

ORIGINAL

In the Supreme Court of Ohio

State of Ohio,

Plaintiff-Appellee,

-vs-

Case No.: 1996-2455

Marvellous Keene,

Defendant-Appellant.

**This is a Capital Case.**

---

Marvellous Keene's Motion to Continue His Scheduled Execution Date

**Execution Scheduled for July 21, 2009**

---

Mathias H. Heck, Jr.  
Montgomery County Prosecutor

OFFICE OF THE  
OHIO PUBLIC DEFENDER

Carley J. Ingram  
Assistant Prosecuting Attorney

Kelly L. Schneider - 0066394  
Supervisor, Death Penalty Division  
**Counsel of Record**

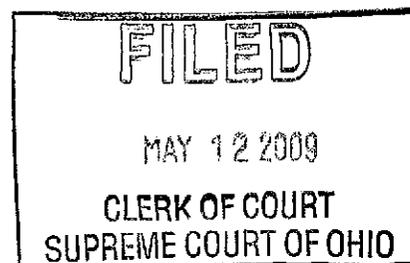
Rachel Troutman - 0076741  
Assistant State Public Defender

Montgomery County Prosecutor's Office  
Appellate Division  
P.O. Box 972  
301 West Third Street, 5<sup>th</sup> Floor  
Dayton, Ohio 45422  
(937)225-4117

Office of the Ohio Public Defender  
250 East Broad Street, Suite, 1400  
Columbus, Ohio 43215-2998  
(614)466-5394  
(614)644-0708 (FAX)

Counsel for Plaintiff-Appellee

Counsel for Defendant-Appellant



In the Supreme Court of Ohio

State of Ohio,

Plaintiff-Appellee,

-vs-

Case No.: 1996-2455

Marvellous Keene,

Defendant-Appellant.

**This is a Capital Case.**

---

Marvellous Keene's Motion to Continue His Scheduled Execution Date

---

On May 6, 2009, this Court scheduled Marvellous Keene's execution for July 21, 2009. The date set by this Court provides Keene with insufficient time to investigate, prepare, and present a clemency request. Therefore, he respectfully requests that this Court move his scheduled execution date to later date that will afford him a meaningful opportunity to pursue clemency.

Respectfully submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER

By: 

Kelly L. Schneider - 0066394  
Supervisor, Death Penalty Division

Counsel of Record

By: 

Rachel Troutman - 0076741  
Assistant State Public Defender

Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614)466-5394  
(614)644-0708 (FAX)  
Counsel for Appellant

## Memorandum in Support

### A. Introduction.

On May 6, 2009, this Court set Marvellous Keene's execution date for July 21, 2009. Should Keene wish to pursue clemency, the latest date the parole board can accommodate a hearing for Keene is June 11, 2009. Any materials Keene wishes to present to the parole board must be prepared and presented by June 4, 2009. This gives counsel less than a month to investigate, collect records, interview family, gather and prepare exhibits, and prepare a clemency presentation.

### B. Argument.

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Harbison v. Bell, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1481, 1490 (2009) (citing Herrera v. Collins, 506 U.S. 390, 411-12 (1993)). If Keene chooses to participate in the clemency process, he will be unable to meaningfully do so. No prisoner should be "put to death without meaningful access to the 'fail-safe' of our justice system." Id. at 1491.

Capital counsel owes no small duty to a death-sentenced inmate, even in preparation for his clemency proceedings. "In addition to assembling the most persuasive possible record for the decisionmaker, counsel must carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process." American Bar Associations Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 937 (2003) (footnote omitted). In order to effectively discharge counsel's duties, the ABA Guidelines require counsel to:

- "be familiar with the procedures for and permissible substantive content of a request for clemency
- to "conduct an investigation in accordance with Guideline 10.7"

- to “ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction; and
- to “ensure that the process governing consideration of the client’s application is substantively and procedurally just, and, if it is not, should seek appropriate redress.

Guideline 10.15.2, 31 Hofstra L. Rev. at 1088.

