling on Biros's pending motion to intervene. Biros argued that the State

should not be allowed to extend the deadline for responding to an inmate's grievance challenging lethal injection so that it could use the additional time to take affirmative steps (i.e., seek an execution date) that would allow it to impose on the inmate the very method of lethal injection that his grievance challenged.

By order dated October 25, 2006, the federal court in the lethal injection action granted Biros's motion to expedite and set an expedited briefing schedule requiring that the defendants file any opposition to the motion to intervene by October 30, 2006, and that Biros file any reply brief by November 3, 2006. The federal court also set November 8, 2006, as the non-oral hearing date for Biros's pending motion to intervene, which is the date by which it is expected the court will rule on Biros's motion. A copy of the federal district court's order granting Biros's motion to expedite is attached hereto as Exhibit 2.

On October 30, 2006, the Chief Inspector finally issued his decision denying Biros's grievance in its entirety. A copy of the Chief Inspector's decision denying the grievance is attached hereto as Exhibit 3. Thus, as of this filing, Biros has fully exhausted his administrative remedies and he is in a position to intervene in the lethal injection litigation.

Because it is anticipated that Biros will be permitted to intervene in the lethal injection litigation, and, in any event, the federal court has not yet ruled on his pending motion to intervene but it expected to rule in a matter of days, this Court should refrain from setting an execution date at this time and should wait to see if Biros's motion to intervene is granted or not. In the cases of other death row inmates who have timely sought to participate in the lethal injection litigation, it has been the practice of this Court to decline to set execution dates despite being requested to do so by the State. See, e.g., State v. Cooney, Case No. 1988-0351, 12/28/05 Case Announcements, 2005-Ohio-6763 at

4 (2005); State v. Tyler, Case No. 1988-0717, 08/02/06 Case Announcements, 2006-Ohio-3862 at 5 (2006); State v. Baston, Case No. 1997-2204, 08/02/06 Case Announcements, 2006-Ohio-3862 at 5 (2006).

Biros respectfully submits that this practice should also be followed in his case, and, accordingly, that the Court should decline the State's request to set an execution date at this juncture and should at least wait to see if Biros is permitted to intervene in the lethal injection litigation. If he is permitted to do so, the Court should refrain from setting an execution date, if at all, until the lethal injection litigation is resolved by final judgment or settlement.

**III. The Court Should Decline to Set An Execution Date For Biros in Any Event Because He Was Never Charged with or Convicted of an Offense which Carries the Death Penalty under Ohio Law.**

Biros was charged with and convicted of aggravated murder, but not capital aggravated murder. The essential element that would have made Biros eligible for the death penalty was never charged in the indictment, was never presented to Biros's jury, and was never found by the jury. The omitted element is that required by O.R.C. §2929.04(A)(7): "**either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.**"

At the time of Biros's trial, and still today, a defendant charged with aggravated murder in Ohio is only eligible to receive the enhanced sentence of death – the ultimate sentencing enhancement – if both of the following occurred: 1) the indictment charged the defendant with one or more of the aggravating circumstances set forth in section 2929.04(A)(7); and 2) the elements of those aggravating circumstances were "proved beyond a reasonable doubt" at the defendant's trial.

Only if the aggravating circumstances were both **charged** and **proved beyond a reasonable**

**doubt** at the trial would the death eligible defendant then proceed to a sentencing phase at which the jury would weigh the aggravating circumstances that had been charged and proved during the trial against any “mitigating factors” that were presented by the defendant at the sentencing hearing, *id.*, §2929.04(B), and determine whether the death eligible defendant should be sentenced to death. If, on the other hand, an aggravating circumstance was **not** charged in the aggravated murder indictment and was **not** proved beyond a reasonable doubt at the trial, the Ohio death penalty statute is unambiguous: “**Imposition of the death penalty for aggravated murder is precluded.**” *Id.*, §2929.04(A)(7). Such an offender is not death eligible.

The State of Ohio attempted to charge Biros with aggravated murder that would allow him to be sentenced to death, but it failed to properly do so. Biros was charged with felony murder in the death of Tami Engstrom, in violation of R.C. §2903.01(B), and this charge sought to include two of the aggravating circumstances enumerated in R.C. §2929.04(A)(7): specifically, that the aggravated murder was committed while the offender was committing, or fleeing immediately after committing, the crimes of aggravated robbery and/or rape. *State v. Biros*, 78 Ohio St. 3d 426 (1997).

However, the indictment omitted from each of these two aggravating circumstances the essential element that Biros “either . . . was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.” *Id.* at 436.

As such, the charge against Biros was not one for which the death penalty was available under Ohio law because his indictment did not properly allege the aggravating circumstances that were essential before he could be eligible for death. Moreover, Biros’s jury was never instructed to find, and did not find, this missing essential element during its deliberations in the guilt phase of the trial. *Id.*

at 438-39.

