IN THE SUPREME COURT OF OHIO

96-2455

STATE OF OHIO

Plaintiff-Appellee,

vs.

MARVALLOUS KEENE

Defendant-Appellant.

Case No. ~~99-0517~~

On Appeal from the Montgomery County Court of Appeals, Second Appellate District

Court of Appeals Case No. 16963
Trial Ct. No. 92-CR-2469

DEATH PENALTY CASE

MOTION TO SET EXECUTION DATE

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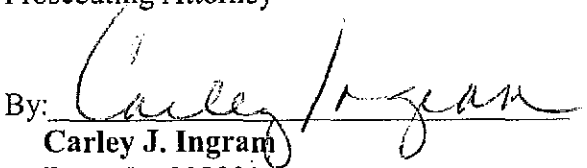
Defendant-Appellant.	**Court of Appeals Case No. CA 16963 Trial Ct. No. 92-CR-2469**
	Death Penalty Case

MOTION TO SET EXECUTION DATE

The State of Ohio respectfully requests this Court to set an execution date for Appellant Marvallous Keene, who has exhausted all state and federal court reviews of his conviction and death sentence.

Respectfully submitted,

Mathias H. Heck, Jr.
Prosecuting Attorney

By: 
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MEMORANDUM IN SUPPORT

I. Introduction: In late December 1992, over a period of two and a half days, Marvallous Keene killed five people in Montgomery County: Joseph Wilkerson, who was robbed and murdered in his own house; Donita Gullette, shot at a pay phone in Dayton for her shoes and jacket; Sarah Abraham, robbed and shot in the face just after she'd opened the neighborhood market she managed; and teenagers Wendy Cottrill and Marvin Washington, executed because Keene believed they'd betrayed him. In October, 1993, Keene was convicted by a three-judge panel in Montgomery County Common Pleas Court of five counts of capital murder and numerous associated felonies and sentenced to death. The judgment has been upheld on direct appeal, as was the trial court's denial of his petition for post-conviction relief under R.C. 2953.21. The Sixth Circuit Court of Appeals affirmed the district court's denial of his petition for habeas corpus relief, and the Supreme Court of the United States has denied certiorari. Keene's motion to intervene in a lawsuit in federal district court challenging Ohio's lethal injection protocol was denied, and he did not appeal. Because Marvallous Keene has exhausted all state and federal court proceedings, the State of Ohio requests this Court to set a date for his execution.

II. State Court Proceedings: The Court of Appeals for Montgomery County affirmed Keene's conviction and death sentence in *State v. Keene* (Sept. 20, 1996), Montgomery App. No. 14375, 1996 WL 531606. This Court affirmed. *State v. Keene*, 81 Ohio St.3d 646, 1998-Ohio-342, 693 N.E. 2d 246. The United States Supreme Court then denied Keene's petition for a writ of certiorari. *Keene v. Ohio* (1998), 525 U.S. 936, 142 L.Ed.2d 288, 119 S.Ct. 350.

On September 20, 1996 Keene filed a petition for post-conviction relief, which the trial court denied on November 17, 1997. The court of appeals affirmed in *State v. Keene* (Feb. 5, 1999), Montgomery App. No. 16963, 1999 WL 55711. This Court declined to hear Keene's appeal. *State v. Keene* (1999), 85 Ohio St.3d 1496, 710 N.E. 2d 716.

III. Federal Court Proceedings: On May 26, 2000, Keene filed a petition for a writ of habeas corpus in the Southern District of Ohio, Western Division. *Keene v. Mitchell*, # 1:00-cv-421. Five years later, the court adopted the report and recommendations of the magistrate, dismissed the petition with prejudice, and closed the case. Keene appealed, but the Sixth Circuit affirmed. *Keene v. Mitchell* (C.A.6, 2008), 525 F.3d 461. On January 26, 2009, the United States Supreme Court denied Keene's petition for a writ of certiorari. *Keene v. Mitchell*, No. 08-7469.

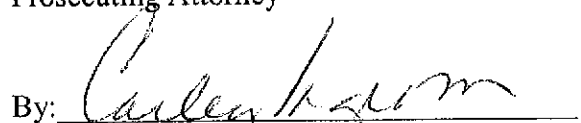
In May, 2008, Keene filed a motion to intervene in *Reynolds v. Strickland*, Case No. 2:08-cv-442, a case in the Southern District of Ohio, Eastern Division that challenged Ohio's lethal injection protocol. When that court dismissed the lawsuit on August 28, 2008, it denied Keene's motion for leave to intervene as moot, and he did not appeal. Keene's failure to appeal that decision prevents him from attempting to intervene in the appeal of the dismissal filed by the actual parties to the litigation — as a general rule a party who unsuccessfully filed a motion to intervene is prohibited from appealing anything but the order denying intervention. *City of*

Cleveland v. State of Ohio et al., (6th Cir. 2007), 508 F.3d 827, 836-837, citing *United States v. Ladd (In re AP)* (7th Cir. 1998), 162 F.3d 503, 506, *B.H. by Pierce v. Murphy*, (7th Cir. 1993) 984 F.2d 196, 199-200. The rule is based on the basic requirements of standing, e.g., that the party seeking to appeal is actually aggrieved by the judgment or order from which an appeal is sought. Id. Keene was not aggrieved by the dismissal of a lawsuit to which he was not a party, which means that any further attempt on his part to participate in the litigation challenging Ohio's lethal injection protocol is doomed.

IV. Conclusion: Keene has exhausted all federal and state reviews of his conviction and death sentence. The State asks that this court set a date for his execution.

Respectfully submitted,

Mathias H. Heck, Jr.
Prosecuting Attorney

By: 
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Attorney for State of Ohio, Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was sent by e-mail and by first class mail on this 6 day of February, 2009 to: Kelly L. Schneider, Pamela J. Prude-Smithers, Assistant State Public Defenders, Ohio Public Defender's Office, 8 East Long Street, Suite 1100, Columbus, OH 43215.

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