

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Supreme Court No. 2009-0947

Plaintiff-Appellee,

vs.

On Appeal From The Lorain  
County Court of Appeals  
Ninth Appellate District  
Court of Appeals No. 92CA005396

DANIEL WILSON,

Defendant-Appellant.

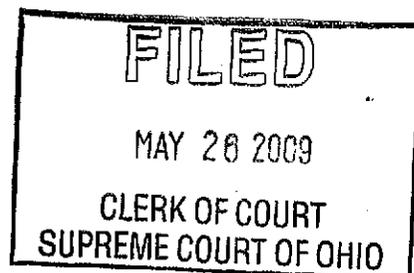
**Death Penalty Case**

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**DANIEL WILSON'S MOTION/ PETITION FOR STAY OF EXECUTION DATE**

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**Dennis P. Will (0038129)**  
Lorain County Prosecutor  
**Billie Jo Belcher (0072337)**  
Assistant Lorain County Prosecutor  
225 Court Street, Third Floor  
Elyria, OH 44035  
(440) 329-5393  
(440) 328-2183 (fax)



**David L. Doughten (0002847)**  
Attorney at Law  
4403 St. Clair Avenue  
Cleveland, OH 44103  
(216) 361-1112  
(216) 881-3928 (fax)

**Alan C. Rossman (0019893)**  
Ass't. Federal Public Defender  
Capital Habeas Unit  
1662 West 2<sup>nd</sup> Street, Ste. 750  
Cleveland, OH 44113  
(216) 522-1950  
(216) 522-1951 (fax)

**Counsel for Appellee State of Ohio**

**Counsel for Appellant Wilson**

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**I. Introduction: A Case of First Impression.**

This stay request asks this Court to permit this ongoing litigation to be completed. The issues before this Court are important issues of first impression, which should be properly resolved and fully litigated. Counsel has filed a Memorandum in Jurisdiction under the above case number and Supreme Court No. 2009-0935.

In addition, the Ohio Department of Correction and Rehabilitation just last week implemented a new lethal injection protocol. Wilson is in 1983 litigation over recently revealed evidence of the lack of education, training, and competence by Ohio's execution team members, and their inability to carry out Ohio's protocol in a constitutionally sufficient manner. *Wilson v.*

*Strickland, et al.*, Sixth Circuit, Case No. 09-3564.

On February 18, 2009, this Court set an execution date of June 3, 2009, for Daniel Wilson. Mr. Wilson is asking that this Court grant his request to stay his execution until pending litigation related to his case is completed. The issue being litigated in state court is unique. Daniel Wilson is facing an execution date in spite of the fact that the single aggravator considered by the jury in the penalty phase of the trial was invalidated in federal court. Under Ohio law, he is currently ineligible for the death penalty. He is currently seeking to have the Ohio courts so-find and re-sentence him according to Ohio law.

Ohio courts have not previously seen a death penalty issue such as this and are unlikely to do so again. The reason for the unique nature of this case is that the federal courts found constitutional error on an issue that had not previously been addressed by this Court. Under the normal appellate process, the federal courts in the habeas corpus procedure review state court findings on each claim raised by a petitioner. If a federal court determines a claim to be error, but harmless under the habeas review standard, the claim is not remanded to the state court. This is because the state court normally has previously addressed and ruled on that particular claim.

That is not the case here. This Court has not previously addressed the error in question in relation to the capital specification. This is the reason for the litigation in the courts below and that which is presently before this Court.

**A. Appellant Wilson Immediately Presented His Claim in Ohio Court's Following the Completion of Federal Litigation.**

On October 16, 2008, Mr. Wilson filed a Motion for a New Sentencing Hearing in the Lorain County Common Pleas Court. This motion was filed as the result of the Sixth Circuit's ruling that

the sole aggravating specification weighed by Wilson's jury was constitutionally invalid. This was based upon the trial court's unconstitutional burden switching on the kidnaping element for the capital specification pursuant to R.C. §2929.04(A)(7). (*See, Wilson's Memorandae In Support of Jurisdiction filed May 21 and 22, 2009.*)

On February 9, 2009, Wilson filed a second postconviction petition asking for relief on the same grounds. Four months after the first filing, on February 18, 2009, this Court set an execution date of June 3, 2009, as the result of a request from the Lorain County Prosecutor's Office to do so. On March 24, 2009, the trial court denied the new sentencing motion and the petition to vacate.

