





aggravated robbery, in violation of R.C. 2911.01(A)(1) and (A)(2); and attempted rape, in violation of R.C. 2923.02(A) and R.C. 2907.02. The specifications of aggravating circumstances underlying the aggravated murder charge were aggravated robbery and attempted rape. The case was assigned number 91-CR-87 in the Trumbull County Common Pleas Court.

### **B. Trial**

Jury selection began in Appellant's case October 2, 1991. Prior to the commencement of voir dire, the State dismissed the abuse of a corpse charge. The jury was impaneled October 7, 1991, and it returned guilty verdicts on all remaining charges October 18, 1991. The mitigation phase began October 22, 1991. Two days later, the jury recommended Appellant be sentenced to death. The trial judge followed that recommendation October 29, 1991, when he filed a sentencing opinion stating that the aggravating circumstances outweighed the mitigating factors and sentenced Appellant to death.

### **C. Direct Appeal**

The Appellant appealed to the Eleventh District Court of Appeals which upheld the death sentence, but reversed the aggravated robbery conviction. *State v. Biros* (Dec. 29, 1995), Trumbull App. No. 91-T-4632, unreported. Both parties appealed to this Court, which upheld the death sentence and reinstated the aggravated robbery conviction on May 14, 1997. *State v. Biros* (1997), 78 Ohio St. 3d 426, 1997-Ohio-204. Appellant appealed to the United States Supreme Court, which denied *certiorari* on December 1, 1997. *Biros v. Ohio* (1997), 522 U.S. 1002. He filed an App. R. 26(B) Application to Reopen his direct appeal with the Eleventh District September 15, 2000, which the court denied December 27, 2000, because it was untimely filed. This Court affirmed that denial in an entry posted September 26, 2001. *State v. Biros* (2001), 93 Ohio St. 3d 250.

#### **D. Postconviction Proceedings**

During the pendency of the direct appeal, Appellant filed a postconviction petition pursuant to R.C. 2953.21 in the Trumbull County Court of Common Pleas on September 20, 1996. On December 4, 1996. He filed an amended petition and a motion for discovery and appointment of experts. In a judgment entry filed February 10, 1998, the trial court denied Appellant's petition without hearing. The Eleventh District affirmed the trial court's denial in *State v. Biros* (May 29, 1999), 11<sup>th</sup> Dist. No. 98-T-0051, unreported. Appellant appealed the Eleventh District's affirmation to this Court, but this Court declined jurisdiction in *State v. Biros* (1999), 87 Ohio St. 3d 1406, on September 29, 1999.

#### **E. Federal Habeas Corpus Proceedings**

On September 15, 2000, Appellant filed his petition for writ of habeas corpus with the United States District Court of Appeals for the Northern District of Ohio, Case No.1: 00 CV 01384, alleging twenty-five claims of error. On December 13, 2002, Judge Dan Aaron Polster granted the writ as to his sentence of death but denied the writ as to the remaining counts. Margaret Bagley, respondent, appealed that ruling to the U.S. Sixth Circuit Court of Appeals and Appellant filed a cross-appeal from the district's denial of his petition as to the claims challenging his underlying convictions. On September 9, 2005, a three-judge panel for the U.S. Sixth Circuit Court of Appeals reinstated Appellant's death sentence in *Biros v. Bagley* (6<sup>th</sup> Cir. 2005), 422 F. 3d 379. The court denied an *en banc* hearing Jan.23, 2006. Appellant sought review by the United States Supreme Court, but the high court denied certiorari on October 2, 2006 and denied rehearing November 27, 2006. U.S. Supreme Court No. 05-11394. Upon the State's motion, this Court set Appellant's execution date for January 23, 2007. *State v. Biros*, 111 Ohio St. 3d 1496, 2006-Ohio-6250.

## **F. Clemency**

The Ohio Parole Board conducted a clemency hearing in this matter January 4, 2007. The seven-member panel unanimously recommended against clemency in the form of a commutation or reprieve. In-coming Governor Ted Strickland granted Appellant a reprieve from his original date with death to more fully review the case. On March 16, 2007, Gov. Strickland denied Appellant clemency. Four days later, Gov. Strickland lifted the reprieve and ordered Appellant's execution for 10 a.m. March 20, 2007. Appellant was transferred from Death Row at the Ohio State Penitentiary in Youngstown to the Death House at the Southern Ohio Correctional Facility at Lucasville, Ohio. Members of Tami Engstrom's family and a representative of this office gathered in Lucasville for the scheduled execution, but the execution did not take place.

## **G. The Lethal Injection Challenge**

After the U.S. Supreme Court denied Appellant's petition for certiorari and before this Court set his original execution date, Judge Gregory Frost of the U.S. District Court for the Southern District of Ohio, Eastern Division, permitted Appellant to join a federal lawsuit challenging the constitutionality of lethal injection, Ohio's sole method of execution, in Case No. 2:04 CV 01156. On Nov. 9, 2006, Appellant joined with fellow Death Row inmate Richard Cooley in a 42 U.S.C. §1983 civil rights action challenging the constitutionality of lethal injection. The U.S. District Court in Columbus entered an order enjoining Appellant's execution Dec. 21, 2006. Through the Office of the Ohio Attorney General, the State requested the U.S. Sixth Circuit Court of Appeals to vacate the lower court's stay. On March 19, 2007, just one day before the scheduled execution, the U.S. Sixth Circuit denied the State's request to lift the injunction. The State sought intervention from the U.S. Supreme Court on the day of execution, but the high court denied the State's application to vacate the stay. Nevertheless, on

March 2, 2007, a two-judge majority of the U.S. Sixth Circuit Court of Appeals held that the statute of limitations had expired when Richard Cooley initiated his lethal injection suit, to which Appellant had joined as an intervenor, remanded the suit, and ordered Judge Frost to dismiss the action. *Cooley v. Strickland* (6<sup>th</sup> Cir. 2007), 479 F. 3d 412.