The jury's verdict of "guilty," therefore, was a verdict of guilty on a charge of aggravated murder that did not carry the possibility of death under Ohio law, *i.e.*, a charge for which the death penalty was **precluded** under Ohio law. *Id.*, §2929.04(A). In other words, the jury found Biros guilty of aggravated murder, but not "capital" aggravated murder. As in *Ring v. Arizona*, 536 U.S. 584 (2002), "[b]ased solely on the jury's verdict finding [Biros] guilty of [aggravated murder], the maximum punishment he could have received was life imprisonment."

Even though the jury had not found Biros guilty of **capital** aggravated murder, the state trial court permitted the matter to proceed to the mitigation phase of the trial, a phase that is reached **only** in capital cases and **only** after the defendant has been found guilty by the jury beyond a reasonable doubt of one or more of the statutory aggravating circumstances charged in the indictment. *Id.*, § 2929.03(C)(2), (D). By so allowing this non-capital aggravated murder conviction to proceed to a mitigation phase – as opposed to proceeding directly to sentencing by the trial court on the non-capital charge of aggravated murder as per R.C. §2929.03(A) – the state trial court effectively directed a verdict for the State on an essential element that had neither been charged nor proved beyond a reasonable doubt, *i.e.*, the element that Biros was the principal offender in the aggravated murder or, if not the principal offender, had committed the aggravated murder with prior calculation and design.

Then, to give effect to its directed verdict on that issue, the trial court instructed the jury during the mitigation phase that the aggravating circumstances had already been proved beyond a reasonable doubt during the guilt phase – and were to be weighed against any mitigating factors presented in the mitigation phase – when, in fact, they had not been proved and were never found by the jury.

Biros has thus been sentenced to death in this State even though all of the following are true:

- 1) an essential element of capital aggravated murder was omitted from his indictment;
- 2) the jury was never charged to find, and did not find, that missing essential element;
- 3) the omitted essential element – i.e., that Biros was the principal offender in the aggravated murder or, if not the principal offender, that he committed the aggravated murder with prior calculation and design – is the difference in Ohio between non-capital aggravated murder (for which life imprisonment is the maximum sentence) and capital aggravated murder (for which death is the maximum sentence);
- 4) the omitted essential element is the element which the federal courts have found to effect the narrowing required by the Eighth Amendment in capital cases and to thus permit Ohio's death penalty statute to pass constitutional muster;
- 5) the state court trial judge was permitted to effectively direct a verdict for the State on the missing essential element before imposing a death sentence on Biros;
- 6) the state trial court was permitted to misinform the jury during the crucial mitigation phase that the aggravating circumstance had already been proved beyond a reasonable doubt when it had not even been presented to the jury much less proved;
- 7) the Ohio death penalty statute unambiguously precludes the imposition of a death sentence in these circumstances.

Yet, inexplicably, Biros remains on death row and the State is now seeking his execution date.

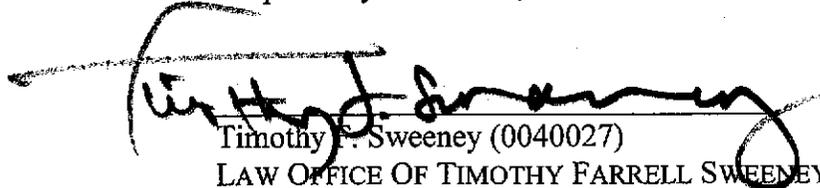
Should Biros be executed under these circumstances he will, to our knowledge, become the first person executed in this country for committing a crime that, as charged by the State and as presented to and found by the jury, was not and is not an offense for which the death penalty may be imposed under the relevant state law. **He is, in other words, being executed for committing an offense for which the Ohio legislature has not provided a sentence of death.** The highest court of this state should not permit such a grave injustice to be imposed on any citizen, even one whose crime was a terrible one.

**CONCLUSION**

For all of these reasons, and in the interest of justice, the State of Ohio's motion to set an execution date should be denied.

Dated: November 2, 2006

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Timothy P. Sweeney", is written over a horizontal line. The signature is fluid and cursive.

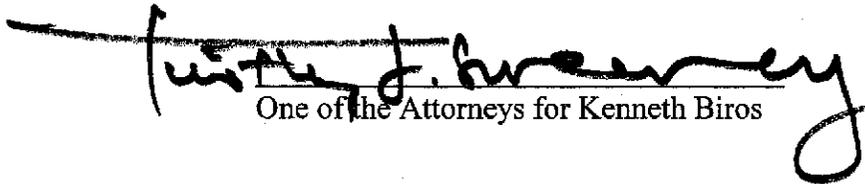
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Counsel for Kenneth Biros

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the DEFENDANT-APPELLANT KENNETH BIROS'S MEMORANDUM IN OPPOSITION TO THE STATE'S MOTION TO SET AN EXECUTION DATE was served via ordinary U.S. mail, first class postage prepaid, upon Dennis Watkins, Esq., Trumbull County Prosecutor, and LuWayne Annos, Esq., Assistant Prosecuting Attorney, Administration Building, Fourth Floor, 160 High Street, N.W, Warren, Ohio 44481, counsel for the State of Ohio, on this 2<sup>nd</sup> day of November 2006.