To this end, once an execution date is set, the Ohio Public Defender assembles a team to work on the specific case. This team includes more than the two lawyers assigned to the case because the ABA Guidelines require far more work than two attorneys are capable or qualified to perform. Mitigation and investigation resources are tapped. Witnesses and exhibits must be located. Oftentimes out of state travel may be necessitated. Expert assistance is obtained. Other attorneys are assembled to assist with the case. All of these resources are required in order to prepare and present an effective clemency petition. And, the ABA Guidelines make clear that clemency is not undersigned counsel’s only obligation—end-stage litigation must be investigated, researched, evaluated, and potentially prepared. See 31 Hofstra L. Rev. at 937 (footnote omitted).

As a result of budgetary constraints and the decrease in death sentences, as well as the creation of Capital Habeas Units in the Northern and Southern Federal Defender’s Offices, the Ohio Public Defender’s death penalty staff has been significantly reduced; the Ohio Public Defender simply does not have manpower to run two execution teams in a single month. This matter is further compounded because Keene, like virtually every other death row inmate, is housed at the Ohio State Penitentiary in Youngstown, Ohio. End-stage litigation and clemency proceedings require extensive client contact; round-trip, this drive will consume 6.5 hours each time Keene’s counsel visits him.

In addition, counsel’s obligation to represent other death-sentenced clients in the state and federal courts does not disappear despite the resource-sapping nature of an execution date. Combined, undersigned counsel represent 22 different death row inmates. Attorney Schneider is

also counsel of record for more than 20 plaintiffs litigating a challenge to Ohio's lethal injection in the Franklin County Court of Common Pleas.

Given the short timeframe this Court has afforded for counsel and the parole board to perform their assigned tasks, there is no meaningful opportunity for undersigned counsel to meet their obligations as outlined in the ABA Guidelines.

This Court should also take notice of the emotional toll it will take on the Ohio Public Defender's staff to run two execution protocols in a single month; a toll that will also be paid by members of the Ohio Department of Rehabilitation and Correction's execution team, the Ohio Parole Board, and the Ohio Attorney General's Office, all of whom participate in the clemency proceedings, end stage litigation, and/or the actual execution.

Moreover, this Court should not ignore the fact that the Ohio Public Defender is among the many state agencies whose budgets have been crippled by cuts and spending freezes. Contracting with experts to assist in clemency proceedings is routine, but it is not clear that the Ohio Public Defender can even negotiate such contracts during this fiscal year given the State of Ohio's current financial situation. Certainly timely contracting cannot occur when Keene's clemency hearing is only a few short weeks away. If Keene is able to identify a necessary expert who has sufficient time to prepare a report in less than a month, someone will foot a hefty bill for such services.

An even more basic concern than experts, however, is records. Keene's counsel requested his Department of Rehabilitation and Correction records in February 2009 when the State requested an execution date in his case. These records often play a central part in the clemency process. To date, counsel does not have these essential records.

Keene respectfully requests that this Court reschedule Keene's execution date. Keene cannot meaningfully investigate, prepare, and present his clemency plea, should he choose to participate in the clemency process. "Far from regarding clemency as a matter of mercy alone, [the

United States Supreme Court] has called it the 'fail safe' in our criminal justice system." Harbison,  
\_\_ U.S. at \_\_, 129 S. Ct. at 1490 (internal citations omitted).

Respectfully Submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER

By: KL Schneider  
Kelly L. Schneider - 0066394

Supervisor, Death Penalty Division  
**Counsel of Record**

By: Rachel Troutman  
Rachel Troutman - 0076741  
Assistant State Public Defender

Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614)466-5394  
(614)644-0708 (FAX)  
Counsel for Appellant

#### Certificate of Service

I hereby certify that a true copy of the foregoing Appellant Marvellous Keene's Motion to Move His Scheduled Execution Date was forwarded by regular U.S. mail to Mathias H. Heck, Jr., Montgomery County Prosecutor, Carley J. Ingram, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division, P.O. Box 972, 301 West Third Street, 5<sup>th</sup> Floor, Dayton, Ohio 45422 on the 12th day of May, 2009.

KL Schneider  
Kelly L. Schneider - 0066394  
Supervisor, Death Penalty Division  
**Counsel of Record**