

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee

Supreme Court No. 97-2247

vs.

On Appeal From The Lucas
County Court Of Appeals
Sixth Appellate District
Court of Appeals No. L-94-03

GREGORY BRYANT-BEY,
Defendant-Appellant

Death Penalty Case

STATE'S MOTION TO SET DATE FOR EXECUTION

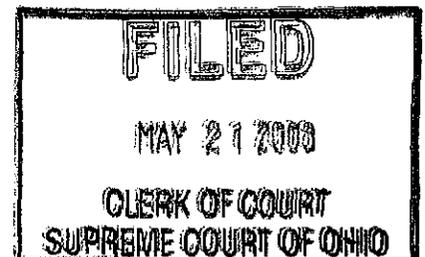
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I. Introduction

Defendant-Appellant Gregory Bryant-Bey (Bryant-Bey) is an Ohio Death Row inmate who was convicted and sentenced to death for the August 9, 1992, aggravated murder of Dale Pinkelman, the proprietor of a business in Toledo, Lucas County, Ohio. Bryant-Bey has exhausted all state and federal remedies, and the State of Ohio respectfully requests that this Court issue an order and Death Warrant setting an execution date.

II. Procedural History

A. Indictment

On November 12, 1992, the Lucas County Grand Jury indicted Bryant-Bey on the following charges:

Count 1

Aggravated Murder (Dale Pinkelman, August 9, 1992), ORC 2903.01(B)
Aggravated Robbery Specification, ORC 2929.04(A)(7)

Principal Offender Specification, ORC 2941.14

Count 2

Aggravated Robbery (Dale Pinkelman, August 9, 1992), ORC 2911.01
Prior Felony Specification, ORC 2941.142

Count 3

Aggravated Murder (Pete Mihas, November 3, 1992), ORC 2903.01(B)
Aggravated Robbery Specification, ORC 2929.04(A)(7)
Principal Offender Specification, ORC 2941.14

Count 4

Aggravated Robbery (Pete Mihas, November 3, 1992), ORC 2911.01
Prior Felony Specification, ORC 2941.142

B. Trial

Bryant-Bey's motion to sever was granted and the matter first proceeded to trial on Counts 3 and 4, wherein Pete Mihas was the victim. A guilty verdict was returned and a sentence of life imprisonment was imposed. The verdict and sentence was upheld on appeal. See *State v. Bryant-Bey* (Mar. 10, 1995), 6th Dist. No. L-93-184, 1995 Ohio App. Lexis 841, unreported, discretionary appeal denied (1995), 73 Ohio St. 3d 1411, 651 N.E.2d 1308, certiorari denied (1996), 516 U.S. 1077, 116 S. Ct. 784, 133 L. Ed.2d 734.

Following the trial and sentencing on Counts 3 and 4, the matter proceeded to trial on Counts 1 and 2, wherein Dale Pinkelman was the victim. A jury was empanelled on November 16, 1993. Guilty verdicts were returned on November 19, 1993. A mitigation hearing was commenced on November 22, 1993, and the jury recommended a death sentence on November 23, 1993. The trial judge followed that recommendation and on December 22, 1993, sentenced Bryant-Bey to death.

C. Direct Appeal

Bryant-Bey appealed to the Sixth District Court of Appeals and the convictions and death sentence were upheld. *State v. Bryant-Bey* (Sep. 19, 1997), 6th Dist. No. L-94-003, 1997 Ohio App.

Lexis 4182, unreported. Bryant-Bey then appealed to this Court, where the convictions and death sentence were upheld. *State v. Bryant-Bey* (1999), 85 Ohio St. 3d 487. Bryant-Bey's application for reconsideration of this decision was denied. *State v. Bryant-Bey* (1999), 86 Ohio St.3d 1421. Certiorari was denied by the United States Supreme Court. *Bey v. Ohio* (1999), 528 US 1049.