On September 25, 2007, the U.S. Supreme Court granted certiorari in *Baze v. Rees* (2008), 128 S.Ct. 1520, 2008 WL 1733259, a case identical to Cooley's challenged which Appellant joined. The suit alleged that the "three-drug cocktail" employed by the State of Kentucky constitutes cruel and unusual punishment and is therefore violative of the Eighth Amendment to the U.S. Constitution. This grant of certiorari halted all executions in the State of Ohio, including Appellant's. On April 16, 2008, the U.S. Supreme Court ruled that the "three drug cocktail" employed by the State of Kentucky is constitutional. *Id.* On April 21, 2008, the U.S. Supreme Court denied certiorari in *Biros v. Strickland et al.* Case No. 07-6243.

As a result of the denial of the writ of certiorari, undersigned counsel filed its second Motion to Set Execution Date on April 30, 2008. However, even with the denial of certiorari by the U.S. Supreme Court, Judge Frost's preliminary injunction barring Appellant's execution remained in effect. The Ohio Attorney General's Office moved the U.S. Sixth Circuit to vacate the preliminary injunction, but on July 8, 2008, the Sixth Circuit remanded the case to Judge Frost to determine whether the injunction should stand in light of the *Baze* decision. Judge Frost denied State's motion to dismiss the preliminary injunction and ordered the matter set for hearing in his court to determine, inter alia, whether Biros was likely to succeed on his lethal injection claims under a *Baze* inquiry. This Court denied the State's Second Motion to Set Execution on September 10, 2008. Cooley, the original plaintiff in the law suit, was executed October 14, 2008.

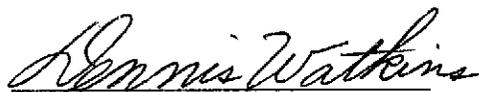
Judge Frost conducted an evidentiary hearing which began March 23, 2009, and lasted five days. A total of seventeen witnesses testified including members of the Ohio Department of Rehabilitation and Correction's execution team, the prison wardens who presided over Ohio's most recent executions, and two expert witnesses. These witnesses discussed Ohio's execution protocols and procedure. The experts opined as to whether Ohio's three-drug injection procedure comports with the *Baze* decision or if it runs a substantial risk of inflicting unnecessary pain and suffering and is therefore violative of the Eighth Amendment to the U.S. Constitution. In a 159-page Opinion and Order issued April 21, 2009 Judge Frost ruled that "the protocol passes constitutional concerns even with the natural risks that unavoidably arise." *Cooley et al. v. Strickland et al.*, (April 21, 2009), U.S. Dist. Court, Southern Dist. of Ohio, Eastern Division, Case No. 2:04-cv-1156, p. 147. Further, Judge Frost held Appellant had failed to demonstrate a strong likelihood of success in further litigation of his §1983 claim. The judge vacated the preliminary injunction which has stayed the execution since December 21, 2006. At this writing, no other stays have been issued to delay this execution.

**Conclusion:**

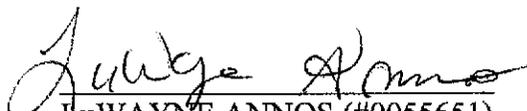
With this procedural history, it is clear Appellant has exhausted all of his state and federal court reviews of his conviction and death sentence and has not sought a stay from this Court. The final impediment to his execution, a federal preliminary injunction staying his execution, has been vacated. In *State v. Steffen* (1994), 79 Ohio St. 3d 398, 412, this Court held that once a capital defendant has exhausted his direct appeal, postconviction 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, Appellant has not sought a stay from this Court.

Tami Engstrom's survivors and the citizens of Trumbull County await justice. They are entitled to closure. While the federal courts have gone to extraordinary lengths to allow Appellant to prosecute a civil rights claim, justice has been delayed and denied to Mrs. Engstrom's family and friends, and the law abiding citizens of our community. Richard Coocy, the plaintiff who originated the lethal injection challenge, was put to death seven months ago. The State argues that a federal judge has now determine Appellant is unlikely to succeed in his lethal injection argument, thereby removing any legitimate excuse to delay his execution. Accordingly, the State of Ohio respectfully moves this Court for an order and Death Warrant setting an execution date without further delay.

Respectfully submitted,



DENNIS WATKINS (#0009949)  
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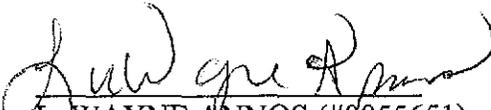


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PROOF OF SERVICE

I do hereby certify that a copy of the foregoing motion was sent by ordinary U.S. Mail to Atty. John Patrick Parker (#0041243), The Brownhoist Bldg., 4493 St. Clair Ave., Cleveland, Ohio, 44103-1125 and Timothy F. Sweeney (#0040027), the 820 Building, 820 W. Superior Ave., Suite 430 Cleveland, Ohio, 44113-1800, Counsel for Defendant-Appellant Kenneth Biros, on this 23<sup>rd</sup> day of April, 2008.

  
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