Wilson filed a timely Notice of Appeal on March 30, 2009 to the Ninth District Court of Appeals on both cases. On May 21, 2009, the Ninth District Court of Appeals affirmed the trial court ruling on both procedures. *State v. Wilson*, 2009-Ohio-2347, No. 09CA9559 and 09-9562 (Lorain Cty 5/21/09).

#### **B. Summary of Claim**

As the full argument is before this Court in two documents, an abbreviated summation will be presented here. The issues boil down to the effect of the Sixth Circuit's Opinion in Mr. Wilson's case. First, it must be understood that this Court did not previously address this issue on its merits. This Court specifically stated in the first direct appeal opinion that Wilson did not argue that the kidnaping instruction error affected the death penalty in his case. This Court found the following:

In proposition of law twenty, Wilson further argues that the trial court erred in instructing the jury, over objection, that he had the burden of proof to establish that **[\*\*306]** his intoxication negated the "knowledge" element in the kidnaping. *This contention relates solely to the kidnaping conviction. Wilson makes no claim that any error affects the remaining charges or the death penalty.*

The court instructed: "Intoxication is not an excuse \*\*\*, [but] such evidence is admissible for the purpose of showing that the Defendant was so intoxicated that he

was incapable of having the knowledge to commit the offense of[\*394] Kidnapping. Knowledge is the element of this offense; and intoxication \*\*\* can co-exist with knowledge. \*\*\* On this issue, *the burden of proof is upon the Defendant* to establish by a preponderance or greater weight of the evidence that at the time in question he was so influenced by alcohol that he was incapable of having the knowledge to commit the offense. If you *find by a preponderance or greater weight* of[\*\*\*32] the evidence that the Defendant was *incapable of having the knowledge* to commit the offense, then you must find the Defendant was not guilty of the offense of Kidnapping because Knowledge is an essential element of the offense[,] as I have previously instructed you." (Emphasis added.)

As the court instructed, "knowledge" is an element of kidnapping. Due process requires the prosecution to prove, beyond a reasonable doubt, every element of the crime charged. *In re Winship* (1970), 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368. Due process prohibits requiring an accused to disprove an element of the crime charged. *Mullaney v. Wilbur* (1975), 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508. This instruction is unconstitutional under *Winship* because it required Wilson to disprove "knowledge," which is an element of the offense of kidnapping. R.C. 2905.01(B). The burden of proof cannot be placed on a defendant to disprove an element of an offense. *Mullaney, supra*. Nevertheless, we find the error to be harmless under the facts of this case since the kidnapping of Lutz continued into the late morning and early afternoon. At that point, he clearly knew what he was doing and [\*\*\*33] intoxication would not reasonably be available as a defense to negate "knowledge."

No other offenses are affected by this instructional deficiency, since this instruction on intoxication involved only the kidnapping. ***The felony-murder counts and kidnapping penalty specifications played no role at all in the penalty phase. The death penalty was imposed solely on Count I and specification one.***

Ohio v. Wilson, (1996) 74 Ohio St.3d 381, 393-94 (Emphasis added).

It is accurate that the felony-murder specification and the kidnapping specification were not included in the jury consideration. However, the counts all included three death penalty specifications; (1) murder to escape detection, apprehension, trial, or punishment for another offense, to wit: kidnapping, R.C. §2929.04(A)(3); murder during the commission of a kidnapping, R.C. §2929.04(A)(7); and (3) murder during an aggravated arson, R.C. §2929.04(A)(7). The prosecutor elected to present the first specification to the jury. This specification clearly includes

the element of kidnapping, as that was the offense from which Wilson sought to avoid detection or apprehension.

As this Court did not believe that Wilson had raised the issue or was arguing the issue, it did not address the claim. This Court clearly found that the error only applied to the principle charge of kidnapping and only addressed the error as such. *“This contention relates solely to the kidnapping conviction. Wilson makes no claim that any error affects the remaining charges or the death penalty.”* *Id.*, p. 393.

Therefore, there was no harmless error finding as to the effect that the erroneous instruction has on the capital specification.