Bryant-Bey filed an application with the Sixth District Court of Appeals pursuant to App. R. 26(B)(5) to reopen his appeal. That application was denied by the Sixth District. *State v. Bryant-Bey* (Nov. 5, 2001), 6th Dist. No. L-94-003, unreported. The denial of Bryant-Bey's application to reopen was upheld by this Court. *State v. Bryant-Bey* (2002), 97 Ohio St. 3d 87.

D. Post-conviction Proceedings

Bryant Bey filed a petition for post-conviction relief on September 20, 1996. The trial court denied that petition on October 31, 1997. The denial of post-conviction relief was upheld by the Sixth District Court of Appeals. *State v. Bryant-Bey* (June 16, 2000), 6th Dist. No. L-97-1425, 2000 Ohio App. Lexis 2564, unreported. This Court declined to grant further review of that denial. *State v. Bryant-Bey* (2000), 90 Ohio St. 3d 1440.

E. Federal Habeas Corpus Proceedings

On July 19, 2001, Bryant-Bey filed a petition for writ of habeas corpus with the United States District Court, Northern District of Ohio, Case No. 01-CV-7385. On September 9, 2004, District Judge Paul Matia denied the petition and declined to issue a certificate of appeal. *Bey v. Bagley*, Unreported, Doc. 34, Case No. 01-CV-7385 (Sep. 9, 2004). Bryant-Bey appealed to the Sixth Circuit Court of Appeals, who issued a certificate of appealability on a single claim. Thereafter, the Sixth Circuit Court of Appeals upheld the denial of relief. *Bey v. Bagley* (6th Cir. 2007), 500 F. 3d 514. A

mandate memorializing that decision was journalized on October 23, 2007. The United States Supreme Court denied certiorari review. *Bey v. Mitchell*, 2008 US LEXIS 2764 (March 24, 2008).

F. A Stay Is Not Appropriate

Bryant-Bey may argue that this Honorable Court should not grant an execution date because there is pending federal litigation relating to the constitutionality of Ohio's lethal injection protocol. This assertion is improper for two reasons. First, Bryant-Bey is not a party to that litigation and therefore has no standing to claim a stay under it.

Second, even if Bryant-Bey were to become a party to the litigation, the litigation itself would not delay setting an execution date. The two relevant federal cases are those dealing with inmates Richard Cooley and Kenneth Biros. Both cases are subject to dismissal and the precedent of the Supreme Court of the United States establishes the right for the State to proceed in seeking an execution date.

Any argument that the *Cooley/Biros* litigation should require a stay is not well-founded for two reasons. First, although there is currently an order by a District Court to stay the execution of Cooley and Biros, the order does not prevent the setting of an execution date. The distinction between setting an execution date and the actual execution is crucial under the specific circumstance of *Cooley/Biros* because the dismissal of the *Cooley/Biros* litigation is inevitable. The District Court's stay will be reversed and the district court judge will be under order to dismiss Cooley's litigation as barred by the statute of limitations.

The Sixth Circuit Court of Appeals ruled that Cooley failed to raise his claim within the statute of limitations for a 42 U.S.C. § 1983 claim. *Cooley v. Strickland*, 479 F.3d 412 (2007). It ordered that Cooley's case be remanded to the District Court with orders that Cooley's lawsuit be dismissed. Cooley filed a writ of certiorari to the Supreme Court of the United States, thereby

staying the Sixth Circuit's mandate. On April 21, 2008, the Supreme Court of the United States denied the writ of certiorari. *Cooley v. Strickland* (2008), S. Ct., 2008 W.L. 1775072.

Although the Sixth Circuit has not yet issued the mandate, Supreme Court precedent dictates that the *Cooley/Biros* litigation is at an end:

As a practical matter, a decision by this Court denying discretionary review usually *signals the end of litigation*. While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare. *See, e.g., First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895 (CA5 1995); *Alphin v. Henson*, 552 F.2d 1033 (CA4 1977). In the typical case, where the stay of mandate is entered solely to allow this Court time to consider a petition for certiorari, Rule 41(d)(2)(D) provides the default: "The court of appeals *must issue the mandate immediately* when a copy of a Supreme Court order denying the petition for writ of certiorari is filed."