  
One of the Attorneys for Kenneth Biros



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

**RICHARD COOEY, et al.,**

**Plaintiffs,**

**v.**

**ROBERT TAFT, et al.,**

**Defendants.**

**Case No. 2:04-cv-1156**

**JUDGE GREGORY L. FROST**

**Magistrate Judge Mark R. Abel**

**ORDER**

This matter is before the Court for consideration of movant Kenneth Biros's motion for an expedited ruling on his pending motion to intervene. (Doc. # 101.) Upon consideration, the Court **GRANTS** the motion to expedite. The parties shall adhere to the following modified briefing schedule:

(1) Defendants shall file any memorandum in opposition to the motion to intervene by October 30, 2006.

(2) Biros shall file any reply by November 3, 2006.

(3) The Court reschedules the motion to intervene for a November 8, 2006 non-oral hearing.

**IT IS SO ORDERED.**

/s/ Gregory L. Frost  
GREGORY L. FROST  
UNITED STATES DISTRICT JUDGE

- Exhibit 2 -

**DECISION OF THE CHIEF INSPECTOR**

**ON A GRIEVANCE**

NAME: Kenneth Biros INSTITUTION: OSP  
NUMBER: 249-514 GRIEVANCE NUMBER: CI-06-432  
DATE: October 30, 2006

The Office of the Chief Inspector is in receipt of your Notification of Grievance against Governor Bob Taft, DRC Director Terry J. Collins, SOCF Warden Edwin Voorhies, and OSP Warden Marc Houk.

In your complaint you state that the procedure used in carrying out a court ordered execution will subject you to an unlawful deprivation of your constitutional rights, including your right to be free from cruel and unusual punishment, your right to substantive and procedural due process, your right to equal protection, and your right not to be exposed to ex post facto laws. You allege that the use of the three drugs specified in the DRC Execution Protocol (i.e., thiopental sodium, pancuronium bromide, and potassium chloride) and the manner which the drugs are to be administered, create an undue risk that you will be subjected to extreme, excruciating and unnecessary pain and suffering. You state that you will be forced to endure an agonizing death. You state that the DRC Execution Protocol does not require the personnel assigned to the execution team to be properly trained in maintaining intravenous lines and administering anesthesia. You state that the DRC Execution Protocol does not require that a licenced Ohio physician be in attendance during the execution to supervise the execution team.

Upon my review, I find that Administrative Rule 5120-9-31, Inmate Grievance Procedure makes no provisions for grievances to be filed directly to the Office of the Chief Inspector against the Governor or the Director.

In carrying out a court ordered death sentence, the Department acts in accordance with Section 2949.22 of the Ohio Revised Code "Execution of Death Sentence". It provides that a death sentence shall be executed by causing the application to the person, upon whom sentence was imposed, a lethal injection of a drug or combination of drugs of sufficient dose to quickly and painlessly cause death. It further states that lethal injection as described in the statute will be applied unless declared unconstitutional. As of the date of this disposition of grievance, the method of legal injection used by the Department has not been declared unconstitutional. Any argument that this procedure is unconstitutional must be addressed through the courts.

Legislative enactment has made lethal injection the only prescribed method of execution in Ohio.

You cite to a variety of alleged deficiencies in the Department's execution protocol with respect to training and the painful effects of the chemicals utilized.

Dr. Mark Dershwitz previously reviewed DRC's execution procedures in the case of *In re: Lewis Williams and In re: John Glenn Roe*, U.S. to App. (6<sup>th</sup> Cir.) Case No. 04-3014. Dr. Dershwitz provided the following information in the affidavit filed with the court in the cited case:

- Exhibit 3 -

By the time all 80 ml of thiopental sodium solution are injected, at the rate of 1mL/second, it is my further opinion, to a reasonable degree of medical certainty, that over 99.99999% of the population would be unconscious. ...[T]here is approximately a 0.00006% probability that a condemned inmate given this dose would be conscious, and able to experience pain, after a period of five minutes. ...[T]here is approximately a 0.003% probability that a condemned inmate given this dose would be conscious, and able to experience pain, after a period of ten minutes.

Thus, in the medical opinion of Dr. Derschwitz, there is "an exceedingly small risk that a condemned inmate under these circumstances would experience any pain associated with the infusion of lethal doses of pancuronium bromide and potassium chloride."

As you note DRC Policy 01-COM-11 addresses executions. The members of the execution team are trained to perform their assigned tasks. The persons responsible for handling and administering the drugs are qualified to do so under Ohio law.

Administrative Rule 5120-9-31, Inmate Grievance Procedure, states in part that grievances in which the Warden or Inspector of Institutional Services has been made a party must show that the Warden or Inspector of Institutional Services was personally and knowingly involved in a violation of law, rule, or policy and approved it or did nothing to prevent it. You have failed to clearly indicate how Warden Houk and Warden Voorhies were personally and knowingly involved in a violation of law, rule, or policy and approved it or did nothing to prevent it.

Accordingly this grievance is **DENIED**. This office will take no further action on this matter at this time.



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Gary R. Croft, Chief Inspector

cc: **Inspector of Institutional Services**