### **Sixth Circuit Opinion**

The federal district court found that Wilson had addressed the issue in relation to the capital specification. The issue was found to be exhausted in state court by Wilson. Therefore, the federal district court engaged in a *de novo* review of the issue. Apparently the real point of contention between the two parties is contained on page 5 of the Appellee’s brief.

Judge David Dowd of the Northern District of Ohio District Court concluded Wilson’s sole aggravator was improperly considered at trial based upon the improper jury instruction and the error was *not* harmless (under Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 (1993), because it affected the outcome of the trial, quoting:

“Clearly, this trial error [.] which permitted the jury to find Wilson guilty of kidnapping and the single aggravating circumstance to Count One even if the State had not sustained its burden with respect to the knowledge element, had ‘a substantial and injurious effect or influence in determining the jury’s verdict.’ ” *Id.* (quoting Brecht, 507 U.S. at 637, 113 S.Ct. 1710).

(District Court Memorandum and Opinion, discussion of Claim 10, p.100).

Judge Dowd explained further: “Had the jury been more clearly instructed as regarding the burden of proof, it is possible that it might have concluded, in the face of all of the testimony and Wilson's assertion of intoxication, that the State could not prove beyond a reasonable doubt that Wilson had the requisite knowledge for either the kidnapping charge of the indictment or the kidnapping specification to the aggravated murder charge.” *Id.* at 96-97. Therefore, had “the kidnapping specification been the only specification for which Wilson had been found guilty,” the district court stated that it “would probably be inclined to grant the writ on this claim because, finding a constitutional error, [the district court] would be left with the ‘grave doubt’ ” described in O’Neal v. McAninch, 513 U.S. 432, 435, (1995), about whether that error is harmless. *Id.* at 98.

In other words, in Judge Dowd’s view, because the jury had found additional statutory aggravating, the writ should not be granted because had the prosecutor hypothetically elected the arson specification which did not include the kidnapping element, the jury would have found death to be the appropriate penalty.

Wilson appealed on the grounds that a death sentence may not be based upon an aggravating factor not considered by the jury in the penalty phase. Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428,(2002). Nor is a federal judge permitted to re-weigh the mitigation against the unconsidered aggravating factor and determine what a jury would have concluded.

The Sixth Circuit agreed that Judge Dowd was incorrect in substituting a unconsidered capital specification, but nevertheless decided that the writ should not be issued. In Wilson v. Mitchell, 498 F.3d 491, 500-501 (6<sup>th</sup> Cir. 2007), the Circuit noted that the district court concluded the kidnaping jury instruction, which the Ohio Supreme Court had “properly” determined to be unconstitutional, “was unconstitutional as to the [sentencing phase] evading-kidnapping

specification.”

#### “Assumed” Error

For purposes of the federal habeas appeal, and consistent with that district court ruling, the Circuit properly “assume[d] that the instruction was erroneous with regard to the evading-kidnapping specification,” and addressed only whether it was harmless under federal harmless error standards. *Id.*, at 501. Part of the reason for this assumption is that the district court’s findings as to the error were not challenged on cross-appeal by the Warden. The circuit appeal thus proceeded upon the unchallenged assumption that the erroneous jury instruction effectively rendered the specification “invalid”:

Crucial to this habeas appeal is how [federal] harmless-error principles discussed above apply in the capital-sentencing context *when, as here, the jury considers an invalid aggravating factor when imposing a death sentence.*

Wilson, 498 F.3d at 504. (Emphasis added).

As the Sixth Circuit further stated: “The question here is a reviewing court’s role when an invalid eligibility factor (i.e., evading kidnapping), in a weighing State like Ohio, skews the jury’s balance of mitigating circumstances against that aggravating factor. Supreme Court decisions provide some reason to believe that a federal habeas court is simply not permitted to conduct harmless-error review-only a state court can do so.” Wilson v. Mitchell, 498 F.3d at 505.

The Appellee below saw legal significance in the wording in the opinion “But we do not decide the question.” Wilson v. Mitchell, at 501. The Appellee argued that this wording means that the court did not decide the issue of the constitutionality of the disputed instruction. A closer look reveals that the Appellee is incorrect in the interpretation for two reasons. First, the question not decided was not whether the instruction was error but another matter. Second, and most important,

there is no such animal in federal jurisprudence as an advisory or hypothetical opinion. For a harmless error analysis to be conducted by a federal circuit court, there must be recognized error.