Bell v. Thompson, 545 U.S. 794, 806 (2005) (emphasis added). Thus, the Supreme Court precedent recognizes that the *Cooley/Biros* litigation is now at an end.

Because the District Court's order does not prevent this Court from setting an execution date for Cooley or Biros, it cannot prevent the setting of the execution date for Bryant-Bey. Additionally, because the *Cooley/Biros* litigation is effectively at an end and the State can proceed in good faith knowing that the Sixth Circuit must issue a mandate requiring the dismissal of the litigation, Bryant-Bey would not be entitled to relief any more than Cooley or Biros.

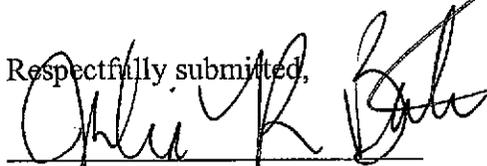
Thus, there is no pending federal order in any case preventing the setting of an execution date, and the pending federal litigation must be dismissed under the Sixth Circuit's ruling in *Cooley*. Under the holding of *Cooley*, any § 1983 claim by Bryant-Bey would be time-barred, as would any attempt to intervene in any § 1983 litigation. Therefore, because the *Cooley/Biros* litigation is at an end for all intents and purposes, and because Bryant-Bey would be time-barred from joining timely litigation, there is no reason for this Court to delay setting an execution date in this case.

Conclusion

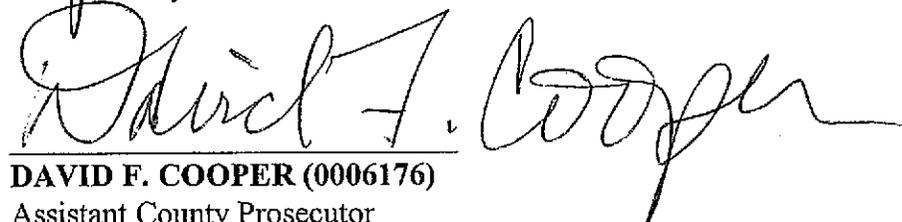
With this procedural history, it is clear that Bryant-Bey has exhausted all of his state and federal court reviews of his conviction and death sentence, and has not sought a stay from this Court. In *State v. Steffen* (1994), 79 Ohio St.3d 398, 412, this Court held that once a capital defendant has exhausted his direct appeal, post-conviction review and delayed reconsideration review, any further filings are likely to be interposed for purposes of delay, and that a capital defendant would have to petition this Court for a stay to allow such further litigation. As of this writing, Bryant-Bey has not sought a stay from this Court.

Accordingly, that State of Ohio respectfully moves this Court for an order and Death warrant setting an execution date.

Respectfully submitted,



JULIA R. BATES (0013426)
Lucas County Prosecutor



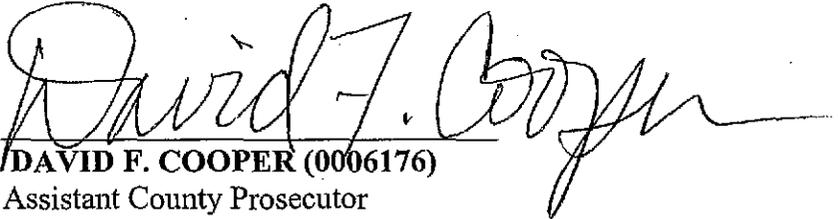
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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing motion was sent by ordinary U.S. Mail to Richard M. Kerger, 33 S. Michigan, Suite 100, Toledo OH 43604-3251 and to Ann Baronas-Jonke, 413 N. Michigan Ave., Toledo OH 43604-5606, counsel for defendant appellant Bryant-Bey, on this 19th day of May, 2008.


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Assistant County Prosecutor