As to the question not decided, the issue was whether a charged defendant could be not guilty of the commission of the kidnapping, (because of the lack of intent) but guilty of the specification that the defendant wanted to avoid detection of the kidnapping. The Court decided that it was not necessary to decide that specific question in order to determine whether the writ should be issued. The district court had found the error to be of a constitutional magnitude, but not one requiring the issuance of a writ of habeas corpus under federal harmless error law. Because the Circuit agreed with the district court that federal law did not require the issuance of the writ on the error, the question of whether kidnapping under a R.C. §2929.04(A)(3) specification is an element of that specification was rendered moot.

In other words, if the Sixth Circuit agreed with the district court that the error did not require the issuance of the writ, it did not need to resolve the aforementioned hypothetical. The Circuit agreed that the constitutional error found by the district court was harmless under federal law (although for a different reason).

The bottom-line is that the federal district court did find the instruction to constitute constitutional error. As noted above, the Warden did not contest the district court finding that the constitutional error had occurred. The Sixth Circuit did not reverse the finding of the district court on the nature of the error. The issue became whether the writ should be issued based on that error. Because the Circuit did not deem the assumed error to require the issuance of a writ of habeas corpus under the *Brecht* Standard, the court found the determination of the hypothetical questions surrounding the claim to be moot.

### C. No Steffen Preclusion

This Court's holding in State v. Steffen, 70 Ohio St.3d 399 (1994), is not applicable to the present procedure. Steffen does not require that Wilson first petition to this Court prior to filing his Lorain County pleadings. Contrary to the State's assertions below, which sought to divest the lower Court of jurisdiction, the Steffen holding merely stated that a trial court "may not stay the judgment of [the Ohio Supreme Court] setting the date for execution." Steffen, 70 Ohio St.3d at 411.

Additionally, the holding of Steffen was fashioned to address a legal situation entirely different from Wilson's. The Steffen litigants had all sought to litigate *new* substantive claims for relief of their convictions or sentences, unlike Wilson, who raises no new claims and only asks that he be sentenced in accordance with Ohio law based upon completed federal courts' rulings. Thus, the Steffen decision looked to and drew its analysis from the 'abuse of the writ' litigation in federal habeas proceedings. Steffen referenced and adopted the federal standard established in McCleskey v. Zant, 499 U.S. 467 (1991), which applies a 'cause and prejudice' standard requiring post-conviction litigants to show that:

" 'some objective factor external to the defense impeded counsel's efforts' " to raise the claim in his prior petition.

Steffen, 70 Ohio St.3d at 411 (Citation omitted).

This holding was adopted to protect 'the need for finality of judgments,' noting that "[a] lax standard for . . . review might give litigants incentives to withhold claims in order to manipulate the system and create disincentives to present fresh claims." Id. (Citation omitted).

It is also another reason Steffen is inapposite to Wilson's case.

Wilson's pending litigation does *not* present any new claims, addresses *nothing* that was not previously litigated through the state and federal courts, does *not* challenge his conviction, and does

*not* invoke anything remotely akin to an “endless repetition of inquiry into facts and law in a vain search for ultimate certitude.” Steffen, 70 Ohio St.3d at 412.

Rather, Wilson’s filing acknowledges Steffen’s recognition that the federal system must recognize the independent and inherent power of a State court “to impose finality on its judgments,” which includes allowing State courts to enforce their own criminal law. Id.

Wilson’s pending litigation only asks this state court to enforce state law consistent with the law that was in effect at the time Wilson was sentenced to death. This request is based upon the federal habeas courts’ merits rulings that Wilson’s sole aggravator was the subject of an unconstitutional jury instruction. This is a finding of federal law by federal district and appellate courts that warrants, pursuant to Ohio law, that Wilson be re-sentenced in accordance with Ohio law. It is consistent with the Supremacy Clause of the U.S. Constitution and the requirement that states give such federal rulings full faith and credit.

In relation to the postconviction litigation, it should be noted that consistent with this interpretation is the fact that the legislature enacted R.C. §2953.23(A), after the Steffen decision. As noted in Wilson’s principle brief, it is significant that R.C. §2953.23(A)(1)(b), specifically chose to embrace death penalty sentencing claims. The statute does not preclude successor claims or any claims. There is no requirement in that statute that permission be sought from the Ohio Supreme Court to file a second petition if an execution date has been set. The statute requires that the petition base the claim on previously unavailable foundations, such as undiscoverable facts or new Supreme Court rulings.

This is entirely consistent with Steffen. If the claims could not have been litigated previously, both Steffen and the statute permit an additional filing. If the claims were available to

the petitioner but he or she failed to file consistent with the statute, both R.C. §2953.23(A), and Steffen, bar the litigation.

**D. New Lethal Injection Protocol**

Baze v. Rees, \_\_\_ U.S. \_\_\_, 128 S.Ct.1520 (2008), established a cause of action if the inmate can establish that the “risk of pain from maladministration” of lethal injection protocols is sufficient to trigger Eighth Amendment protections. Baze, 128 S.Ct. at 1526 (Roberts, C.J., plurality).

The facts giving rise to Appellant Wilson’s claim only came to light recently during the week of March 23, 2009, in the evidentiary hearing in Biros v. Strickland, Case No 2:04-cv-1156. The evidence in support of Wilson’s Complaint was culled from the testimony of the Wardens and execution team members during the Biros hearing.

The district court found that while the evidence did not support Mr. Biros’s request for a preliminary injunction under federal law, the evidence *did* demonstrate that as of May 2009, “there are conditions that suggest a need for modifications *to address risks falling just short of constitutional magnitude.*” (Emphasis added). Biros, ECF 147, p.146 in Case No. 2:04-cv-1156. The denial of Mr. Biros’ injunction is also currently before the Sixth Circuit. Such a ruling reflects the closeness of the constitutional issue.

Based upon evidence first revealed at the Biros hearing, Wilson filed a Section 1983 Complaint that, unlike Biros, did *not* challenge the Ohio lethal injection procedures as *per se* unconstitutional. Rather, his present claims assert that since the time Ohio adopted lethal injection as the state’s exclusive execution method, he could legitimately infer and reasonably expect that Ohio would execute him consistent with their legal obligations under Eighth Amendment principles. Appellant was entitled to assume, based upon both the written protocols and upon specific

information that was available upon request, that his execution by lethal injection would be implemented competently by an execution team competent to meet the state's constitutional obligations. The *Biros* testimony informed otherwise.

The district court dismissed Wilson's post-Baze Complaint saying the facts supporting his claims could have been discovered earlier than the Biros hearing. This matter is before the Sixth Circuit with briefing to be completed by 5-26-09.

Last week, the Ohio Department of Rehabilitation and Correction, published, effective 5-14-2009, a re-written execution protocol, that would seem to acknowledge the viability of many of the criticisms and concerns noted by the district court and currently being litigated by Mr. Wilson. Some of the new protocol specifically reflects increased education and training for the execution team, the very concerns addressed in Wilson's Complaint and appeal. Perhaps the timing is merely coincidental, but a less cynical person might infer that the comments of the district court judge and the factual basis of Wilson's Complaint are indeed substantive, and that the protocol changes were brought about in direct response to ongoing litigation.

A stay is warranted to permit Wilson to complete this ongoing litigation.

**E. Conclusion.**

For the aforementioned reasons, this Court should stay the execution date and permit Wilson's pending litigation to proceed expeditiously and in accordance with Ohio law and thereby allow Wilson to be sentenced for this homicide in accordance with Ohio's capital scheme. In addition, time is needed to complete litigation, install the Warden's new lethal injection protocol, and to assess whether the new procedures meets constitutional muster before Wilson is executed.

Respectfully Submitted,

David L. Doughten - by  
David L. Doughten *Kathryn L. Sandford*  
*#0063985*  
*per authorization*  
Alan C. Rossman - by *KLS*  
Alan C. Rossman

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Defendant-Appellant Daniel Wilson's Motion for Stay of Execution, was forwarded by regular U.S. Mail and/or email and facsimile to Dennis Will, Lorain County Prosecutor, 225 Court Street, Third Floor, Elyria, Ohio 44035 on this 26th day of May, 2009.

David L. Doughten -  
David L. Doughten *by Kathryn L. Sandford*  
*#0063985*  
*per authorization*  
Counsel for Daniel Wilson